PRESENTATION OF
BT AMERICAS, CBEYOND, EARTHLINK, INTEGRA, LEVEL 3, AND TW TELECOM
ON THE FCC'S PROPOSED SPECIAL ACCESS INFORMATION COLLECTION

JANUARY 16, 2014

A. The Importance of the Proposed Information Collection

- The collection will enable reform of a $40B market that is critical to the U.S. economy.
- Incumbent carriers' overpricing of special access services has inflicted substantial harm on the economy—in the form of decreased investment, less innovation, and less competition.
- The FCC has repeatedly stated it cannot address the special access market failure without additional data.
- The benefits of the proposed collection are far reaching. One economist has found that special access pricing reform will help lead to $184B in additional investment and 650,000 new jobs in the telecom sector.[1]

B. The Competitive Carriers' Interest in the Proposed Information Collection

- The Competitive Carriers include providers and purchasers of special access services that will be required to comply with the proposed information collection.
- Some of the Competitive Carriers are both significant providers and purchasers of special access services. As such, they have a vested interest in a comprehensive information collection that narrowly targets regulation where it is needed.
- AT&T and other incumbent carriers have an incentive to limit the effectiveness of the collection because they do not want their special access prices reduced.
- Cable companies sell special access services but do not generally purchase them. Accordingly, cable companies (represented by NCTA) have an incentive to limit the effectiveness of the collection because they want to continue taking advantage of the price umbrella set by the incumbents.

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[1] *See* Susan M. Gately, *The Benefits of a Competitive Business Broadband Market* (Apr. 2013), http://thebroadbandcoalition.com/storage/benefits-of-broadband-competition.pdf; *see also* Stephen E. Siwek, *Economic Benefits of Special Access Price Reductions* (Mar. 2011), http://apps.fcc.gov/ecfs/document/view?id=7021034406.

C. The Relevance of the Requested Data

- *Locations*—The FCC needs detailed information on the locations to which providers own connections because the agency has repeatedly found that special access competition occurs at the building level.[2]

- *Maps*—The FCC needs fiber network maps to evaluate potential competition. The FCC and DOJ have consistently used maps for this purpose.

    - For example, the FCC and DOJ have used the following "demand/distance" screens to identify locations where competitive entry is likely (*i.e.*, where a competitive carrier is likely to build a connection because the revenue opportunity (based on demand) justifies the cost of construction (based on distance of the location from the carrier's fiber transport network)):[3]

Minimum Demand	Max. Distance to Competitive Carrier Fiber Transport
2 DS3 circuits	0.1 mile
1 OC-12 circuit	0.25 mile
Over OC-48 circuit	1 mile

    - It is therefore critical that all special access providers, including cable companies, submit maps showing not only their fiber routes to end user locations but also their fiber transport networks. NCTA's offer (at 15) to submit (a) whatever maps are in its members' possession or (b) maps that do not show transport networks is insufficient.

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[2] *See, e.g., AT&T-BellSouth Merger Order*, FCC 06-189, ¶ 31 (holding that "the relevant geographic market for wholesale special access services is a particular customer's location, since it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid a 'small but significant and nontransitory' increase in the price of special access service"); *SBC-AT&T Merger Order,* FCC 05-183, ¶ 28 (same); *Verizon-MCI Merger Order*, FCC 05-184, ¶ 28 (same).

[3] *See AT&T-BellSouth Merger Order* n.114; *see also* Declaration of W. Robert Majure, *United States v. SBC Communications, Inc. and AT&T Corp.*, No. 1:05cv02102, ¶ 14 & n.17 (D.D.C. Aug. 9, 2006), http://www.justice.gov/atr/cases/f219000/219054.pdf.

- *Prices, Terms, and Conditions*—The FCC needs this data to ensure that incumbent carriers' rates, terms, and conditions are "just and reasonable"—one of the agency's core duties under Sections 201 and 202 of the Communications Act.
    - Pricing information will enable the FCC to:
        - determine whether and where the incumbents are exercising market power by setting prices above competitive levels; and
        - design and implement a remedy to ensure that prices are just and reasonable in the future.
    - Terms and conditions information will enable the FCC to determine whether the incumbents' terms and conditions are preventing more competition from developing than would otherwise be the case.

D. Response to NCTA's PRA Arguments

- *The burden of the proposed collection on NCTA members is relatively insignificant.*
    - Comcast and Cox's hourly burden estimates are 0.17% and 0.03%, respectively, of their total annual employee hours.
    - And Comcast and Cox's cost estimates are a mere 0.03% and 0.02%, respectively, of their 2012 annual revenues.
- *The FCC has the experience and expertise to timely collect and use the requested data.*
    - NCTA is wrong to claim (at 12) that "the FCC has no history of gathering, analyzing, and publishing any data related to the special access marketplace."
        - The FCC did exactly that in three major merger review proceedings (AT&T-BellSouth, SBC-AT&T, and Verizon-MCI).
        - The FCC timely processed and analyzed large volumes of special access data in the latter two proceedings simultaneously.
    - NCTA's comparison (at 12) of the resources the FCC estimates for the proposed collection and the resources used by the NTIA in its National Broadband Map collection is apples-to-oranges.
- *The FCC has consistently protected the highly sensitive special access data it collects* (*e.g.*, in 2005-2006 and 2010-2011). NCTA cannot point to a single situation in which the FCC has failed to protect confidential special access information in its possession.
- *As discussed, the benefits of the proposed collection are not speculative.* The burden of the collection is justified by its practical utility.

Excerpt from the FCC's *AT&T-BellSouth Merger Order* (2007)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
AT&T Inc. and BellSouth Corporation	)	WC Docket No. 06-74
Application for Transfer of Control	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 2006 **Released:** March 26, 2007

By the Commission: Chairman Martin and Commissioner Tate issuing a joint statement;
Commissioners Copps and Adelstein concurring and issuing separate statements;
Commissioner McDowell not participating.

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market participants and examine market concentration and how concentration will change as a result of the merger. We also consider whether entry conditions are such that new competitors could likely enter and defeat any attempted post-merger price increase.

25. If our structural analysis suggests that the merger may have anticompetitive effects, we must then examine in more detail whether and how the merger might affect competitive behavior. In performing this behavioral analysis, we consider whether the merger is likely to have anticompetitive effects either through unilateral actions of the merged entity or through coordinated interaction among firms competing in the relevant market.[87]

26. With regard to potential vertical effects, we will examine how the merger affects the Applicants' incentives and ability to discriminate in provisioning inputs to competitors. In particular, we will consider the effect of the merger on the merged entity's incentives and ability to discriminate in the provision of special access services.

B. Wholesale Special Access Competition

27. In this section, we consider the effects of the proposed merger on the provisioning and pricing of wholesale special access services.[88] As discussed below, wholesale special access service is a critical input for: competitive LECs in providing services to their retail enterprise customers, wireless and competitive LECs in connecting their networks to other carriers, long distance carriers seeking to connect customers to their long distance networks, and entities seeking to connect with Internet backbones.[89]

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elsewhere do not change." *EchoStar/DirecTV Order*, 17 FCC Rcd at 20609, para. 117 (citing *DOJ/FTC Guidelines* § 1.21).

[87] *Id.* at 20619, para. 151. As the Commission explained in the *EchoStar/DirecTV Order*:

> Unilateral effects arise when the merging firm finds it profitable to alter its behavior following the merger. Examples of unilateral effects include a merging firm's raising its price or reducing the quantity it supplies. Coordinated effects, in contrast, arise when competing firms, recognizing their interdependence, take actions "that are profitable for each of them only as a result of the accommodating reactions of others." Because coordinated effects generally are more likely the smaller the number of firms in a market, mergers may significantly increase the likelihood of coordinated effects by reducing the number of firms. Examples include explicit collusion, tacit collusion, and price leadership.

Id. at 20619, para. 152 (footnotes omitted).

[88] The Commission previously has defined special access as a dedicated transmission link between two places. *See Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1997, para. 7 (2005) (*Special Access NPRM*); *see also SBC/AT&T Order*, 20 FCC Rcd at 18304, para. 24; *Verizon/MCI Order*, 20 FCC Rcd at 18447, para. 24. We recognize that different companies may offer dedicated loop and transport links between two points under tariffs and contracts that bear proprietary names. *See, e.g.*, AT&T/BellSouth Application, Declaration of Robert W. Bickerstaff (AT&T/BellSouth Bickerstaff Decl.) at para. 11 (listing by name several of BellSouth's special access discount programs). For simplicity, we will use the term "special access" to refer to all services provided by any carrier that involves such dedicated links.

[89] *See infra* Part V.C (Retail Enterprise Competition); Part V.D (Mass Market Telecommunications Competition); Part V.E (Mass Market High-Speed Internet Access Competition) and Part V.F (Internet Backbone Competition); *see also* Cbeyond *et al.* Comments at 61-62; T-Mobile Reply at 3 (stating that T-Mobile's provision of wireless (continued....)

Firms needing dedicated transmission links essentially have three choices: to deploy their own facilities, to buy special access service from incumbent LECs, or to purchase such service from a competing special access provider. As discussed below, we find that AT&T provides special access services in competition with BellSouth's special access services in BellSouth's in-region territory.[90] We further find that AT&T is currently the sole carrier, besides BellSouth, with a direct wireline connection to a number of buildings in BellSouth's region, so that the merger will reduce the number of competitors with direct connections to those particular buildings from two to one. We further find that competitive entry is unlikely in a small number of these buildings and that, as a result, the merger may result in anticompetitive effects with respect to that subset of buildings. AT&T has, however, voluntarily committed to divest IRUs to those buildings,[91] which we find adequately remedies the potential harms.

1. Relevant Markets

a. Relevant Product Markets

28. As previously indicated, special access is a dedicated transmission link between two locations, most often provisioned via high-capacity circuits. Such services are used for various purposes, such as directly connecting tenants of commercial buildings to a competing carrier's network or connecting different facilities of the same firm. Both voice and data may be carried using special access services. The facilities used to provide special access service typically consist of three different segments: (1) an entrance facility, which connects the purchasing carrier's point of presence (POP) to the nearest wire center, carrier hotel, or similar location ("entrance facility"); (2) local transport; and (3) a "last mile" connection or local loop, also known as a channel termination, which runs from the transport facility to the end-user customer.

29. The Commission previously has found that there are at least two separate relevant product markets for special access services: "Type I" special access services, which are offered wholly over a carrier's own facilities, and "Type II" special access services, which are offered using a combination of the carrier's own facilities for two of the segments and the special access services of another carrier for the third segment.[92] The Commission has also previously found that many purchasers of wholesale

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services, which allows customers to "cut the cord," depends on T-Mobile's ability to obtain services and facilities from incumbent LECs such as AT&T and BellSouth); Global Crossing Comments at 3 (stating that Global Crossing "relies heavily on AT&T and BellSouth's 'last mile' special access facilities to reach end-user customers" and that a significant portion of Global Crossing's national special access purchases will be directed to the merged entity); Letter from Thomas Jones and Jonathan Lechter, Counsel for TWTC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. at 4, 10 (filed Aug. 8, 2006) (TWTC Aug. 8 *Ex Parte* Letter) (stating that numerous classes of providers "must rely completely or almost completely upon RBOC last mile facilities to provide enterprise class services to businesses"); PAETEC Comments at ii (stating that PAETEC does not rely on UNEs and relies on incumbent LEC provided special access services for 95% of its last mile connections to end users).

[90] By "in-region," we mean the franchise areas where BellSouth is the incumbent LEC. Thus, "out-of-region" refers to all other regions in the U.S.

[91] *See* Appendix F.

[92] *See SBC/AT&T Order*, 20 FCC Rcd at 18305, para. 26; *Verizon/MCI Order*, 20 FCC Rcd at 18448, para. 26; *see also* TWTC Petition at 7-8. Several commenters claim that there are "essentially no intermodal competitors in this market." *See* TWTC Petition at 3; *see also* Consumer Federation *et al.* Reply at 32; MSV LLC Comments at 6. While we recognize that cable operators generally may not use hybrid-fiber coax to provide special access services, the record evidence suggests that, to the extent cable operators are providing competitive special access services,
(continued....)

special access services view Type I services as substantially superior to Type II services, due to differences in performance, reliability, security, and price, and that these differences are sufficiently large that Type I special access services fall into a separate relevant product market from Type II.[93]

30. We also recognize that the services provided over different segments of special access (*e.g.*, channel terminations and local transport) constitute separate relevant product markets, which may be subject to varying levels of competition.[94] In the competitive analysis section below, we will discuss the competitiveness of the different special access services.

b. Relevant Geographic Markets

31. Consistent with Commission precedent and the record before us, we conclude that the relevant geographic market for wholesale special access services is a particular customer's location, since it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid a "small but significant and nontransitory" increase in the price of special access service.[95] In order to simplify its analysis, however, the Commission has traditionally aggregated or grouped customers facing similar competitive choices, and we will do so in our discussion below to the extent appropriate.[96]

32. In addition, however, we will consider the potential effect of the merger on BellSouth's special access prices, which generally are set on a wider geographic basis. Because BellSouth has gained Phase II pricing flexibility for its special access services in some metropolitan statistical areas (MSAs),[97] but not

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they do so using fiber facilities. *See* TWTC Aug. 8 *Ex Parte* Letter, Attach. at 9, 11-12 (explaining that cable modem service does not provide the level of service quality that most businesses require and that to provide such services cable operators largely rely on fiber facilities, citing a fiber-based service announced by Charter Communications).

[93] *See SBC/AT&T Order*, 20 FCC Rcd at 18306, para. 26 n.89; *Verizon/MCI Order*, 20 FCC Rcd at 18448, para. 26 n.88. *See also* TWTC Petition at 7 (recognizing that Type I and II special access services are in separate product markets because "[a] carrier providing services solely over its own facilities can deliver higher quality service than a carrier that must rely on a combination of its own facilities and those of another carrier" and stating that TWTC purchases almost exclusively Type I service).

[94] Consistent with the *SBC/AT&T* and *Verizon/MCI* decisions, we find that, in general, different capacity circuits are likely to constitute separate relevant product markets as well. *See SBC/AT&T Order*, 20 FCC Rcd at 18306, para. 27 n.90; *Verizon/MCI Order*, 20 FCC Rcd at 18448-49, para. 27 n.89. However, for the reasons given in those orders, we do not find it necessary to analyze separate product markets for different capacities of special access services. *See SBC/AT&T Order*, 20 FCC Rcd at 18306, para. 27 n.90; *Verizon/MCI Order*, 20 FCC Rcd at 18448-49, para. 27 n.89.

[95] *See, e.g., SBC/AT&T Order*, 20 FCC Rcd at 18307, para. 28; *Verizon/MCI Order*, 20 FCC Rcd at 18449-50, para. 28. Our geographic market definition is consistent with the arguments made by certain commenters. *See, e.g.,* Ad Hoc Telecom Users Reply at 19 ("From a customer's perspective, a CLEC either has facilities serving a particular building or it does not, regardless of the fiber capacity passing the building by."); TWTC Petition at 8-9.

[96] *See SBC/AT&T Order*, 20 FCC Rcd at 18306, para. 27 n.90; *Verizon/MCI Order*, 20 FCC Rcd at 18448-49, para. 27 n.89.

[97] *See, e.g., BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 00-20, Memorandum Opinion and Order, 15 FCC Rcd 24588 (CCB 2000) *aff'd, BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CC Docket No. 01-22, Memorandum Opinion and Order, 16 FCC Rcd 18174 (2001); *BellSouth Petition for Pricing Flexibility for Special Access and* (continued....)

others, BellSouth's rates for special access may vary from MSA to MSA.[98] Accordingly, we will also examine on an MSA basis how the merger is likely to affect BellSouth's special access prices.

c. Market Participants

33. BellSouth can access all or virtually all of the buildings and transport routes in its territory. Although the record is not clear as to the exact extent that other competitive LECs compete in the special access market in BellSouth's territory, it is clear that, in addition to AT&T, **[REDACTED]**[99] provide wholesale Type I, and in some cases Type II, special access services.[100] The record does not, however, clearly indicate the extent to which individual buildings are served by one or more of these competitive LECs.[101]

2. Competitive Analysis

34. Consistent with the analysis adopted in the *SBC/AT&T Order* and the *Verizon/MCI Order*, we separate our discussion of the competitive effects of the merger into the effects on the in-region special

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Dedicated Transport Services, WCB/Pricing No. 02-24, Memorandum Opinion and Order, 17 FCC Rcd 23725 (2002).

[98] *See* AT&T/BellSouth Application at 61 n.179 (stating that in areas where BellSouth has been granted pricing flexibility, customers of BellSouth's TAP tariff have the option of negotiating more individualized contract tariffs than are available to other similarly situated customers). We recognize that BellSouth also offers various volume and term discount plans which offer percentage discounts off the tariffed rate. Some discounts are based on a carrier's total spend over a larger geographic market while other discounts may vary from MSA to MSA. *See* AT&T/BellSouth Bickerstaff Decl. at para. 11 (describing certain BellSouth tariffs).

[99] In this Order, "REDACTED" indicates that confidential or proprietary information that is subject to a Protective Order in this proceeding has been redacted from the public version of this Order. *See First Protective Order*, 21 FCC Rcd 5215; *Second Protective Order*, 21 FCC Rcd 7282. The unredacted text is included in the confidential version of this Order, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgments of the protective orders. Qualified persons who have not yet signed the required acknowledgments may do so in order to obtain the confidential version of this Order. Note that in some cases where both a confidential unredacted version and a redacted public version of a document were filed, the page number was inconsistent between the two documents. With respect to such documents, all citations are to the redacted version, unless otherwise specified.

[100] *See* Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. 2 at 6-24 (filed Sept. 1, 2006) (AT&T Sept. 1 *Ex Parte* Letter). In addition to the entities specifically enumerated above, the record indicates that a number of other competitive LECs provide voice and data services in BellSouth's region. *See id.* (listing all the competitive LECs known to AT&T that provide fiber to buildings where AT&T has direct fiber connections); AT&T/BellSouth Application at 57 n.164 (listing 20 fiber-based competitive LECs providing service in Atlanta); AT&T/BellSouth Bickerstaff Decl. at paras. 5-9 (listing various special access competitors), AT&T/BellSouth Application, App. B at B-15 to B-30 (listing and describing the services offered by numerous competitive LECs operating in BellSouth's region).

[101] To clarify, the record contains information about buildings served by one or more competitive LECs where AT&T also serves the same building. *See* Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. 2 (filed Sept. 20, 2006) (AT&T Sept. 20 *Ex Parte* Letter) (revised supplemental exhibit 14.b.4). The record does not, however, clearly indicate which other individual buildings are served by one or more competitive LECs but not AT&T in the remainder of BellSouth's territory.

access markets, both horizontal and vertical, and the effects on out-of-region special access markets. We begin by considering whether the merger is likely to result in a meaningful reduction in competition or increase in price for special access services to particular locations.

35. As an initial matter, the record demonstrates that BellSouth offers no wholesale Type I or Type II special access services in AT&T's in-region territory or any other area outside of BellSouth's in-region territory. Thus, the merger is unlikely to result in any anticompetitive effects in special access markets in AT&T's in-region territory.[102] We therefore limit our analysis only to whether the merger is likely to result in unilateral anticompetitive effects in the provision of wholesale special access services in BellSouth's in-region territory.

36. As discussed below, we find that, with respect to Type I special access, AT&T has direct connections to approximately 317 buildings in BellSouth territory.[103] The Applicants submitted a detailed building analysis,[104] which analysis identifies AT&T-connected buildings that: (1) are vacant or have AT&T (or an AT&T affiliate) as the sole tenant; (2) are currently served by other competitive LECs with direct connections; and (3) have demand and cost characteristics such that entry would be likely should the merged entity attempt to raise prices after the merger.[105] Based on our evaluation of these submissions, we find that there are 31 buildings within BellSouth's territory where AT&T is currently the sole carrier with a direct wireline connection to the building (besides BellSouth), and where entry by other facilities-based carriers is unlikely.[106] AT&T has, however, voluntarily committed to divest IRUs to those 31 buildings and, for the reasons given below, we accept that commitment.[107]

37. With respect to Type II special access services, we conclude that the ability of remaining carriers in the market to offer competitive special access services through a combination of their own transport facilities with an incumbent LEC's special access or high-capacity unbundled loops, or a competing

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[102] Therefore, we disagree with the argument of Cbeyond *et al.* that the loss of BellSouth as a competitor in AT&T's region is likely to have anticompetitive effects. *See* Cbeyond *et al.* Aug. 22 *Ex Parte* Letter at 10-11; *see also* Letter from Denise N. Smith, Counsel for Cbeyond *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. at 22 (filed Aug. 31, 2006) (Cbeyond *et al.* Aug. 31 *Ex Parte* Letter) (arguing that BellSouth had plans to enter AT&T's market and compete for special access services); Letter from Gary L. Phillips, AT&T, and Bennett L. Ross, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 at 4-5 (filed Sept. 14, 2006) (AT&T/BellSouth Sept. 14 *Ex Parte* Letter) (disputing Cbeyond *et al.*'s interpretation of the BellSouth documents cited in the Cbeyond *et al.* Aug. 31 *Ex Parte* Letter).

[103] *See infra* para. 44.

[104] *See* Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Sept. 28, 2006) (AT&T Sept. 28 *Ex Parte* Letter). According to the Applicants, the analysis set forth in the AT&T Sept. 28 *Ex Parte* Letter expands upon and corrects earlier analyses that they submitted. *See* AT&T Sept. 20 *Ex Parte* Letter; AT&T Sept. 1 *Ex Parte* Letter; AT&T/BellSouth Application, Declaration of Dennis W. Carlton and Hal S. Sider (AT&T/BellSouth Carlton/Sider Decl.) at paras. 108-09; AT&T/BellSouth Reply, Declaration of Dennis W. Carlton and Hal S. Sider (AT&T/BellSouth Carlton/Sider Reply Decl.) at paras. 19-20; *see also* AT&T Info. Req., Exh. 12.2, 14.a.5, 14.b (providing lit building lists).

[105] *See* AT&T Sept. 1 *Ex Parte* Letter at 3-7.

[106] *See infra* para. 44.

[107] *See* Appendix F.

carrier's loop facilities, alleviates concerns about the loss of AT&T as a provider of Type II special access services to particular buildings in BellSouth's in-region territory. Further, because AT&T provides such a relatively small amount of wholesale Type II special access services within BellSouth's region, and because other competitive providers should be able to move in quickly to fill any void left by AT&T, we conclude that the merger is unlikely to result in an increase in the price of Type II services within BellSouth's region.

38. We next consider whether the merger is likely to result in anticompetitive effects in the provision of wholesale special access services by increasing the incentives of AT&T and Verizon to engage in mutual forbearance within each other's territories. We conclude that the merger will not result in competitive harm in Verizon's territory. We find that a variety of actual and potential competing providers will remain post-merger to fill any void left by AT&T if the merged entity does not continue to offer wholesale special access services in Verizon's territory.

39. Finally, we consider possible vertical effects of the merger. BellSouth already is a vertically integrated company. We conclude that the merger is not likely to increase significantly the Applicants' incentives to discriminate against rivals, including with respect to services provided to Cingular's rivals. To the extent that the Applicants, prior to the merger, had any incentive or ability to raise rivals' costs or discriminate in the provision of wholesale special access services, those issues are better addressed in pending general rulemaking proceedings.

a. Horizontal Effects

40. *Unilateral Effects*. Certain commenters claim that the present merger likely would result in increased wholesale special access prices at specific buildings where AT&T currently is offering Type I and Type II special access services.[108] The record suggests that the merger will result in a reduction in the number of competitors offering Type I services in buildings where AT&T is currently connected via its own facilities, and that, of those buildings, there is a small number where AT&T is the sole carrier with a direct connection (besides BellSouth) and where entry is unlikely.[109] The elimination of AT&T as a

[108] *See, e.g.*, Cbeyond *et al.* Comments at 74 ("In those cases where only AT&T and BellSouth have deployed facilities to a particular building, the merged firm would obviously obtain a monopoly over local transmission serving that building. It is hard to conceive of a clearer example of competitive harm caused by a merger."); Consumer Federation *et al.* Petition, Declaration of Mark N. Cooper and Trevor Roycroft (Consumer Federation *et al.* Cooper/Roycroft Decl.) at 40-44; COMPTEL Petition at 8; TWTC Petition at 20-23 (urging the Commission to conclude that the merger would result in harm to consumer welfare in any case where, post-merger, fewer than four competitors supply fiber to a building); Sprint Nextel Comments at 11-12. *See also* Cbeyond *et al.* Comments at 66 (arguing that the "loss of AT&T as a reseller of BellSouth local transmission inputs would itself likely seriously harm competition" for wholesale special access services because other competitors would be unlikely to obtain the level of volume and term discounts "AT&T likely receives today off BellSouth's month-to-month tariffed prices," making other competitors less likely to resell such tariffed services and thus they would not "pose as significant a competitive threat as AT&T").

[109] The Applicants' experts estimate that there are 219,000 commercial buildings in BellSouth's region with more than ten DS0 line equivalents. *See* AT&T/BellSouth Carlton/Sider Decl. at para. 112. The Applicants conclude that AT&T provides Type I service to fewer than 350 buildings in BellSouth's region as a whole – less than 0.2%. *See* AT&T Sept. 28 *Ex Parte* Letter, Attach. 10. The Applicants present much of their quantifiable data in the following 11 metropolitan areas: Atlanta, GA; Birmingham, AL; Charlotte, NC; Chattanooga, TN; Greensboro, NC; Jacksonville, FL; Knoxville, TN; Miami, FL; Nashville, TN; Orlando, FL; and Raleigh-Durham, NC. *See* AT&T Sept. 28 *Ex Parte* Letter, Attach. 10; AT&T/BellSouth Carlton/Sider Decl. at para. 103 n.118; *see also*

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provider of Type I special access services to these buildings poses a potential competitive harm. AT&T has, however, voluntarily committed to divest IRUs to these buildings and we find that it is in the public interest to accept that commitment. With respect to Type II special access services, we find that the merger is not likely to result in anticompetitive effects in the provision of Type II services. Competing carriers can use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and can purchase special access circuits or UNE loops to provide Type II services.

41. *Type I Services.* In the *SBC/AT&T Order* and the *Verizon/MCI Order*, the Commission found that the proposed mergers posed a potential anticompetitive harm in buildings where AT&T was the sole carrier besides SBC in SBC's territory or MCI was the sole carrier besides Verizon in Verizon's territory and where entry by other competitive LECs was unlikely.[110] The Commission further found, however, that divestitures ordered by the DOJ as part of its consent decrees with the merging parties adequately remedied those harms.[111]

42. In the DOJ/AT&T/Verizon Consent Decrees, the DOJ found potential competitive harm and ordered divestitures only in buildings where "AT&T and SBC or MCI and Verizon, respectively, were capable of supplying local private lines before the merger and no other competitive LEC was likely to connect the building to its network."[112] In identifying buildings where divestiture was required, the DOJ began by identifying buildings in the SBC and Verizon territories where the merger would reduce the number of competitors with direct connections (or laterals) from two to one.[113] Adopting criteria used by individual competitive LECs in deciding whether it was economic to build, the DOJ then developed "screens" to identify whether competitive entry was likely at each two-to-one building.[114] The DOJ then

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AT&T/BellSouth Reply at 14 ("AT&T operates local fiber networks in only 11 BellSouth metropolitan areas."). Our use of the term "MSA" in this Order refers to these 11 metropolitan areas, the boundaries of which are not necessarily coterminous with the boundaries of the Metropolitan Statistical Areas as defined by the Office of Management and Budget.

[110] *See SBC/AT&T Order*, 20 FCC Rcd at 18308, para. 32; *Verizon/MCI Order*, 20 FCC Rcd at 18451, para. 32.

[111] Proposed Final Judgment, United States v. SBC Communications Inc. and AT&T Corp., Civil Action No. 1:05CV02102 (D.D.C. filed Oct. 27, 2005) (DOJ-SBC/AT&T Consent Decree); Proposed Final Judgment, United States v. Verizon Communications Inc. and MCI, Inc., Civil Action No. 1:05CV02103 (D.D.C. filed Oct. 27, 2005) (DOJ-Verizon/MCI Consent Decree). The DOJ-SBC/AT&T Consent Decree and the DOJ-Verizon/MCI Consent Decree are hereinafter referred to together as the "DOJ/AT&T/Verizon Consent Decrees." The DOJ/AT&T/Verizon Consent Decrees currently is under review pursuant to 15 U.S.C. § 16 (the Tunney Act) in the U.S. District Court for the District of Columbia. We agree with AT&T that it would be inappropriate to delay our consideration of this merger during the pendency of the Tunney Act proceeding. *See* Letter from Gary L. Phillips, AT&T Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Oct. 24, 2006).

[112] *See* Decl. of W. Robert Majure at 14, United States v. SBC Communications, Inc. and AT&T Corp., Civil Action No. 1:05CV02102 at 14, n.17 (D.D.C. Aug. 7, 2006) (public redacted version) (DOJ Majure Decl.); *see also* DOJ/AT&T/Verizon Consent Decrees, App. A (listing divestiture assets).

[113] Dept. of Justice Submission in Response to the Court's Minute Order of July 25, 2006, United States v. SBC Communications Inc. and AT&T Corp., Civil Action No. 1:05CV02103 at 8 (D.D.C. Aug. 9, 2006) (public redacted version) (DOJ Aug. 9 Submission); DOJ Majure Decl. at paras. 13-14.

[114] DOJ's screens were based on estimates of "revenue opportunity (based on current traffic being generated in the building adjusted for special circumstances) and the distance to the closest CLEC fiber," which represented the

(continued....)

required divestiture of at least eight fiber strands in the form of ten-year IRUs for those two-to-one buildings where entry was found to be unlikely.[115]

43. In various filings, Applicants assert that AT&T's presence in BellSouth's region is significantly smaller than was legacy AT&T's presence in SBC's region and that "the impact of this merger on potential wholesale special access competition is truly *de minimus* and does not warrant the conditions agreed to in the SBC/AT&T and Verizon/MCI merger[s]."[116] In further support of their contention that divestitures and other conditions are unwarranted, the Applicants filed detailed data that identify the buildings in BellSouth's region where AT&T has direct connections.[117]

(Continued from previous page)
likely cost of construction. DOJ Majure Decl. at para. 14. More specifically, the DOJ used the following "demand/distance" screens to eliminate from the list of potentially problematic buildings those where the demand was at or above a minimum threshold and where a competing carrier had fiber facilities within the corresponding distance:

Minimum Demand	Distance
2 DS3s	0.1 mile
1 OC-12	0.25 mile
Over OC-48	1 mile

Id. at n.17. In addition, the DOJ eliminated certain buildings where there was unlikely to be competition in the future, such as where the only customer in the building was AT&T or one of its affiliates. *Id.*

[115] DOJ Aug. 9 Submission at 10-11, 13.

[116] *See* AT&T/BellSouth Reply at ii-iii. The Applicants further contend that the number of buildings that raise competitive concerns under the criteria DOJ used in the SBC/AT&T merger proceeding is less than 10% of the buildings subject to similar concerns in the earlier proceedings. *Id.* at 13-17; AT&T Sept. 1 *Ex Parte* Letter at 7-13; AT&T Sept. 20 *Ex Parte* Letter at 3; *see also* AT&T/BellSouth Application at 56-59 (asserting that: AT&T's annual wholesale local private line sales in the BellSouth region are less than the monthly sales legacy AT&T provided in SBC's region; AT&T sells less than 1% of the billions of dollars of total wholesale special access services sold annually in BellSouth's region; and AT&T's sales are less than one tenth the amount that AT&T pays to the other competitive LECs that sell wholesale special access services to AT&T in BellSouth's region); AT&T/BellSouth Carlton/Sider Decl. at paras. 103-12.

[117] *See* AT&T Sept. 28 *Ex Parte* Letter; AT&T Sept. 20 *Ex Parte* Letter; AT&T Sept. 1 *Ex Parte* Letter; AT&T/BellSouth Carlton/Sider Decl. at paras. 103-12; AT&T/BellSouth Carlton/Sider Reply Decl. at paras. 19-26. *See also* AT&T Info. Req., Exh. 12.2, 14.a.5, 14.b. We primarily rely on the Applicants' most recent data submissions because the Applicants have continued to investigate building-specific issues and to refine their data submissions throughout this proceeding.

44. In their most recent submission, the Applicants present an updated, detailed building analysis.[118] This analysis indicates that AT&T has a direct connection to 317 buildings in BellSouth's in-region territory.[119] The Applicants first eliminate 44 buildings, which "merely house 'network' connections, are vacant buildings, or have AT&T (or an AT&T affiliate) as the sole tenant,"[120] leaving a total of 273 buildings. The Applicants next subtract buildings where other competitive LECs have direct connections,

[118] The Applicants' initial building list indicated that AT&T had Type I connections to 355 buildings in BellSouth's territory. *See* AT&T Sept. 1 *Ex Parte* Letter at 2, Attach. 1. In addition, AT&T initially identified twelve other buildings to which AT&T had a Type I connection in its response to the Information Request, which buildings were not included in the initial list because they "were added (or planned to be added) to AT&T's building database after AT&T pulled the data for its response to Specification 14.b." *See* AT&T Sept. 20 *Ex Parte* Letter at 1; AT&T Info. Req., Exh. 14.a.5. The Applicants suggest that four of the 12 buildings originally listed in AT&T Info. Req., Exh. 14.a.5 should be added to the building list because they are buildings "at which both AT&T and BellSouth actually have local fiber connections." *See* AT&T Sept. 28 *Ex Parte* Letter at n.3. The Applicants further suggest that the eight remaining buildings originally listed in AT&T Info. Req., Exh. 14.a.5 should not be added to the building list because: two actually are located in Sprint, not BellSouth, incumbent franchise areas; three were listed in AT&T Info. Req., Exh. 14.a.5. due to a database error, and in fact are not served by AT&T local fiber; and three are served by AT&T local fiber but are not connected to BellSouth's local networks. *Id.* We agree that we should exclude from our analysis of Type I special access services buildings that are not located in BellSouth's franchise areas and where AT&T has no facilities. We decline, however, to exclude from our competitive analysis buildings where AT&T has a fiber connection simply because BellSouth currently does not have a connection. BellSouth, as the incumbent LEC in its in-region territory, both has a ubiquitous network and is subject to certain "carrier of last resort" obligations. While the record is unclear as to the exact nature of such "carrier of last resort" obligations under relevant state law, we are unwilling, without more, to conclude that BellSouth would not be willing or required to build out facilities to such buildings upon request. Finally, we note that two buildings originally were listed as "No Longer Active" in AT&T Info. Req., Exh. 14.a.5, and concur with AT&T's suggestion that one be included in AT&T's list of 359 buildings and one excluded because it is not served by AT&T local fiber. *See* AT&T Info. Req., Exh. 14.a.5; AT&T Sept. 28 *Ex Parte* Letter at n.3. We therefore begin our analysis with an initial list of 362 buildings of potential competitive concern, and note that our numbers, as a result, vary at times from those contained in the AT&T Sept. 28 *Ex Parte* Letter and previous submissions.

[119] AT&T states that 31 buildings should be removed from the initial list of 362 buildings of potential competitive concern because they were duplicate entries. *See* AT&T Sept. 1 *Ex Parte* Letter at 2; AT&T Sept. 28 *Ex Parte* Letter, Attach. 2 (identifying duplicate buildings). AT&T further states that it has no facilities to 14 of the remaining 331 buildings, and no lit fiber to two additional buildings. *See* AT&T Sept. 28 *Ex Parte* Letter at 2-3, Attach. 3 (identifying 14 buildings with no AT&T fiber connection and two "buildings where AT&T's local fiber connection has not been cut, but where AT&T has no customer, no service and no electronics . . ."). We agree that we should exclude from our analysis of Type I special access services buildings where AT&T has no facilities. We reject, however, AT&T's suggestion that buildings to which it has a direct fiber connection but which are not "lit" are, for that reason alone, not of potential competitive concern. Accordingly, contrary to AT&T's suggestion, we do not drop from our analysis the two buildings identified in Attach. 3 of the AT&T Sept. 28 *Ex Parte* Letter as "buildings with no AT&T electronics installed." *See* AT&T Sept. 28 *Ex Parte* Letter, Attach. 3. With that exception, we otherwise agree that these 45 buildings (*i.e.*, 31 duplicate entries and 14 buildings with no facilities) should be dropped because it is not appropriate to treat them as AT&T buildings in BellSouth's in-region territory. We therefore find, based on the record evidence, that AT&T has direct connections to 317 buildings in BellSouth's region.

[120] *See* AT&T Sept. 1 *Ex Parte* Letter at 3-4 (explaining why these 44 buildings raise no competitive concerns); AT&T Sept. 28 *Ex Parte* Letter, Attach. 4 (identifying the 44 buildings).

reducing the list of potentially problematic buildings to 72.[121] The Applicants then apply the demand/distance screens used by the DOJ in the DOJ/AT&T/Verizon Consent Decrees to eliminate buildings where competitive LEC entry is likely.[122] Application of these screens leaves only 31 buildings where AT&T is the only competitive LEC with a direct connection and where entry is unlikely.

45. With respect to these 31 buildings, the Applicants argue that divestiture or conditions are unwarranted. Specifically, the Applicants argue that anticompetitive effects are unlikely because: (1) AT&T does not provide any wholesale services to any of these buildings; (2) fixed wireless is a low-cost alternative to AT&T's fiber; (3) under the Commission's impairment test, DS1 and DS3 UNE loops remain available in the wire centers that serve these buildings; and (4) BellSouth prices special access on at least an MSA basis, and the elimination of AT&T as a competing provider of Type I special access to 31 buildings spread over nine metropolitan areas in five states is unlikely to have a significant effect on BellSouth's pricing in any MSA.[123] Applicants further argue that one building has OC-96 or greater demand and is less than two miles from the existing local fiber of other competitive LECs.[124]

46. We find that the Applicants' use of the various screens to eliminate particular buildings as being of no competitive concern, as described above, is, for the most part, both reasonable and consistent with the approach the DOJ adopted in the DOJ/AT&T/Verizon Consent Decrees. Specifically, we find it appropriate to eliminate those buildings where: (1) the listing is duplicative or AT&T lacks a direct connection; (2) there are other competitive LECs with direct connections (*i.e.*, those buildings that will not suffer a two-to-one reduction); (3) the building is vacant or the sole customer is AT&T or one of its affiliates; or (4) entry by a competitive LEC is likely under the DOJ's demand/distance screens.

47. We are not persuaded, however, by the Applicants' arguments that six of the buildings should be deemed to be of no competitive concern because: (1) three are not connected to BellSouth's local networks; (2) two are not served by "lit" fiber; and (3) one has OC-96 or greater demand and is located less than two miles from the existing local fiber of other competitive LECs.[125] Elimination of buildings on such grounds is not dictated by the approach the DOJ adopted in the DOJ/AT&T/Verizon Consent Decrees, and the Applicants have failed to provide record evidence sufficient to justify eliminating these six buildings. We therefore find that there are a total of 31 buildings in BellSouth's in-region territory where AT&T is the only competitive LEC with a direct connection and where entry is unlikely.[126]

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[121] *See* AT&T Sept. 1 *Ex Parte* Letter at 4-5 (explaining why these buildings raise no competitive concerns); AT&T Sept. 28 *Ex Parte* Letter, Attach. 5 (identifying the 201 buildings eliminated).

[122] *See* AT&T Sept. 1 *Ex Parte* Letter at 5-7 (explaining why these buildings raise no competitive concerns); AT&T Sept. 28 *Ex Parte* Letter, Attach. 6, Attach. 7, Attach. 8 (identifying 41 buildings captured by the demand/distance screens).

[123] *See* AT&T Sept. 1 *Ex Parte* Letter at 7-9; AT&T Sept. 20 *Ex Parte* Letter at 3.

[124] *See* AT&T Sept. 20 *Ex Parte* Letter at 2.

[125] *See supra* notes 112-13; AT&T Sept. 20 *Ex Parte* Letter at 2.

[126] Of these 31 buildings, ten are located in Miami, seven in Atlanta, seven in Nashville, and two in Knoxville. Birmingham, Charlotte, Chattanooga, Jacksonville and Orlando each have one such building. *See* AT&T Sept. 28 *Ex Parte* Letter at n.3, Attach. 3, Attach. 9 (identifying 26 buildings in Attachment 9, two buildings in **[REDACTED]** as "buildings with no AT&T electronics installed") in Attachment 3, and three buildings in **[REDACTED]** "not connected to BellSouth's local networks" in n.3).

48. We also do not accept the Applicants' arguments that divestiture or conditions are unwarranted with respect to the remaining 31 buildings. In particular, we do not agree that, just because AT&T currently is not providing wholesale Type I special access services to a particular building, AT&T would not do so in the future, absent the merger. Second, while we agree that fixed wireless offers the potential of being a cost-effective substitute for fiber as a last-mile connection to commercial buildings, we recognize that fixed wireless connections are not always technically or economically feasible (*e.g.*, a particular building may not be well positioned relative to a wireless provider's transmission equipment), and Applicants have failed to demonstrate that fixed wireless connections are feasible at all of the 31 buildings. Finally, even if DS1 and DS3 UNE loops are available in the wire centers associated with the 31 buildings, those UNEs may not be adequate substitutes for AT&T's existing fiber connections. For example, a carrier that might have sought to purchase an AT&T Type I special access circuit absent the merger might not qualify to lease UNEs due to UNE use restrictions or demand levels.

49. We conclude that elimination of AT&T as a provider of Type I special access services at those 31 buildings may lead to an increase in the wholesale cost of special access at those buildings, and, ultimately, to higher retail prices for customers located in those buildings. AT&T has, however, offered a voluntary commitment to divest at least eight fiber strands in the form of ten-year IRUs for these 31 two-to-one buildings where entry is unlikely.[127] We note that this divestiture commitment, which is consistent with the DOJ's actions in the SBC/AT&T and Verizon/MCI mergers and,[128] consistent with our analysis in the *SBC/AT&T Order* and the *Verizon/MCI Order*, adequately remedies these potential harms. Accordingly, we accept AT&T's commitment.

50. *Type II.* In buildings in BellSouth's in-region territory where a competitive LEC is not directly connected to a building via its own facilities and where customer demand may not justify the construction of competitive facilities (such as where demand is less than the OCn level), competing carriers can combine their own transport facilities with special access loops or, where available, high-capacity loop UNEs purchased from BellSouth[129] (*i.e.*, Type II offerings). More specifically, competitors can use their existing collocation facilities in the relevant wire center, or they can contract with a competitor that has such collocation facilities. They can then use these collocation facilities to interconnect special access loops or UNEs to their own transport facilities.[130]

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[127] *See* Appendix F.

[128] *See supra* para. 42.

[129] While DS1 and DS3 UNEs are not available solely for the provision of long distance or mobile wireless services, they are available for the provision of local exchange and exchange access services, subject to specific demand limitations. *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 at 2551-58, paras. 34-40 (*Triennial Review Remand Order*). Carriers that obtain UNEs for the provision of local exchange or exchange access services may also provide other services using those UNEs as well. 47 C.F.R. § 51.309(d).

[130] We decline Access Point *et al.*'s request that we prohibit the merged entity from recalculating its business line density for purposes of determining UNE availability in BellSouth's territory. *See* Access Point *et al.* Petition at 68-69 (stating that "CLECs could be harmed if UNEs were to become less available because of changes in wire center business line counts insofar as lines that AT&T obtained from BellSouth as special access are excluded from current line counts, but would be recounted as BellSouth lines"). We do not believe that the merger is likely to have any effect on business line density counts. The Commission's rules define "business line" for purposes of determining UNE availability as "an incumbent LEC-owned switched access line used to serve a business customer, whether by (continued....)

Excerpt from the FCC's *SBC-AT&T Merger Order* (2005)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
SBC Communications Inc. and	)	
AT&T Corp. Applications for	)	WC Docket No. 05-65
Approval of Transfer of Control	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 2005 **Released:** November 17, 2005

By the Commission: Chairman Martin and Commissioner Abernathy issuing separate statements; Commissioners Copps and Adelstein concurring and issuing separate statements.

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begin by defining the relevant product markets[83] and relevant geographic markets.[84] We next identify market participants and examine market concentration and how concentration will change as a result of the merger. We also consider whether entry conditions are such that new competitors could likely enter and defeat any attempted post-merger price increase.

22. If our structural analysis suggests that the merger may have anticompetitive effects, we must then examine in more detail whether and how the merger might affect competitive behavior. In performing this behavioral analysis, we consider whether the merger is likely to have anticompetitive effects either through unilateral actions of the merged entity or through coordinated interaction among firms competing in the relevant market.[85]

23. With regard to potential vertical effects, we will examine how the merger affects the Applicants' incentives and ability to discriminate in provisioning inputs to competitors. In particular, we will consider the effect of the merger on the merged entity's incentives and ability to discriminate in the provision of special access services.

B. Wholesale Special Access Competition

24. In this section, we consider the effects of the merger of SBC and AT&T on the provisioning and pricing of wholesale special access services. The Commission has previously defined special access as a dedicated transmission link between two places.[86] As discussed below, wholesale special access service is

[83] A relevant product market has been defined as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "'small but significant and nontransitory' increase in price." Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, (Apr. 2, 1992, revised Apr. 8, 1997) §§ 1.11, 1.12 (*DOJ/FTC Guidelines*); *see also EchoStar/DirecTV Order*, 17 FCC Rcd at 20605-6, para. 106.

[84] A relevant geographic market has been defined "as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a 'small but significant and nontransitory' increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change." *EchoStar/DirecTV Order*, 17 FCC Rcd at 20609, para. 117 (citing *DOJ/FTC Guidelines* § 1.21).

[85] *Id.* at 20619, para. 151. As the Commission explained in the *EchoStar/DirecTV Order*:

> Unilateral effects arise when the merging firm finds it profitable to alter its behavior following the merger. Examples of unilateral effects include a merging firm's raising its price or reducing the quantity it supplies. Coordinated effects, in contrast, arise when competing firms, recognizing their interdependence, take actions "that are profitable for each of them only as a result of the accommodating reactions of others." Because coordinated effects generally are more likely the smaller the number of firms in a market, mergers may significantly increase the likelihood of coordinated effects by reducing the number of firms. Examples include explicit collusion, tacit collusion, and price leadership. *Id.* at 20619, para. 152 (footnotes omitted).

[86] *See Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1997, para. 7 (2005) (*Special Access NPRM*). We recognize that different companies, particularly carriers that are not incumbent LECs, may use slightly different terms to refer to dedicated loop and transport links between two points. For example, AT&T uses the terms "Local Private Line" and "Domestic Private Line" to refer to services consisting of loops and transport, typically in combination that generally compete directly with SBC's special access services. *See, e.g.*, SBC/AT&T (continued....)

a critical input for: competitive LECs in providing services to their retail enterprise customers, wireless and competitive LECs in connecting their networks to other carriers, long distance carriers seeking to connect customers to their long-distance networks, and entities seeking to connect with Internet backbones.[87] Firms needing dedicated transmission links essentially have three choices: to deploy their own facilities, to buy special access service from incumbent LECs, or to purchase such service from a competing special access provider. As discussed below, we find that AT&T provides special access services in competition with SBC's special access services, and that the merger, absent appropriate remedies, is likely to result in anticompetitive effects for wholesale special access services offered wholly over AT&T's own facilities to certain buildings. We conclude, however, that the consent decree, entered into between the Applicants and the DOJ, pursuant to which the Applicants agreed to certain divestitures in the form of IRUs for loops and transport necessary to reach to certain buildings where AT&T is the only competitive LEC that has a direct wireline connection, should remedy any likely anticompetitive effects. Moreover, we find further comfort in certain voluntary commitments, which the Applicants have offered. Accordingly, we adopt the proffered commitments as express conditions of our approval of the transfer of licenses and authorizations from AT&T to SBC.

1. Relevant Markets

a. Relevant Product Markets

25. As previously indicated, special access is a dedicated transmission link between two locations, most often provisioned via high-capacity circuits. Such services are used for various purposes, such as direct connection between tenants of commercial buildings and a competing carrier's network or between different facilities of the same firm. Both voice and data may be carried using special access services. The facilities used to provide special access service typically consist of three different segments: (1) an entrance facility, which connects the purchasing carrier's point of presence ("POP") to the nearest wire center, carrier hotel, or similar location ("entrance facility"); (2) local transport; and (3) a "last mile" connection or local loop, also known as a channel termination, which runs from the transport facility to the end-user customer.

26. The record demonstrates that there are at least two separate relevant product markets for special access services: "Type I" special access services, which are offered wholly over a carrier's own facilities, and "Type II" special access services, which are offered using a combination of the carrier's own facilities for two of the segments and the special access services of another carrier for the third segment.[88] The

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Carlton/Sider Reply Decl. at para. 9 n.5; *DOJ-SBC/AT&T Complaint* at para. 13. For simplicity, we will use the term "special access" to refer to all services provided by any carrier that involves such dedicated links.

[87] *See infra* Part V.C (Retail Enterprise Competition); Part V.D (Mass Market Competition); and Part V.E (Internet Backbone Competition).

[88] *See, e.g.*, Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 8 (filed June 15, 2005) (Qwest June 15 *Ex Parte* Letter). Approximately **[REDACTED]** of AT&T's wholesale DS3 and lower-capacity special access services are Type II. Response of AT&T Corp. to the Commission's April 18, 2005 Information and Document Request, WC Docket No. 05-65, Exh. 5(c) II – 5(c) VI (filed May 9, 2005) (AT&T Info. Req.) (Local Private Line and Domestic Private Line wholesale special access). AT&T **[REDACTED]** services. *See* Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, App. C at 2 (filed Aug. 1, 2005) (SBC/AT&T Aug. 1 *Ex Parte* Letter).

(continued....)

record evidence suggests that many purchasers of wholesale special access services view Type I services as substantially superior to Type II services, due to differences in performance, reliability, security, and price, and that these differences are sufficiently large that Type I special access services fall into a separate relevant product market from Type II.[89]

27. We also recognize that the services provided over different segments of special access (*e.g.*, channel terminations and local transport) constitute separate relevant product markets, which may be subject to varying levels of competition.[90] In the competitive analysis section below, we will discuss the competitiveness of the different special access services.

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In this Order, "REDACTED" indicates that confidential or proprietary information that is subject to a Protective Order in this proceeding has been redacted from the public version of this Order. *First Protective Order*, 20 FCC Rcd at 5196; *Second Protective Order*, 20 FCC Rcd at 8876. The unredacted text is included in the confidential version of this Order, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgments of the protective orders. Qualified persons who have not yet signed the required acknowledgments may do so in order to obtain the confidential version of this Order.

Note that in some cases where both a confidential unredacted version and a redacted public version of a document were filed, the page number was inconsistent between the two documents. With respect to such documents, all citations are to the redacted version, unless otherwise specified.

[89] *See, e.g.*, Qwest June 15 *Ex Parte* Letter, Attach. at 8; Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 7 (filed July 7, 2005) (Qwest July 7 *Ex Parte* Letter); Cbeyond *et al.* Petition, Declaration of Simon Wilkie (Cbeyond *et al.* Wilkie Decl.) at para. 17 n.6 ("[O]ther things being equal, buyers have a preference to purchase Type I circuits to avoid any reliance on the ILEC who may degrade quality or be unresponsive to service problems."); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, App. C at 2 (filed Aug. 1, 2005) (unredacted) (AT&T **[REDACTED]** services) (SBC/AT&T Aug. 1 *Ex Parte* Letter); AT&T Info. Req., ATT546000175-79 (**[REDACTED]**); ATT598003761-78 at 63 (**[REDACTED]**); ATT599000837-44 at 39-40 (**[REDACTED]**). We note that the analysis of Type II offerings as part of a distinct product market is consistent with the assertions of commenters that Type II services are significant, as well. *See, e.g.*, Letter from Brad E Mutschelknaus, *et al.*, Counsel for Eschelon *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 6 (filed June 6, 2005) (Eschelon *et al.* June 6 Ex Parte Letter) (asserting that the fact that wholesale services are provisioned using Type II, rather than Type I, offerings "does not significantly diminish the competitive significance" of those offerings, and that criticisms of Type II offerings do not "account for the important role played by those facilities in the wholesale market").

[90] We do not, however, analyze separate product markets for different capacities of special access services. *See, e.g.*, Letter from Brad E. Mutschelknaus, Counsel for Conversent *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 3 (filed Aug. 31, 2005) (Conversent *et al.* Aug. 31 *Ex Parte* Letter) (asserting that different capacity services should be different relevant product markets). While customers in certain circumstances may be able to substitute different capacity services in different combinations to meet their needs if the price of a particular capacity circuit were raised (for example, customers could substitute multiple DS1 loops for a single DS3 loop), we believe that, in general, different capacity circuits are likely to constitute separate relevant product markets. However, we find comparable competitive alternatives for varying capacities of special access circuits, and thus for administrability purposes we do not separately analyze different capacity services. Where competing carriers offer Type I service using their own facilities, the facilities can be "channelized" to provide service at all capacity levels. *See, e.g.*, Response of SBC Communications Inc. to Information and Document Request Dated April 18, 2005, WC Docket No. 05-65, Exh. 6(d)(3) at III-2 (filed May 9, 2005) (SBC Info. Req.); *see also Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2585-86, para. 86 (2005), petitions for review filed (*Triennial Review Remand Order*). Where carriers seek to offer Type (continued....)

b. Relevant Geographic Markets

28. Consistent with Commission precedent and the record before us, we conclude that the relevant geographic market for wholesale special access services is a particular customer's location, since it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid a "small but significant and nontransitory" increase in the price of special access service.[91] In order to simplify its analysis, however, the Commission has traditionally aggregated or grouped customers facing similar competitive choices, and we will do so in our discussion below to the extent appropriate.[92]

29. In addition, however, we will consider the potential effect of the merger on SBC's special access prices, which are generally set on a wider geographic basis. Because SBC has gained Phase II pricing flexibility for its special access services in some metropolitan statistical areas (MSAs),[93] but not others,

(Continued from previous page)

II service, they can purchase the required capacity of special access service from the incumbent or from any competitive access providers.

We note that, in prior orders addressing our section 251 unbundling rules, we conducted a capacity-based analysis. *See, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2625, para. 166 (describing the capacity-based analysis used for DS1, DS3, and dark fiber loops); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17102, para. 197 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *aff'd in part, vacated and remanded in part, and remanded in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (describing the capacity-based analysis used for DS1, DS3, OCn, and dark fiber loops). Our approach to product definitions here differs in key respects from our unbundling analysis, however. Our merger analysis focuses on special access competition generally (whether through facilities deployment or partial reliance on other carriers' special access services), whereas our high-capacity loop impairment analysis focused solely on the likelihood of competitive facilities deployment. Moreover, our location-specific analysis in the merger context focuses on those locations where AT&T offers competing special access services today, whereas the Commission applied a wire center test for high-capacity loop unbundling because a building-by-building test would not be administrable. Thus, we find no need to perform separate analyses for different capacity circuits based on the record and analytical framework here, notwithstanding our prior unbundling analyses.

[91] *See, e.g., SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 69; *Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, CC Docket No. 98-24, Memorandum Opinion and Order, 13 FCC Rcd 15236, 15248, para. 21 (*AT&T/TCG Order*). Our geographic market definition is consistent with the arguments made by certain commenters. *See* Global Crossing Comments at 10-14; Global Crossing Comments, Attach. A, Statement of Joseph Farrell at paras. 117-25 (Global Crossing Farrell Decl.); Conversent *et al.* Aug. 31 *Ex Parte* Letter at 3; *cf. EchoStar/DirecTV Order*, 17 FCC Rcd at 20609-12, paras. 117-125; *AT&T/Comcast Order*, 17 FCC Rcd at 23282, para. 90 (finding that the relevant geographic market was individual customer residences but that it is reasonable to aggregate to a larger geographic area); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-19, para. 54-57 (finding that separate geographic areas were appropriately defined by the availability of similar set of services at similar prices).

[92] *See, e.g., AT&T/Comcast Order*, 17 FCC Rcd at 23282, para. 90; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-19, paras. 54-56; *EchoStar/DirecTV Order* 17 FCC Rcd at 20610-11, para. 120; *SBC/Ameritech Order* 14 FCC Rcd at 14746, paras. 67-68.

[93] SBC/AT&T Application at 103.

SBC's rates for special access may vary from MSA to MSA.[94] Accordingly, we will also examine on an MSA basis how the merger is likely to affect SBC's special access prices.

c. Market Participants

30. SBC can access all or virtually all of the buildings and transport routes in its territory. Although the record is not clear as to what extent other competitive LECs compete in the special access market in SBC's territory, it is clear that, in addition to AT&T, **[REDACTED]** provide wholesale Type I, and in some cases Type II, special access services.[95] The record does not, however, clearly indicate the extent to which individual buildings are served by one or more of these competitive LECs.

2. Competitive Analysis

31. In this section, we separate our discussion of the competitive effects of the merger into the effects on the in-region special access market, both horizontal and vertical, and the effects on out-of-region special access markets.[96] We begin by considering whether the merger is likely to result in a meaningful reduction in competition or increase in price for special access services to particular locations.

32. As discussed below, we find that the elimination of AT&T as a provider of wholesale special access services is likely to result in anticompetitive effects in the provision of Type I special access services to particular buildings where AT&T is currently the sole carrier, besides SBC, with a direct wireline connection to the building, and where barriers to entry make it unlikely that other carriers will build their own facilities. Absent appropriate remedies, these building-specific effects may also lead to increases in SBC's MSA-wide special access prices.

33. With respect to Type II special access services, we conclude that the ability of remaining carriers in the market to offer competitive special access services through a combination of their own transport facilities and an incumbent LEC's special access or high-capacity unbundled loops, or a competing carrier's loop facilities, alleviates concerns about the loss of AT&T as a provider of Type II special access services to particular buildings. Further, because AT&T provides such a relatively small amount of wholesale Type II special access services within SBC's region, and because other competitive providers should be able to move in quickly to fill any void left by AT&T, we conclude that the merger is unlikely to result in an increase in the price of Type II services within SBC's region.

34. We next consider whether the merger is likely to result in anticompetitive effects in the provision of wholesale special access services in areas outside SBC's territory. In particular, we consider arguments made by certain commenters that, after the SBC/AT&T and Verizon/MCI mergers are consummated, SBC and Verizon will have an incentive to forbear from competing in the provision of wholesale special access services within each other's territories. We conclude that the merger will not

[94] We recognize that SBC also offers various volume and term discount plans which offer percentage discounts off the tariffed rate. Some discounts are based on a carrier's total spend over a larger geographic market while other discounts may vary from MSA to MSA. *See, e.g.*, CompTel/ALTS Petition at 15 (suggesting a regional analysis is appropriate given SBC pricing strategies).

[95] SBC/AT&T Application, Reply Declaration of Anthony Fea *et al.* (SBC/AT&T Fea *et al.* Reply Decl.) at paras. 15, 47.

[96] By "in-region," we mean the franchise areas where SBC is the incumbent LEC. Thus, "out-of-region" refers to all other regions in the U.S.

result in competitive harm in Verizon's territory. We find that a variety of actual and potential competing providers will remain post-merger to fill any void left by AT&T if the merged entity does not continue to offer wholesale special access services in Verizon's territory.

35. Finally, we consider possible vertical effects of the merger. SBC is already a vertically integrated company. We conclude that the merger, as conditioned by the DOJ Consent Decree, will not increase the merged entity's ability to increase prices for or decrease quality of wholesale special access services. To the extent that SBC, prior to the merger, had any incentive or ability to raise rivals' costs or discriminate in the provision of wholesale special access services, those issues are better addressed in pending general rulemaking proceedings.

a. Horizontal Effects

36. *Unilateral Effects*. Several commenters claim that, as a result of the merger, wholesale special access prices are likely to rise at specific buildings where AT&T is currently offering either Type I or Type II special access services.[97] As discussed in greater detail below, we believe these claims are correct in part. The record suggests that the merger will result in a reduction in the number of competitors offering Type I services in buildings where AT&T is currently connected via its own facilities, and that, absent remedial measures, this is likely to lead to an increase in the price of special access service to buildings where only SBC and AT&T own or control a direct wireline connection, and where conditions make additional facilities-based entry unlikely.[98] We further find, however, that the merger is not likely to result in anticompetitive effects in the provision of Type II services. Competing carriers can use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and can purchase special access circuits or UNE loops to provide Type II services.

37. *Type I Services.* We disagree with the Applicants' assertion that "the absolute number of buildings served by AT&T is so small that AT&T's facilities cannot be considered competitively significant."[99] As discussed above, the relevant geographic market for wholesale special access services is a particular customer's location. Thus, where AT&T is the only carrier besides SBC that is directly connected to a particular building and where entry is unlikely, AT&T's elimination as a competitor may lead to an increase in the price of Type I special access services to that building. Thus, absent appropriate remedial measures, like those imposed by the DOJ Consent Decree, the proposed merger is likely to have

[97] *See, e.g.*, ACN *et al.* Comments at 39-41; Broadwing and SAVVIS Petition at 22-29; Cbeyond *et al.* Petition at 22-25; CompTel/ALTS Petition at 13-15; Global Crossing Comments at 17-19; NASUCA Comments at 14-18; Qwest Petition at 12-17; Ad Hoc Telecom Users Reply at 20-23; BT Americas Reply at 13-15, 19-20; Letter from Richard M. Blau and Edward W. Kirsch, Counsel for CTC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 4-5 (filed Sept. 21, 2005) (CTC Sept. 21 *Ex Parte* Letter); Letter from Brad E. Mutschelknaus, Counsel for BridgeCom *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, at 2 (filed Sept. 22, 2005) (BridgeCom *et al.* Sept. 22 *Ex Parte* Letter); Letter from John T. Nakahata, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 2 (filed Sept. 23, 2005) (Level 3 Sept. 23 *Ex Parte* Letter).

[98] In the 19 in-region MSAs where AT&T has local facilities, SBC identifies over 240,000 commercial buildings with more than 10 DS0 line equivalents, and states that AT&T provides Type I service to only 1,691 buildings in SBC's region as a whole using its own facilities—only 0.7%. *See* SBC/AT&T Application at 105 n.347; SBC/AT&T Reply at 30-32; Letter from Christopher M. Heimann, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 2-3 (filed Sept. 6, 2005) (SBC/AT&T Sept. 6 *Ex Parte* Letter).

[99] SBC/AT&T Sept. 6 *Ex Parte* Letter at 3.

anticompetitive effects in buildings where AT&T is the only competitive LEC with a direct wireline connection and where entry appears unlikely.

38. AT&T is directly connected via its own facilities to at least 1,691 buildings in the 19 MSAs in SBC's territory where AT&T has local facilities.[100] AT&T has provided data indicating that AT&T is the only competitive provider to approximately **[REDACTED]** of those buildings.[101]

39. The record also indicates that, for many buildings, there is little potential for competitive entry, at least in the short term. As the Commission has previously recognized, carriers face substantial fixed and sunk costs, as well as operational barriers, when deploying loops, particularly where the capacity demanded is relatively limited.[102] Given these barriers, it appears unlikely that a carrier would be willing to make the significant sunk investment without some assurance that it would be able to generate revenues sufficient to recover that investment.[103] Consistent with this analysis, there is evidence in the record that carriers generally are unwilling to invest in deploying their own loops unless they have a long-term retail contract that will generate sufficient revenues to allow them to recover the cost of their investment.[104] Moreover, even where there is adequate retail demand, the costs of constructing the loop may be sufficiently high, or there may be other operational barriers, that may deter entry.[105]

40. This analysis is consistent with the analysis contained in the complaint that the DOJ filed in connection with this merger. In its complaint, the DOJ alleged that, in certain buildings where "SBC and AT&T are the only firms that own or control a direct wireline connection to the building," the merger was "likely to substantially reduce competition for Local Private Lines and telecommunications services that rely on Local Private Lines to those buildings."[106] The DOJ's complaint goes on to allege that "[a]though

[100] *See id.*

[101] SBC/AT&T Sept. 6 *Ex Parte* Letter at 3; SBC/AT&T Aug. 1 *Ex Parte* Letter, App. B at 1; Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, at 2 (filed June 24, 2005) (SBC/AT&T June 24 *Ex Parte* Letter). We note that AT&T's data is likely to overestimate the number of buildings where AT&T is the sole competitive LEC with a direct connection, because the data only count competitive LECs with whom AT&T has wholesale contracts. *See, e.g.*, SBC/AT&T Sept. 6 *Ex Parte* Letter at 5; SBC/AT&T Carlton/Sider Reply Decl. at paras. 27-30.

[102] *See Triennial Review Remand Order*, 20 FCC Rcd at 2615-18, paras. 149-54; *see also Triennial Review Order*, 18 FCC Rcd at 17160-62, paras. 303-306.

[103] *See, e.g.*, Cbeyond *et al.* Petition at 23; Letter from Brad E. Mutschelknaus, Counsel for Cbeyond *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 17 (filed July 14, 2005) (Cbeyond *et al.* July 14 *Ex Parte* Letter); Letter from Thomas Cohen, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at paras. 15-21 (filed Oct. 21, 2005) (XO Oct. 21 *Ex Parte* Letter).

[104] *See id.*

[105] We are not persuaded by the Applicants' argument that Commission findings that network elements need not be unbundled pursuant to the "impairment" standard of section 251(d)(2) demonstrate that the special access market has sufficiently low entry barriers to permit sufficient and timely competitive, facilities-based entry to defeat any attempted post-merger price increase. *See, e.g.*, SBC/AT&T Reply at 26-27, 32-33, 37-38, 41. As the Commission explained in the *Triennial Review Order*, "[t]he purposes of a market power analysis are not the purposes of section 251(d)(2). . . the Act requires only that network elements be unbundled if competing carriers are impaired without them, regardless of whether the incumbent LEC is exercising market power or the unbundling would eliminate this market power." *Triennial Review Order*, 18 FCC Rcd at 17051 at para. 109.

[106] *DOJ-SBC/AT&T Complaint* at para. 3.

other CLECs can, theoretically, build their own fiber connection to each building in response to a price increase by the merged firm, such entry is a difficult, time-consuming, and expensive process."[107] The complaint further alleges that "[a]lthough entry may occur in response to a post-merger price increase in some of the buildings where AT&T is the only connected CLEC, the conditions for entry are unlikely to be met in hundreds of those buildings."[108] To remedy this problem, the DOJ in the consent decree required that AT&T divest IRUs to those buildings where it was the sole CLEC with a direct connection to the building and where DOJ found entry unlikely.[109] We find that the terms of the consent decree should adequately remedy any likely anticompetitive effects in the provision of Type I wholesale special access services.

41. *Type II.* In buildings where a competitive LEC is not directly connected to a building via its own facilities and where customer demand may not justify the construction of competitive facilities (such as where demand is less than the OCn level), competing carriers can either combine competitive transport with special access loops or, where available, high-capacity loop UNEs purchased from SBC (*i.e.*, Type II offerings).[110] Carriers can use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and can purchase special access loops or UNEs to provide Type II services.

42. Commenters claim that AT&T has three unique advantages in supplying Type II special access services to other competing carriers: (1) AT&T obtains greater special access discounts from SBC for the loop portion of the circuit;[111] (2) AT&T has more collocations than other competitive LECs so it can use the incumbent LEC special access to a greater number of buildings;[112] and (3) AT&T has a more extensive fiber network and therefore can reach more commercial buildings.[113] We do not find these arguments persuasive.

43. First, there is no evidence that AT&T has access to a discount plan that is not available to other providers. The Applicants assert, and opponents do not rebut, that SBC's "MVP" volume and term discount plan, under which AT&T takes SBC special access circuits, is also available to other competitive LECs,[114] and the Applicants state that eleven carriers in addition to AT&T subscribe to the MVP plan.[115]

[107] *Id.* at para. 27.

[108] *Id.* at para. 29.

[109] *DOJ-SBC/AT&T Consent Decree*, App. A.

[110] While UNEs are not available solely for the provision of long distance or mobile wireless services, they are available for the provision of local exchange and exchange access services. *Triennial Review Remand Order*, 20 FCC Rcd at 2551-58, paras. 34-40. Carriers that obtain UNEs for the provision of local exchange or exchange access services may also provide other services using those UNEs, as well. 47 C.F.R. § 51.309(d).

[111] CompTel/ALTS Petition at 14; Cbeyond *et al.* July 14 *Ex Parte* Letter at 14.

[112] Cox Comments at 15.

[113] CompTel/ALTS Petition at 14; Cbeyond *et al.* July 14 *Ex Parte* Letter at 16-21; Letter from Teresa D. Baer, Counsel for Global Crossing, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 8 (filed June 2, 2005) (Global Crossing June 2 *Ex Parte* Letter).

[114] SBC/AT&T Reply, Declaration of Parley C. Casto (SBC/AT&T Casto Reply Decl.) at paras. 3-8; SBC/AT&T Aug. 1 *Ex Parte* Letter, App. C at 1-3.

[115] SBC/AT&T Casto Reply Decl. at para. 6.

Excerpt from the FCC's *Verizon-MCI Merger Order* (2005)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Verizon Communications Inc. and MCI, Inc.	)	
Applications for Approval of	)	WC Docket No. 05-75
Transfer of Control	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 2005 **Released:** November 17, 2005

By the Commission: Chairman Martin and Commissioner Abernathy issuing separate statements; Commissioners Copps and Adelstein concurring and issuing separate statements.

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23. With regard to potential vertical effects, we will examine how the merger affects the Applicants' incentives and ability to discriminate in provisioning inputs to competitors. In particular, we will consider the effect of the merger on the merged entity's incentives and ability to discriminate in the provision of special access services.

B. Wholesale Special Access Competition

24. In this section, we consider the effects of the merger of Verizon and MCI on the provisioning and pricing of wholesale special access services. The Commission has previously defined special access as a dedicated transmission link between two places.[85] As discussed below, wholesale special access service is a critical input for: competitive LECs in providing services to their retail enterprise customers, wireless and competitive LECs in connecting their networks to other carriers, long distance carriers seeking to connect customers to their long-distance networks, and entities seeking to connect with Internet backbones.[86] Firms needing dedicated transmission links essentially have three choices: to deploy their own facilities, to buy special access service from incumbent LECs, or to purchase such service from a competing special access provider. As discussed below, we find that MCI provides special access services in competition with Verizon's special access services, and that the merger, absent appropriate remedies, is likely to result in anticompetitive effects for wholesale special access services offered wholly over MCI's own facilities to certain buildings. We conclude, however, that the consent decree entered into between the Applicants and the DOJ, pursuant to which the Applicants agreed to certain divestitures in the form of IRUs for loops and transport necessary to reach to certain buildings where MCI is the only competitive LEC that has a direct wireline connection, should remedy any likely anticompetitive effects. Moreover, we find further comfort in certain voluntary commitments, which the Applicants have offered. Accordingly, we adopt the proffered commitments as express conditions of our approval of the transfer of licenses and authorizations from MCI to Verizon.

1. Relevant Markets

a. Relevant Product Markets

25. As previously indicated, special access is a dedicated transmission link between two locations, most often provisioned via high-capacity circuits. Such services are used for various purposes, such as direct connection between tenants of commercial buildings and a competing carrier's network or between

(Continued from previous page)

> accommodating reactions of others." Because coordinated effects generally are more likely the smaller the number of firms in a market, mergers may significantly increase the likelihood of coordinated effects by reducing the number of firms. Examples include explicit collusion, tacit collusion, and price leadership. *Id.* at 20619, para. 152 (footnotes omitted).

[85] *See Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1997, para. 7 (2005) (*Special Access NPRM*). We recognize that different companies, particularly carriers that are not incumbent LECs, may use slightly different terms to refer to dedicated loop and transport links between two points. For example, MCI uses the term "Metro Private Line" to refer to services consisting of loops and transport, typically in combination that generally compete directly with Verizon's special access services. Verizon/MCI Application, Declaration of Jonathan P. Powell and Stephen M. Owens, Attach. 13 at para. 14. For simplicity, we will use the term "special access" to refer to all services provided by any carrier that involves such dedicated links.

[86] *See infra* Part V.C (Retail Enterprise Competition); Part V.D (Mass Market Competition); and Part V.E (Internet Backbone Competition).

different facilities of the same firm. Both voice and data may be carried using special access services. The facilities used to provide special access service typically consist of three different segments: (1) an entrance facility, which connects the purchasing carrier's point of presence ("POP") to the nearest wire center, carrier hotel, or similar location ("entrance facility"); (2) local transport; and (3) a "last mile" connection or local loop, also known as a channel termination, which runs from the transport facility to the end-user customer.

26. The record demonstrates that there are at least two separate relevant product markets for special access services: "Type I" special access services, which are offered wholly over a carrier's own facilities, and "Type II" special access services, which are offered using a combination of the carrier's own facilities for two of the segments and the special access services of another carrier for the third segment.[87] The record evidence suggests that many purchasers of wholesale special access services view Type I services as substantially superior to Type II services due to differences in performance, reliability, security, and price, and that these differences are sufficiently large that Type I special access services fall into a separate relevant product market from Type II.[88]

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[87] *See, e.g.*, Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 8 (filed June 15, 2005) (Qwest June 15 *Ex Parte* Letter). MCI offers two additional types of special access: Type III and Type IV. Type III services use two incumbent channel terminations and MCI "fiber connection in the middle." Type IV services use no MCI facilities, being "simply resale of the incumbent's special access service." More than **[REDACTED]** of MCI's wholesale special access revenue is derived from Type I service, and most of the rest is from Type II service. Less than **[REDACTED]** of MCI's wholesale special access revenue is derived from Type III services, while MCI does not currently offer Type IV service except for a "handful" of grandfathered services. Verizon/MCI Reply, Declaration of Jonathan P. Powell, Peter H. Reynolds, and Edwin A. Fleming, (Verizon/MCI Powell/Reynolds/Fleming Reply Decl.), Tab 9, at paras. 8-12 & n.2.

We decline to find that the limited Type III and Type IV services constitute separate relevant product markets. Type III service is a mix of MCI network and purchased Verizon services, much like Type II service and, thus, Type II and Type III services will be considered as essentially the same service in the current proceeding. MCI does not currently market Type IV service, and only a residual number of grandfathered customers are in existence. Therefore we conclude that any sale of Type IV service is *de minimis* and will not be considered.

In this Order, "REDACTED" indicates that confidential or proprietary information that is subject to a Protective Order in this proceeding has been redacted from the public version of this Order. *First Protective Order*, 20 FCC Rcd at 5196; *Second Protective Order*, 20 FCC Rcd at 8876. The unredacted text is included in the confidential version of this Order, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgments of the protective orders. Qualified persons who have not yet signed the required acknowledgments may do so in order to obtain the confidential version of this Order.

[88] *See, e.g.*, Cbeyond *et al.* Petition, Declaration of Simon Wilkie (Cbeyond *et al.* Wilkie Decl.) at para. 19 n.10 ("[O]ther things being equal, buyers have a preference to purchase Type I circuits to avoid any reliance on the ILEC who may degrade quality or be unresponsive to service problems."); Letter from Melissa E. Newman, Vice President–Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 8 (filed June 15, 2005) (Qwest June 15 *Ex Parte* Letter); Letter from Thomas W. Cohen, Counsel for XO *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 2-4 (filed Oct. 3, 2005) (XO *et al.* Oct. 3 *Ex Parte* Letter) (**[REDACTED]**); Letter from Brad E. Mutschelknaus, *et al.*, Counsel for Eschelon *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 6 (filed June 6, 2005) (Eschelon *et al.* June 6 *Ex Parte* Letter) (asserting that the fact that wholesale services are provisioned using Type II, rather than Type I, offerings "does not significantly diminish the competitive significance" of those offerings, and that criticisms of Type II offerings do not "account for the important role played by those facilities in the wholesale market").

27. We also recognize that the services provided over different segments of special access (*e.g.*, channel terminations and local transport) constitute separate relevant product markets, which may be subject to varying levels of competition.[89] In the competitive analysis section below, we will discuss the competitiveness of the different special access services.

b. Relevant Geographic Markets

28. Consistent with Commission precedent and the record before us, we conclude that the relevant geographic market for wholesale special access services is a particular customer's location, since it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid a "small but significant and nontransitory" increase in the price of special access service.[90] In order to simplify its

[89] We do not, however, analyze separate product markets for different capacities of special access services. *See* Letter from Brad E. Mutschelknaus, Counsel for Conversent *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 3 (filed Aug. 31, 2005) (Conversent *et al.* Aug. 31 *Ex Parte* Letter) (asserting that different capacity services should be different relevant product markets). While customers in certain circumstances may be able to substitute different capacity services in different combinations to meet their needs if the price of a particular capacity circuit were raised (for example, customers could substitute multiple DS1 loops for a single DS3 loop), we believe that, in general, different capacity circuits are likely to constitute separate relevant product markets. However, we find comparable competitive alternatives for varying capacities of special access circuits, and thus for administrability purposes we do not separately analyze different capacity services. Where competing carriers offer Type I service using their own facilities, the facilities can be "channelized" to provide service at all capacity levels. *See, e.g., Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2585-86. para. 86 (2005), petitions for review filed (*Triennial Review Remand Order*). Where carriers seek to offer Type II service, they can purchase the required capacity of special access service from the incumbent or from any competitive access providers.

We note that, in prior orders addressing our section 251 unbundling rules, we conducted a capacity-based analysis. *See, e.g., Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2625, para. 166 (rel. Feb. 4, 2005), petitions for review filed (*Triennial Review Remand Order*) (describing the capacity-based analysis used for DS1, DS3, and dark fiber loops); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17102, para. 197 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *aff'd in part, vacated and remanded in part, and remanded in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (describing the capacity-based analysis used for DS1, DS3, OCn, and dark fiber loops). Our approach to product definitions here differs in key respects from our unbundling analysis, however. Our merger analysis focuses on special access competition generally (whether through facilities deployment or partial reliance on other carriers' special access services), whereas our high-capacity loop impairment analysis focused solely on the likelihood of competitive facilities deployment. Moreover, our location-specific analysis in the merger context focuses on those locations where MCI offers competing special access services today, whereas the Commission applied a wire center test for high-capacity loop unbundling because a building-by-building test would not be administrable. Thus, we find no need to perform separate analyses for different capacity circuits based on the record and analytical framework here, notwithstanding our prior unbundling analyses.

[90] *See, e.g., SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 69; *Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, CC Docket No. 98-24, Memorandum Opinion and Order, 13 FCC Rcd 15236, 15248, para. 21 (*AT&T/TCG Order*). Our geographic market definition is consistent with the arguments made by certain (continued....)

analysis, however, the Commission has traditionally aggregated or grouped customers facing similar competitive choices, and we will do so in our discussion below to the extent appropriate.[91]

29. In addition, however, we will consider the potential effect of the merger on Verizon's special access prices, which are generally set on a wider geographic basis. Because Verizon has gained Phase II pricing flexibility for its special access services in some metropolitan statistical areas (MSAs),[92] but not others, Verizon's rates for special access may vary from MSA to MSA.[93] Accordingly, we will also examine on an MSA basis how the merger is likely to affect Verizon's special access prices.

c. Market Participants

30. Verizon can access all or virtually all of the buildings and transport routes in its territory. Although the record is not clear as to what extent other competitive LECs compete in the special access market in Verizon's territory, it is clear that, in addition to MCI, 360 Networks, AboveNet, AT&T, Broadwing/Focal, Cablevision Lightpath, Con Ed, Cox, CTC Communications, CTSI, Elantic/Dominion, Edison Carrier Solutions/SCE, Electric Lightwave, Fiber Net, FPL Fibernet, Interstate Fibernet/ITC Deltacom, DMC Telecom, Level 3, Looking Glass, McLeod USA, Neon, NTS Communications, On Fiber, PPL Telecom, Progress Telecomm, Qwest, SBC Communications, Sprint, TelCove, Time Warner, Wiltel and XO provide wholesale Type I, and in some cases Type II, special access services.[94] The record does not, however, clearly indicate the extent to which individual buildings are served by one or more of these competitive LECs.

2. Competitive Analysis

31. In this section, we separate our discussion of the competitive effects of the merger into the effects on the in-region special access market, both horizontal and vertical, and the effects on out-of-

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commenters. *See* Global Crossing Comments at 8-13; Conversent *et al.* Aug. 31 *Ex Parte* Letter at 3; *cf. EchoStar/DirecTV Order*, 17 FCC Rcd at 20609-12, paras. 117-125; *AT&T/Comcast Order*, 17 FCC Rcd at 23282, para. 90 (finding that the relevant geographic market was individual customer residences but that it is reasonable to aggregate to a larger geographic area); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-19, para. 54-57 (finding that separate geographic areas were appropriately defined by the availability of similar set of services at similar prices).

[91] *See, e.g., AT&T/Comcast Order*, 17 FCC Rcd at 23282, para. 90; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-19, paras. 54-56; *EchoStar/DirecTV Order* 17 FCC Rcd at 20610-11, para. 120; *SBC/Ameritech Order* 14 FCC Rcd at 14746, paras. 67-68.

[92] Verizon/MCI Reply, Declaration of Quintin Lew (Verizon/MCI Lew Reply Decl.), Tab 4, at paras. 38-43; Letter from Dee May, Verizon, and Curtis Groves, MCI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-75, Attach. Special Access White Paper at 61-65 (filed Aug. 25, 2005) (Verizon/MCI Special Access White Paper).

[93] We recognize that Verizon also offers various volume and term discount plans, which offer percentage discounts off the tariffed rate. Some discounts are based on a carrier's total spend over a larger geographic market while other discounts may vary from MSA to MSA. *See, e.g.*, CompTel/ALTS Petition at 14 (suggesting a regional analysis is appropriate given Verizon pricing strategies); Global Crossing Comments at 8-13.

[94] Verizon/MCI Lew Reply Decl., at Exh. 1A.

region special access markets.[95] We begin by considering whether the merger is likely to result in a meaningful reduction in competition or increase in price for special access services to particular locations.

32. As discussed below, we find that the elimination of MCI as a provider of wholesale special access services is likely to result in anticompetitive effects in the provision of Type I special access services to particular buildings where MCI is currently the sole carrier, besides Verizon, with a direct wireline connection to the building, and where barriers to entry make it unlikely that other carriers will build their own facilities. Absent appropriate remedies, these building-specific effects may also lead to increases in Verizon's MSA-wide special access prices.

33. With respect to Type II special access services, we conclude that the ability of remaining carriers in the market to offer competitive special access services through a combination of their own transport facilities and an incumbent LEC's special access or high-capacity unbundled loops, or a competing carrier's loop facilities, alleviates concerns about the loss of MCI as a provider of Type II special access services to particular buildings. Further, because MCI provides such a relatively small amount of wholesale Type II special access services within Verizon's region and because other competitive providers should be able to move in quickly to fill any void left by MCI, we conclude that the merger is unlikely to result in an increase in the price of Type II services within Verizon's region.

34. We next consider whether the merger is likely to result in anticompetitive effects in the provision of wholesale special access services in areas outside Verizon's territory. In particular, we consider arguments made by certain commenters that, after the Verizon/MCI and SBC/AT&T mergers are consummated, Verizon and SBC will have an incentive to forbear from competing in the provision of wholesale special access services within each other's territories. We conclude that the merger will not result in competitive harm in SBC territory. We find that a variety of actual and potential competing providers will remain post-merger to fill any void left by MCI if the merged entity does not continue to offer wholesale special access services in SBC's territory.

35. Finally, we consider possible vertical effects of the merger. Verizon is already a vertically integrated company. We conclude that the merger, as conditioned by the DOJ Consent Decree, will not increase the merged entity's ability to increase prices for or decrease quality of wholesale special access services. To the extent that Verizon, prior to the merger, had any incentive or ability to raise rivals' costs or discriminate in the provision of wholesale special access services, those issues are better addressed in pending general rulemaking proceedings.

a. Horizontal Effects

36. *Unilateral Effects.* Several commenters claim that, as a result of the merger, wholesale special access prices are likely to rise at specific buildings where MCI is currently offering either Type I or Type II special access services.[96] As discussed in greater detail below, we believe these claims are correct in

[95] By "in-region," we mean the franchise areas where Verizon is the incumbent LEC. Thus, "out-of-region" refers to all other regions in the U.S.

[96] *See, e.g.*, Verizon/MCI Public Interest Statement at 33-34; ACN *et al.* Comments at 32-37; Broadwing and SAVVIS Petition at 22-30; Cbeyond *et al.* Petition at 22-25; CompTel/ALTS Petition at 13-20; Global Crossing Comments at 13-18; NASUCA Comments at 14-16; Qwest Petition at 15-21; Ad Hoc Telecom Users Reply at 19-23; Letter from Richard M. Blau and Edward W Kirsch, Counsel for CTC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 4-5 (filed Sept. 21, 2005) (CTC Sept. 21 *Ex Parte* Letter); Letter from Brad E. Mutschelknaus, Counsel for BridgeCom, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 2 (filed Sept. 22, 2005) (BridgeCom *et al.* Sept. 22 *Ex Parte* Letter); Letter from John T. (continued....)

part. The record suggests that the merger will result in a reduction in the number of competitors offering Type I services in buildings where MCI is currently connected via its own facilities, and that, absent remedial measures, this is likely to lead to an increase in the price of special access service to buildings where only Verizon and MCI own or control a direct wireline connection, and where conditions make additional facilities-based entry unlikely.[97] We further find, however, that the merger is not likely to result in anticompetitive effects in the provision of Type II services. Competing carriers can use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and can purchase special access circuits or UNE loops to provide Type II services.

37. *Type I Services.* We disagree with the Applicants' assertion that "the absolute number of buildings served by MCI is so small that MCI's facilities cannot be considered competitively significant."[98] As discussed above, the relevant geographic market for wholesale special access services is a particular customer's location. Thus, where MCI is the only carrier besides Verizon that is directly connected to a particular building and where entry is unlikely, MCI's elimination as a competitor may lead to an increase in the price of Type I special access services to that building. Thus, absent appropriate remedial measures, like those imposed by the DOJ Consent Decree, the proposed merger is likely to have anticompetitive effects in buildings where MCI is the only competitive LEC with a direct wireline connection and where entry appears unlikely.

38. MCI is directly connected via its own facilities to at least **[REDACTED]** buildings in Verizon's territory where MCI has local facilities.[99] MCI has provided data indicating that MCI is the only competitive provider to approximately **[REDACTED]** of those buildings.[100]

39. The record also indicates that, for many buildings, there is little potential for competitive entry, at least in the short term. As the Commission has previously recognized, carriers face substantial fixed and sunk costs, as well as operational barriers, when deploying loops, particularly where the capacity demanded is relatively limited.[101] Given these barriers, it appears unlikely that a carrier would be willing to make the significant sunk investment without some assurance that it would be able to generate

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Nakahata, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 2 (filed Sept. 23, 2005) (Level 3 Sept. 23 *Ex Parte* Letter).

[97] In the 39 wire center clusters in the 30 in-region MSAs where MCI has local facilities, Verizon estimates that it serves over 246,000 commercial buildings, and states that MCI provides Type I service to only **[REDACTED]** of them using its own facilities – less than **[REDACTED]**. *See* Verizon/MCI Special Access White Paper at 24; Letter from Dee May, Verizon, and Curtis Groves, MCI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-75 at 3 (filed Sept. 28, 2005) (Verizon/MCI Sept. 28 *Ex Parte* Letter); Verizon/MCI Reply, Declaration of Gustavo E. Bamberger, Dennis W. Carlton and Allan L. Shampine, (Verizon/MCI Bamberger/Carlton/Shampine Reply Decl.), Tab 1, at para. 19.

[98] Verizon/MCI Powell/Reynolds/Fleming Reply Decl. at paras. 5; Verizon/MCI Special Access White Paper at 13-14.

[99] Letter from Dee May and Curtis Groves, Counsel for Verizon and MCI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-75, at 4 (filed Sept. 9, 2005) (Verizon/MCI Sept. 9 *Ex Parte* Letter).

[100] *Id.* We note that MCI's data is likely to overestimate the number of buildings where MCI is the sole competitive LEC with a direct connection, because the data only count competitive LECs with whom MCI has wholesale contracts. *See, e.g., id.* at 3-4, n.11.

[101] *See Triennial Review Remand Order*, 20 FCC Rcd at 2615-18, paras. 149-54; *see also Triennial Review Order*, 18 FCC Rcd at 17160-62, paras. 303-306. *See also* ACN *et al.* Aug. 10, 2005 *Ex Parte* Letter, Attach. at 3.

revenues sufficient to recover that investment.[102] Consistent with this analysis, there is evidence in the record that carriers generally are unwilling to invest in deploying their own loops unless they have a long-term retail contract that will generate sufficient revenues to allow them to recover the cost of their investment.[103] Moreover, even where there is adequate retail demand, the costs of constructing the loop may be sufficiently high, or there may be other operational barriers, that may deter entry.[104]

40. This analysis is consistent with the analysis contained in the complaint that the DOJ filed in connection with this merger. In its complaint, the DOJ alleged that, in certain buildings where "Verizon and MCI are the only firms that own or control a direct wireline connection to the building," the merger was "likely to substantially reduce competition for Local Private Lines and telecommunications services that rely on Local Private Lines to those buildings."[105] The DOJ's complaint goes on to allege that "[a]though other CLECs can, theoretically, build their own fiber connection to each building in response to a price increase by the merged firm, such entry is a difficult, time-consuming, and expensive process."[106] The complaint further alleges that "[a]lthough entry may occur in response to a post-merger price increase in some of the buildings where MCI is the only connected CLEC, the conditions for entry are unlikely to be met in hundreds of those buildings."[107] To remedy this problem, the DOJ in the consent decree required that MCI divest IRUs to those buildings where it was the sole CLEC with a direct connection to the building and where DOJ found entry unlikely.[108] We find that the terms of the consent decree should adequately remedy any likely anticompetitive effects in the provision of Type I wholesale special access services.

41. *Type II.* In buildings where a competitive LEC is not directly connected to a building via its own facilities and where customer demand may not justify the construction of competitive facilities (such as where demand is less than the OCn level), competing carriers can either combine competitive transport with special access loops or, where available, high-capacity loop UNEs purchased from Verizon (*i.e.*,

[102] *See, e.g.*, Verizon/MCI Sept. 9 *Ex Parte* Letter, Attach. 3, Declaration of Edwin A. Fleming, at paras. 6-7; Letter from Thomas Cohen, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at paras. 15-21 (filed Oct. 21, 2005) (XO Oct. 21 *Ex Parte* Letter).

[103] *See id.*

[104] We are not persuaded by the Applicants' argument that Commission findings that network elements need not be unbundled pursuant to the "impairment" standard of section 251(d)(2) demonstrate that the special access market has sufficiently low entry barriers to permit sufficient and timely competitive, facilities-based entry to defeat any attempted post-merger price increase. *See, e.g.*, Verizon/MCI Bamberger/Carlton/Shampine Reply Decl. at paras. 14-22, Verizon/MCI Reply, Reply Declaration of Jonathan P. Powell, Peter H. Reynolds, and Edwin A. Fleming (Verizon/MCI Powell/Reynolds/Fleming Reply Decl.), Tab 9, at para. 31. As the Commission explained in the *Triennial Review Order*, "[t]he purposes of a market power analysis are not the purposes of section 251(d)(2). . . the Act requires only that network elements be unbundled if competing carriers are impaired without them, regardless of whether the incumbent LEC is exercising market power or the unbundling would eliminate this market power." *Triennial Review Order*, 18 FCC Rcd at 17051 at para. 109.

[105] *DOJ-Verizon/MCI Complaint* at para. 3.

[106] *Id.* at para. 27.

[107] *Id.* at para. 29.

[108] *DOJ-Verizon/MCI Consent Decree*, App. A.

Declaration from the DOJ's Review of the SBC-AT&T and Verizon-MCI Mergers (2006)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America, Plaintiff, v. SBC Communications, Inc. and AT&T Corp., Defendants.	Civil Action No.: 1:05CV02102 (EGS) **FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER ENTERED AUGUST 4, 2006**
United States of America, Plaintiff, v. Verizon Communications Inc. and MCI, Inc., Defendants.	Civil Action No.: 1:05CV02103 (EGS)

DECLARATION OF W. ROBERT MAJURE

1. My name is W. Robert Majure. I am an economist employed by the Antitrust Division of the United States Department of Justice. During my tenure at the Antitrust Division, I have analyzed numerous mergers in the telecommunications industry and in other industries. I have also been involved in settling concerns in many of these matters by consent decree. Examples of the mergers I have reviewed are WorldCom/Sprint, Cingular/AT&T Wireless, and SBC/Ameritech. In addition, I have been involved in

analyzing and helping to develop the Division's position on policy issues relating to the telecommunications industry, and have assisted in preparing comments on telecommunications-related issues that were filed with the FCC. I currently serve as Chief of the Division's Competition Policy Section, a group of economists who are routinely assigned to work with Division lawyers on investigations. A copy of my curriculum vitae is attached.

2. I supervised the economists who worked with staff attorneys on the Division's investigations of SBC's proposed merger with AT&T and Verizon's proposed merger with MCI. I was involved in all aspects of their work including the development of potential economic theories of harm and the analysis of whether these theories were supported by the documents and data produced by the merging parties and competitive local exchange carriers ("CLECs"), as well as by information gathered from industry and public sources. I also supervised their work in evaluating the proposed remedies, and in recommending that the Department accept the divestitures contained in the proposed Final Judgments as solutions to the harms that have been identified in the Complaints.

3. I have been asked to prepare this declaration in order to help explain how the proposed remedies address the harm identified by the Department and described in the Complaints. Below, I discuss local private line services and the companies that provide such service, and describe in particular the extent to which these companies have competing facilities. Next, I describe the anticompetitive harm from the mergers as discussed in the

Complaints, which focused on specific buildings where the merging firms had the only facilities that can be used to provide local private line services. Finally, I address why the remedies are sufficient and appropriate, including how they provide an appropriate buyer with all of the assets it will need to step into the shoes of AT&T or MCI and replace the competition in these services lost through the mergers. I also describe how the remedies are crafted to limit disruption to customers' existing telecommunications services. Throughout this declaration, I reference examples of the types of materials that support the Department's decisions to bring the present cases and to adopt the remedies.

4. The focus of antitrust analysis of mergers is on predicting when a proposed merger will likely lead to a loss of competition. Two large companies in the same industry do not necessarily compete vigorously with one another. For example, they may only rarely sell comparable products to the same customers. As an economist trying to determine whether a proposed merger should be challenged, I look at where and to what extent the companies compete, who else competes, how competition occurs, and who else is likely to enter if conditions change. The goal is to understand how competition, not competitors, will be affected. So the focus is on the overall mechanics of competition and the particular ways in which each of the merging parties influences the other's competitive activities, such as pricing. In the present cases, the question is whether the loss of either AT&T or MCI is likely to affect competition for any particular product in a particular geographic area. More specifically, I assess whether there is evidence supporting a valid economic theory that indicates that the merger is likely to harm

customers.[1]

5. The questions posed in an antitrust analysis are not ones that companies study in the normal course of business. The hypothetical question of how firms in the industry would alter their behavior after a merger, a question which is essential to antitrust analysis, is far removed from the usual things with which businesses are concerned (e.g., how to produce the product most efficiently or where to sell a product for the most profit). So it is rare for internal business documents to provide complete answers. Rather, in reviewing a merger, I build a picture of the industry and competitive conditions by assembling relevant information from numerous sources and applying pertinent economic theories. This declaration references the types of materials collected and indicates the relevant facts suggested by such materials.

[1] During investigation of these mergers, the Department conducted extensive interviews of retail customers. The comments of the retail customers did not raise concerns consistent with an antitrust theory of harm. Included in the attachments to this Declaration are copies of declarations and statements from retail customers submitted to the Department by the parties to the mergers. *See* Attachments to Declaration of W. Robert Majure, Tab 1, Retail Customer Statements. The views expressed in these documents are consistent with what the Department learned from its interviews.

The Products and Providers

6. SBC and Verizon initially were only local phone companies. They were formed as a result of the 1984 Modification of Final Judgement ("MFJ") that was entered in the antitrust case the Department brought against the Bell System. The MFJ separated the old Bell System into a number of local telephone companies, which were owned by regional bell operating companies ("RBOCs"), such as SBC and Verizon, and one long distance company, AT&T. Each of the local companies created by the MFJ had a distinct service area wherein it was effectively the monopoly provider of local phone service. At the same time, AT&T was positioned to compete against new entrants, primarily MCI, for the provision of long distance service.

7. Since 1984, the industry has seen dramatic changes including the entry of additional competitors and the construction of additional network facilities to provide both local and long distance service. Of particular note, the Telecommunications Act of 1996 altered the regulatory regime to encourage competition in long distance and local markets. This precipitated a period of aggressive investment in telecommunications facilities as many firms – including AT&T and MCI – spent considerable sums expanding their network infrastructure to offer local services. As a result there are multiple local networks in most major U.S. cities operated by these competitive local exchange carriers ("CLECs"), including MCI and AT&T.

8. At the time its merger with SBC was proposed, AT&T owned local area networks in

some cities where SBC was the RBOC. As the incumbent, SBC provides ubiquitous service – its network in these cities is extensive and capable of providing service essentially anywhere. By contrast, AT&T's network was focused on providing service where it is most profitable to do so – in areas where the density of high-revenue business customers justifies the construction costs. As is typical of CLEC networks, AT&T local area networks have two components, transport and laterals. Transport networks are high-capacity fiber[2] deployed to provide the capability to move traffic around a city.[3] Laterals are the connections from this fiber network into individual buildings. Most of the buildings along a fiber transport network will not have a lateral connection to the network (referred to as "off-net"), but many others will ("on-net").[4] Wherever AT&T offered facilities-based service it can be assumed that SBC offered a competing service.

9. Likewise, at the time their merger was proposed, MCI owned local area networks

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[2] A fiber optic cable is a sheath containing multiple strands of fiber each of which is capable of transmitting its own light-based signals between the electronic devices to which it is connected. Those devices originate and propagate the signals, but they also allow the carrier that owns the cable to divide the raw transmission capability of a given strand so that multiple users or messages can be simultaneously carried on a single strand. Thus, the carrier can allocate to a given customer portions of a strand of fiber, the whole strand, or even multiple strands if needed. *See* Tab 14, Declaration of Charles H. Carnes, Jr. (Verizon) (Aug. 4, 2006) ("Carnes Decl."), ¶¶ 5-7. Customers buy a circuit, which is the ability to transmit up to a certain bandwidth.

[3] AT&T provided to the Department maps that show the company's transport networks in the cities referenced in the Complaints. Tab 2, AT&T Network Maps; Tab 7, Overlapping CLEC Fiber Maps.

[4] AT&T provided to the Department a list of on-net buildings that shows the customer locations to which AT&T owned a connection within the cities referenced in the Complaints. Tab 3, AT&T Buildings List.

(including both transport[5] and laterals into buildings[6]) in some cities where Verizon was the incumbent local service provider. The MCI networks were built, similar to AT&T's, primarily in central business districts, but as to all these locations it can be assumed that MCI was competing with Verizon.

10. In addition, CLECs other than AT&T and MCI have also built local area networks in the same cities where either AT&T or MCI owned local facilities.[7] In fact, multiple CLECs do business in each of the major cities within SBC's and Verizon's service territory.[8] These CLEC's include cable companies (such as Cox Communications and Cablevision), traditional long distance carriers (Sprint), and a number of companies whose primary business is providing either long distance and/or local facilities (such as AboveNet, Level 3, XO Communications, and Telcove). CLECs' networks tend to cover the same high-density areas covered by AT&T and MCI, and they therefore overlap substantially with the transport networks of AT&T and MCI.[9] In addition, CLECs (sometimes multiple

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[5] MCI provided to the Department maps that show the company's transport networks in the cities referenced in the Complaints. Tab 4, MCI Network Maps; Tab 7, Overlapping CLEC Fiber Maps.

[6] MCI provided to the Department a list of on-net buildings that shows the customer locations to which MCI owned a connection within the cities referenced in the Complaints. Tab 5, MCI Buildings List.

[7] Various CLECs provided to the Department maps and on-net building lists that idenitfy where each CLEC had relevant facilities. Tab 6, CLEC Network Maps and Buildings Lists.

[8] *See* Tab 7, Note on Overlapping Fiber Maps.

[9] *See* Tab 7, Overlapping CLEC Fiber Maps (overlays of the maps provided to the Department by individual CLECs which illustrate the overlaps among their transport networks).

CLECs) have laterals into the same buildings as AT&T or MCI.[10] Some, though not all, CLECs continue to build both transport and laterals into individual buildings.[11] At the time the mergers were proposed, for example, **[REDACTED TEXT]** was adding new buildings at a faster rate than either MCI or AT&T.[12]

11. These local area networks are used to provide business customers with a common fundamental building block of telecommunications services – local private lines. These are dedicated circuits (meaning that the customer has the exclusive right to use the transmission path) connecting two points in the same metropolitan area. The customer for such a circuit might be a business seeking to connect computers in two office buildings, or another carrier seeking to sell services to business customers. Access into a building through owned or leased facilities is necessary to enable a carrier to serve customers in that building. Virtually any telecommunications service one intends to use needs a local connection to the buildings where the service originates or terminates, and, except where the expected volume of traffic on the connection is low, a business will use local private lines to make that connection. In each of the cities identified in the Complaints, local

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[10] For example, five CLECs had laterals in the building at 767 5th Avenue, New York, New York, and four CLECs had lateral connections at 141 W. Jackson Blvd, Chicago, Illinois. *See* Tab 6, CLEC Network Maps and Buildings Lists (containing building lists provided by CLECs in response to compulsory process).

[11] *See* Tab 6, CLEC Network Maps and Buildings Lists; Tab 8, CLEC Business Plans.

[12] **[REDACTED]** reported far more buildings added in the 2004-05 time frame than AT&T or MCI. *See* Tab 9, CLEC Interrogatory Responses (explaining criteria for adding buildings and reporting recent additions). The reporting periods for these companies overlap only partially, but the wide disparity in the numbers suggest that this is a reasonable conclusion.

private lines are provided by the merging parties and by other CLECs.[13]

The Harm Alleged

12. The existence of overlapping assets that can be used to provide competing products and services (e.g., those described above) often suggest areas of concern in the Department's merger investigations. But the fact that two companies have overlapping assets does not, in and of itself, prove that customers would experience higher prices as a result of a merger of those companies. To determine whether a merger that would result in common ownership of overlapping assets would rise to the level of an antitrust violation, the Department attempts to evaluate all relevant facts about the market to determine how firms compete. Based on its understanding of the facts and the nature of competition, the Department then attempts to predict the effect of the merger on competition.

13. As set forth in the Complaints, the Department identified harm in the market for the sale of local private lines. This harm is predicted in situations where only AT&T and SBC or MCI and Verizon, respectively, were capable of supplying local private lines before the merger and no other CLEC was likely to connect the building to its network. After the merger, SBC or Verizon would be the only possible supplier of local private lines to those buildings, and they could raise prices without fear of competition. In practice, the

[13] *See* Tab 10, Documents Pertaining to CLECs as Providers of Access. The Verizon cities are: Washington–Baltimore; Boston; New York; Philadelphia; Tampa; Richmond, Virginia; Providence, Rhode Island; and Portland, Maine. The SBC cities are: Chicago; Dallas–Fort Worth; Detroit; Hartford–New Haven, Connecticut; Indianapolis; Kansas City; Los Angeles; Milwaukee; San Diego; San Francisco–San Jose; and St. Louis.

fact that the merged firms would no longer face competition from a CLEC in these buildings is likely to result in higher prices or lower quality (e.g., less responsiveness to service outages or requests to provide new circuits) for local private lines, or for packages of telecommunications services that include local private lines into the affected buildings, all to the detriment of consumers.

14. Of course, harm to consumers would be unlikely if the merged firms knew that raising prices, for example, would make it profitable for a CLEC to construct a lateral connection from its network into these buildings and thereby offer customers a choice. When entry such as that is likely, firms often recognize that fact and avoid giving the would-be entrant cause to enter. As a result, the buildings identified by the Department as likely to experience harm from the mergers do not include all situations where only AT&T and SBC or only MCI and Verizon were present before the mergers. Rather, they include only those 2-1 buildings where entry is unlikely.[14] The likelihood of entry can be assessed by examining the criteria CLECs use in deciding whether to make such investments, i.e., whether the potential revenue to be earned will be sufficiently greater than the cost of building a lateral.[15] This provides an understanding of the relationship

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[14] As discussed here, entry means establishing a physical connection to the building. It makes no analytical difference in this context whether the lateral is built as a result of a merger-induced price increase or as a response to a new business opportunity.

[15] Some CLECs provided in response to interrogatories information on the criteria they used in such evaluations. *See* Tab 9, CLEC Interrogatory Responses (responses explaining criteria for adding buildings). Although individual companies perceive different revenue opportunities and have different tolerances for risk at any given time, the basic relationship in these criteria between the revenue opportunities in a building and the distance from the building to the CLEC's existing facilities was confirmed to apply generally.

between cost (primarily the distance of the building from the provider's network) and the revenue the CLEC was likely to receive from customers in the building.[16] Estimates of the revenue opportunity (based on the current traffic being generated in the building adjusted for special circumstances) and the distance to the closest CLEC fiber provide bases for identifying the subset of 2-1 buildings for which long-term harm was not likely to be offset by entry.[17] These more than 700 buildings are listed in the Appendices to the proposed Final Judgments.

The Remedies

15. In fashioning a remedy here, the Department's goal was to restore the competition that the Complaints allege would likely be lost due to the mergers. In general, the Department aims to craft a remedy that has a "close logical nexus" to the alleged violation.[18] In addition, the proposed remedy should "effectively redress the violation

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[16] *See infra* note 25 (detail on entry costs).

[17] Specifically, the Department used the following screens and eliminated from the list of potentially problematic buildings those where the demand was at or above the minimum level shown below, and where a competing carrier had facilities within the corresponding distance:

Minimum demand	Distance
2 DS3s	0.1 mile
1 OC-12	0.25 mile
over OC-48	1 mile

In some cases, a building was eliminated because there was unlikely to be competition in the future for its business. For example, there was a building served by AT&T which was used exclusively by a wireless company. That wireless company was subsequently sold to SBC. It seems unlikely that SBC would use a CLEC to serve its own subsidiary when the current contract expires.

[18] U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies*, Section II (Oct. 2004).

and, just as importantly, be no more intrusive on market structure and conduct than necessary to cure the competitive harm."[19]

16. In these cases, the proposed remedies are straightforward. They require the divestiture of connections into the buildings identified as problematic in the Complaints. In each building, the buyer of the divested assets would step into the shoes of AT&T or MCI. As new sales opportunities arise in the buildings, the buyer will be positioned to offer an alternative to SBC or Verizon. All customers – the tenants in the building as well as the carriers who need to buy a connection in order to sell their services to tenants – will have a choice of two facilities-based providers, just as they did before the mergers.

17. If AT&T or MCI had some unique qualifications as a competitor in selling local private lines, there might be concerns that no other CLEC would be as competitive as AT&T or MCI. However, I found no evidence suggesting a unique competitive role for either of these firms in selling local private lines. In fact, any supplier that can provide a technically reliable point-to-point connection is a competitive option for purchasers interested in accessing those two locations.[20]

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[19] *Id.*

[20] AT&T and MCI purchased local private lines from a laundry list of carriers, and other CLECs routinely purchase local private lines from each other. *See* Tab 10, Documents Pertaining to CLECs as Providers of Access; *see also* Tab 11, AT&T Documents

[REDACTED TEXT]

See Tab 12, MCI Documents

[REDACTED TEXT]

18. Replacing the lost competition often presents some practical difficulties that requires a balance of the competitive benefits from a divestiture with any burdens the divestitures could create for customers. For example, some commentators have suggested that the merging firms should be required to sell customer contracts along with the live circuits that serve those customers. These proposals, however, would create concerns that forcing customers to change carriers when they had not anticipated or planned for such a change would be disruptive and costly for the customers.[21] The proposed remedies are a balance between these potential problems and the benefits of requiring divestiture of these assets. Because most business contracts are relatively short in duration (typically one to three years), many of the existing contracts will be expiring within the next two years, and, consequently, a buyer of the divestiture assets can compete directly or indirectly (through **[REDACTED TEXT]** leasing access to another CLEC) for this business as contracts come up for renewal. Under the proposed remedies, therefore, it is likely that a

[21] *See* Tab 13, Letter from C. Douglas Jarrett, Keller and Heckman, to Marlene H. Dortch, FCC (Sept. 27, 2005) (summarizing oral *ex parte* discussion of concerns of eCommerce Telecommunications User Group and the American Petroleum Institute). I understand the divestiture of customers and live circuits can cause problems because it would require a buyer to transfer the circuits to its own network which would result in a temporary disconnection of the circuit. In addition, some customers purchase connections to multiple buildings from AT&T or MCI. If the connection to one building was sold to the buyer but not the connection to other buildings, the customer would be forced to deal with two separate companies to maintain its telecommunications system. For companies that specifically chose to have a single provider oversee their network, this would create inefficiencies and dissatisfaction. Finally, other customers are purchasing an integrated package of telecommunications services from AT&T or MCI, and the individual local private lines are just one part of the service. Divesting just connections to some buildings would create the types of problems outlined above, but at a much greater level given the complexity of the services involved.

buyer will be successful without these assets, and it is better not to burden customers with the disruption associated with transferring the customer contracts and most of the facilities providing services under those contracts.[22]

19. The specific terms of the remedies embodied in the proposed Final Judgments are crafted to address practical concerns such as this. The proposed remedies achieve a desirable balance between minimizing unintended negative consequences and giving a buyer of the assets the ability to replicate the competitive significance of AT&T or MCI in providing local private line services to the buildings of concern. Consequently, I believe the proposed remedies appropriately limit collateral harm while effectively addressing the harm in the Complaints.

20. The proposed decrees call for divestiture of the greater of half of the unused fiber or eight of the strands. At least eight strands have to be divested. I believe this amount of fiber will be sufficient to serve likely customer demand in the affected buildings today, as it is as much fiber as CLECs generally use in a building.[23] Going forward, the amount of bandwidth customers demand will likely continue to grow but so will the amount of bandwidth that advanced fiber-optic electronics can produce from a single strand.

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[22] In comments to the FCC, one CLEC suggested requiring the merging entities to sell the actual circuits being used and then rent them back from a buyer. Since the point of a divestiture is to have the divested assets be used to compete independently with the merged firm, the Department generally disfavors remedies that require the merged firm and a buyer to enter into business arrangements involving a substantial portion of the revenues generated by the divested assets.

[23] *See* Tab 14, Carnes Decl. ¶ 6.

Advances in optronics continue to make this equipment cheaper and more efficient every year.[24] Therefore, even if there is an increase in demand in the building, upcoming advances in the state of the art for this equipment will likely make each fiber strand even more productive.

21. The proposed decrees do not require divestiture of wiring or electronics inside the buildings. The cost of wiring and electronics are relatively small compared to the other costs of connecting a building to one's network in order to connect a new customer. A CLEC's decision whether to enter a building is instead generally driven by the distance to the CLEC's network.[25] Putting this another way, once the buyer has purchased the divestiture assets relevant to a particular building, the remaining costs of serving a particular customer in that building are not likely to prevent entry if the customer is expected to produce any substantial amount of revenue. Therefore, not requiring that the buyer obtain wiring or other equipment inside a building at the point of the divestiture is not likely to lessen the ability of the buyer to compete. On the other hand, forcing the

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[24] *Id.* ¶ 8.

[25] CLECs have identified the criteria they use in determining whether to bring their network into a building. *See* Tab 9, CLEC Interrogatory Responses. Although each CLEC's criteria are somewhat different, one thing all of their criteria have in common is that distance from the carrier's transport network plays a significant role in the investment analysis. Distance is a proxy for the costs of constructing the connection from the transport fiber to the building. In the urban settings where most of the competitive infrastructure investment is taking place, this usually means burying a conduit under the sidewalk and street. In these criteria, distance seems to drive the investment decision in the sense that if there is an expectation of some substantial business in the building, constructing a short connection to the fiber transport network will be justified. Based on the criteria of the individual CLECs, the Department developed aggregate entry guidelines to use as a screen to identify buildings where entry would be unlikely. *See supra* note 17 (describing screens used).

divestiture of the inside wiring and electronics that are currently being used to provide services to customers in the building could raise all of the unintended negative consequences for those customers discussed above.

22. Rather than a divestiture of full ownership of fiber strands, the proposed decrees use 10-year IRUs (indefeasible rights of use) effectively to divest a portion of a facility. It is common practice in the industry for multiple carriers to share in the ownership of a fiber cable through IRU arrangements (each carrier has access to a strand or multiple strands in the fiber cable). As I understand it, the IRU conveys essentially all ownership rights to the current IRU holder.[26] These types of agreements have been developed through ordinary commercial dealings between carriers to achieve a high level of control by the IRU holder. In fact, carriers routinely use IRUs to supplement their owned facilities. For example, AT&T uses IRUs to support a large part of its local service networks, including some of the buildings identified in the Complaints.[27]

23. The 10-year terms for the IRUs are appropriate given the dynamic nature of the industry and the difficulties inherent in predicting the future in the long term. Generally, the Department has tried to limit decrees to 10 years[28] precisely because industries change

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[26] In addition, for the IRUs for transport circuits the proposed decrees also require that the buyer be permitted to splice into the transport circuit at locations other than the divested buildings. Thus, the buyer can use the transport as a connection point to other buildings just like it could if it owned that portion of the transport network.

[27] Tab 15, Declaration of Michael E. Todd (AT&T) (Aug. 3, 2006), ¶ 5.

[28] *Antitrust Division Policy Guide to Merger Remedies* at 35 n.48.

dramatically over time, and a decree which started out in the public interest may end up doing more harm than good over the decades. In this industry, 10 years is a relatively long time. Customer contracts are typically one to three years, so the IRUs allow the buyer to compete through multiple contracting cycles. At the end of 10 years, the buyer may choose to replace the IRUs with its own facilities. Another possibility is that another CLEC will build overlapping facilities in the interim. The proposed decrees do not, of course, prohibit longer IRU terms. For example, some of the prospective buyers of the divested assets elected to negotiate extensions.[29]

24. The proposed decrees provide that the buyer must be provided with transport from the customer's premises back to the transport network of the buyer. Clearly, a carrier that is not AT&T or MCI might have some difficulties using a connection that starts at the building but ends at the AT&T or MCI transport network. The concept in the proposed Final Judgments is to divest something that connects the identified buildings to the buyer's local area network. The decrees do not require divestiture of the entire fiber transport network of the merged entity that runs close to these buildings and terminates at the buyer's network, because this infrastructure is being used simultaneously to provide service to many more buildings. The problem of customer disruption and lost efficiencies associated with such a divestiture would be significantly greater than for the customer divestitures described above. Again, the proposed decrees solve this problem by granting the buyer some of the rights of ownership without transferring ownership of

[29] *See* Tab 16, Divestiture Assets Purchase Agreements.

the asset in its entirety. The buyer gets the right to use the merged firms' transport fiber networks to move the traffic from the customer's premises to the buyer's network as well as the right to add other buildings.[30]

25. In short, the proposed remedies address the alleged violations. In each building where lost competition between AT&T and SBC or between MCI and Verizon was identified as likely to cause a substantial harm, the proposed remedies introduce a new competitor that will have the assets necessary to replicate the competition AT&T or MCI was providing for local private line services before the mergers. At the same time, the proposed decrees minimize the disruptions to other services and other customers using the same facilities. This balance is struck by focusing the divestitures as much as possible on the assets that are critical to the competitiveness of the buyer, and by relying on the types of joint ownership arrangements that are common in the industry.

Conclusion

26. The Complaints identify particular buildings where the Department concluded that the facts showed a reasonable likelihood of proving that the loss of local private line competition would be substantial. These buildings are ones in SBC's service area where presently AT&T is the only competitor, and in Verizon's service area where presently MCI is the only competitor to the RBOC, and where entry by other competitors is unlikely. In all such situations, the proposed remedies will provide an alternate

[30] *See supra* note 26.

competitor with the assets it needs to restore competition. Prospective buyers already have offered to take these assets and begin playing this competitive role.[31] Allowing them to do so would address the harm identified by the Department and benefit the public through the preservation of a competitive option to the merged parties in the affected buildings identified in the Complaints.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on August __, 2006

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W. Robert Majure, Ph.D.

[31] The Department has reviewed and approved as appropriate the prospective buyers for the AT&T assets. These firms (**[REDACTED TEXT]**) are all CLECs with experience in providing reliable point-to-point connections. The Department is reviewing the proposed MCI divestiture agreements, and will require that the buyers have demonstrated similar qualifications.