BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Petition of VERIZON COMMUNICATIONS INC. and MCI, INC., for Approval of Agreement and Plan of Merger	Docket No. UT-050814

POST-HEARING BRIEF OF

XO COMMUNICATIONS SERVICES, INC.

November 23, 2005

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I. INTRODUCTION AND SUMMARY OF POSITION

1. The Telecommunications Act of 1996 ("Act") initially was heralded as the blueprint for bringing competition to all telecommunications markets. Almost ten years later, the Act more accurately could be characterized as having provided the means of reconstituting the old Bell system that was dismantled in 1984. Since 1996, Southwestern Bell acquired Southern New England Telephone, Ameritech, and Pacific Bell to become SBC, while Bell Atlantic acquired NYNEX and GTE to become Verizon. Not content with consolidating incumbent local exchange carrier ("ILEC") properties, SBC and Verizon have now set their sights on absorbing their two largest competitors, AT&T and MCI, respectively. What was once considered unthinkable is now on the verge of becoming reality.

2. How did this happen? Verizon would have the Commission believe that it is the result of a proper reading of the Act and the natural progression of the telecommunications marketplace. More specifically, Verizon contends that its acquisition of MCI brings together complementary service providers who will be better positioned to compete with other providers of wireline and wireless services, cable telephony, and Voice over Internet Protocol ("VoIP"). XO Communications Services, Inc. ("XO") offers a different explanation. Verizon and the other ILECs have succeeded in bringing their two strongest rivals to their knees through a combination of relentless challenges to the Federal Communications Commission's ("FCC's") interpretation of federal law, unremitting recalcitrance in complying with their legal obligations to competitors, and effective manipulation of the provisions of the Act that are favorable to the ILECs. Verizon's proposed acquisition of MCI (and SBC's acquisition of AT&T) adds the final nail to the coffin that the ILECs have been constructing for the last decade.

3. Verizon presents the transaction to the Commission as a *fait accompli*, asking that the Commission either disclaim jurisdiction to review the acquisition or approve the transaction.

The Commission should decline both requests. The Commission has consistently asserted jurisdiction over transactions like the one proposed here,[1] but has never faced a situation in which the state's second largest ILEC proposes to acquire one of its largest competitors. On its face, such a transaction raises serious concerns. Verizon and MCI have presented no substantial evidence to demonstrate that this acquisition will not harm competition in Washington or that the transaction will bring any consumer benefits to this state. The Commission thus should not find that Verizon's proposed acquisition of MCI is in the public interest or otherwise approve the acquisition.

4. Even if the Commission were to approve the transaction, the Commission should adopt conditions that will mitigate the competitive harm that will result. Verizon, MCI, Commission Staff ("Staff") and Integra Telecom of Washington, Inc. ("Integra") have reached a settlement agreement ("Settlement Agreement") that they propose the Commission adopt to resolve this proceeding. The Settlement Agreement asks the Commission to disregard the issues that XO and Public Counsel have raised and to approve "conditions" that will do nothing to minimize the acquisition's enhancement to Verizon's market power. The Commission should not adopt the Settlement Agreement, at least not as the sole means of resolving this docket.

5. XO proposes that the Commission condition any approval of Verizon's acquisition of MCI on Verizon agreeing to essentially the following four undertakings:

- Reduce Verizon's intrastate Special Access services rates to cost-based levels;

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[1] *E.g.*, *In re Application of GTE Corp. and Bell Atlantic Corp.*, Docket No. UT-981367, *et al.*, Fourth Supp. Order (Dec. 1999). The Commission thoroughly analyzed the jurisdictional issues in this order, and XO has nothing to add to that discussion. Accordingly XO does not address the Commission's jurisdiction to review Verizon's proposed acquisition of MCI in this brief.

- Recalculate the wire centers out of which Verizon is no longer required to provide high capacity unbundled network elements ("UNEs") pursuant to the FCC's Triennial Review Remand Order ("TRRO")[2];
- Waive the TRRO's cap of 10 DS1 loops to any one building and 10 DS1 circuits on each transport route; and
- Reinitialize the terms of the existing interconnection agreements between Verizon and competing local exchange carriers ("CLECs") and make the current Verizon-MCI interconnection agreement available for adoption for a period of five (or no less than three) years.

6. These conditions will not eliminate the negative impacts of the proposed transaction on competition in Washington, but they will lessen those impacts. Effective competition is virtually nonexistent in Verizon's service territory in Washington. Verizon's acquisition of MCI, in conjunction with SBC's acquisition of AT&T, further insulates Verizon's local exchange service monopoly from the benefits of consumer choice. The least the Commission should do is to hamper Verizon's ability to further undermine such choice by adopting XO's proposed conditions.

II. BACKGROUND OF THE TRANSACTION AND PROCEEDING

7. XO leaves to other parties the technical description of the proposed transaction, the Applicants, and the procedural history of this proceeding. Whatever the description, the bottom line is that the largest ILEC in the country (Verizon) proposes to purchase its second largest competitor (MCI), while the second largest ILEC (SBC) proposes to buy the largest CLEC (AT&T). These transactions may be structured or characterized as "mergers," but they

[2] *In re Unbundled Access to Network Elements*, FCC 04-290, WC Docket No. 04-313 & CC Docket No. 01-338, Order on Remand (rel. Feb. 4, 2005).

are acquisitions. The Commission should have no doubt that Verizon's current management and philosophy will remain unchanged and that Verizon will have full and absolute control of what used to be MCI if the transaction is approved and consummated.

III. THE PROPOSED SETTLEMENT

8. Verizon, MCI, Staff, and Integra have executed a Settlement Agreement in which Verizon and MCI have agreed to certain conditions in exchange for Staff and Integra's support for approval of the proposed acquisition. The Agreement largely ignores the concerns raised by XO and Public Counsel, which would not necessarily be objectionable if the Agreement were intended to resolve only Staff's and Integra's issues. The Settlement Agreement, however, purports to resolve the entire proceeding, and XO opposes the Agreement on those grounds. The settlement conditions, moreover, may satisfy Staff's and Integra's concerns, but those conditions fall short of mitigating the substantial anti-competitive impact of Verizon's acquisition of MCI. The Commission thus should not adopt the Settlement Agreement as the final resolution of this proceeding.

A. Are the Settlement Conditions in the Public Interest?

9. XO takes no position on whether the individual settlement conditions are in the public interest. Two of those conditions, however, purport to address the issues of the competitive harm that will result from the acquisition. Both of those conditions are effectively meaningless and as such, cannot be considered as providing any mitigation of that harm, regardless of whether they are in the public interest.

10. Settlement condition number seven requires Verizon to make available to Verizon's remaining competitors the terms and conditions of any commercial agreements for facilities and services between Verizon and MCI or any other Verizon affiliate. Verizon, however, has yet to disclose whether MCI will continue to exist as a separate entity if the

acquisition is approved, much less whether there will be any "commercial agreements" between Verizon and MCI or any other affiliated companies in which any legitimate CLECs would be interested. Even if any such agreements exist, Verizon and its affiliates have every incentive to ensure that they include prices, terms, or conditions that would make the agreements unattractive to unaffiliated companies. Little wonder, then, that Verizon and MCI would agree to this settlement condition.

11. Settlement condition number eight similarly is of no practical value. This condition provides that Verizon will support a review of its intrastate special access rates if the FCC requires Verizon to lower its interstate special access rates as a condition of approving Verizon's acquisition of MCI. Verizon's support is not a prerequisite for Commission review of Verizon's intrastate special access rates, and nothing in the Settlement Agreement precludes Verizon from strenuously opposing any reduction to those rates. Again, this condition requires Verizon to offer the sleeves from its vest – all the more so because the FCC in the press release announcing its approval of the acquisition did not include any requirement that Verizon lower its interstate special access rates.[3] Settlement condition number eight, therefore, will not be triggered, much less effectively mitigate the negative impacts of the proposed acquisition.

B. Does the Settlement, as a Whole, Assure that the Merger Meets the Standard for Approval?

12. The Settlement Agreement does not assure that the acquisition meets the standard for Commission approval. The Agreement is procedurally improper, as well as substantively deficient. The Commission thus should not accept the Settlement Agreement as the sole resolution of the issues presented in this proceeding.

[3] Ex. 511.

13. The Settlement Agreement addresses only Staff's and Integra's issues and essentially ignores the issues raised by XO and Public Counsel. The Agreement nevertheless provides that its "terms should be accepted as a resolution of all issues in this docket, not just those issues in dispute among the Signing Parties."[4] A settlement agreement that would have the Commission disregard the positions of nonsettling parties is fundamentally inconsistent with the public interest.

14. Commission consideration of non-unanimous settlement agreements has been hotly debated recently. XO understands Staff to take the position that Staff is simply a party like any other party and that Staff may enter into a settlement agreement with less than all parties if such an agreement adequately addresses Staff's concerns. The Settlement Agreement is not consistent with this view. If Staff and the Applicants considered Staff to be a party like any other, the settlement agreement would have resolved only Staff's (and Integra's) issues, leaving open the issues raised by nonsettling parties. The proposed Settlement Agreement, however, is conditioned on Commission acceptance of the Agreement as the sole resolution of the entire case, including the issues raised and conditions proposed by nonsettling parties. Staff thus is acting as more than just another party by presenting its issues as the only issues that are worthy of determination. Staff is placing the Commission in the position of resolving this proceeding either by adopting Staff's Settlement Agreement, regardless of its exclusion of other parties and their issues, or by rejecting the Settlement Agreement and addressing all parties' issues.

15. No party should be permitted to present the Commission with such an alternative. If less than all parties choose to settle their issues, they certainly should be allowed to do so. But settling parties should not purport to settle an entire case at the expense of nonsettling parties. Staff, in particular, should have an obligation to look beyond its individual interests and, at a

[4] Ex. 501 ¶ 7; *accord id.* ¶¶ 15 & 17.

minimum, not condition settlement of Staff's issues on the Commission refusing to accommodate the interests of other parties. On this ground alone, the Commission should reject the proposed Settlement Agreement.

16. This Settlement Agreement's effort to have the Commission disregard nonsettling parties' interests is particularly egregious. The Settlement Agreement scarcely addresses, much less resolves, the competitive harms that will result from the proposed acquisition. As discussed above, two of the three settlement conditions that address competitive concerns are virtually meaningless, while the third deals only with the narrow issue of wholesale service quality. The Settlement Agreement, therefore, is procedurally improper, fails to mitigate the competitive harms that will result from the proposed acquisition, and thus does not assure that the transaction is in the public interest.

IV. IF COMMISSION REVIEW AND APPROVAL OF THE TRANSACTION IS REQUIRED, WHAT IS THE STANDARD FOR APPROVAL?

17. The Commission has long reviewed proposed mergers to determine whether they are consistent with the public interest, particularly in light of the relative harms and benefits to consumers that will result from the proposed transaction.[5] The impact on the public interest necessarily depends on the nature of the particular transaction. Verizon's proposed acquisition of MCI is unique. The Commission has never considered the public interest impact of one of the two largest ILECs in the state acquiring one of its major competitors. Such a transaction on its face requires substantial scrutiny.

18. The federal Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have established the most common and well-accepted analytical framework for examining proposed mergers. The DOJ/FTC *Horizontal Merger Guidelines* ("Merger

Guidelines") "provide the primary mechanism that should be used to evaluate how the Verizon-MCI merger will affect the end user customers within the different markets for telecommunications services in Washington."[6]

> The guidelines describe the tests for (1) defining relevant markets, (2) measuring the degree of concentration in the markets before and after a proposed merger, (3) identifying likely adverse effects from a merger, described either as unilateral effects (such as price increases) or coordinated effects (a resulting change in market structure), (4) determining whether firms other than the merging parties could enter the relevant market to compete and whether such firms would be mere fringe competitors or would be able to expand their competitive presence in order to discipline the prices and conduct of the newly merged firm, and (5) analyzing whether the merged firm would enjoy such increased efficiencies that the merger should be approved regardless of deficiencies in the other areas.[7]

The Commission should use the Merger Guidelines to analyze the impact of the proposed acquisition on consumers and relevant markets in Washington.

19. The Applicants, on the other hand, offer virtually no framework for analyzing the proposed acquisition. The Applicants pay but scant lip service to the Merger Guidelines and instead offer a generalized assessment of undefined markets using little more than anecdotal evidence. The Applicants effectively seek to distract the Commission with smoke and mirrors and ask the Commission to pay no attention to the man behind the curtain. The Commission should decline that request and should require the Applicants to use the Merger Guidelines to demonstrate that the proposed transaction is consistent with the public interest. Not surprisingly, the Applicants cannot make such a demonstration.

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[5] *E.g.*, *In re Application of GTE Corp. and Bell Atlantic Corp.*, Docket No. UT-981367, Fourth Supp. Order at 24 (Dec. 1999).
[6] Ex. 301T (XO Wood Response) at 5, lines 1-4.
[7] *Id.* at 8.

V. ABSENT THE SETTLEMENT, DOES THE TRANSACTION MEET THE STANDARD FOR APPROVAL?

20. Verizon's proposed acquisition of MCI is not consistent with the public interest with or without the Settlement Agreement. The transaction would create adverse effects for competition in the market for mid-sized business services, provides no offsetting benefits for Washington consumers, and should not be approved, at least not without significant conditions.

A. Will the Transaction Create Adverse Effects for Competition or in Other Areas?

1. Will the Transaction Adversely Affect Mass Market Local Exchange Services?

21. XO takes no position on this issue.

2. Will the Transaction Adversely Affect Mass Market Long Distance Services?

22. XO takes no position on this issue.

3. Will the Transaction Adversely Affect Competition for Enterprise Services?

a. Mid-sized business services constitute a distinct market.

23. "As the Merger Guidelines make clear, developing an accurate and meaningful market definition is the essential first step of any antitrust merger analysis."[8] A "market" for these purposes is defined by "demand substitution effects," in other words, "[i]f a particular product can be substituted for another, then those two products are considered to be in the same market."[9] XO operates in, and therefore focuses on, the market for mid-sized business services. That market is comprised of business customers who require high capacity services to their respective location or locations that they purchase on a local, rather than regional or national,

[8] Ex. 301T (XO Wood Response) at 10, lines 12-13.
[9] *Id.* at 12, lines 19-20.

basis. As Mr. Wood explained, these customers comprise a distinct market under a proper application of the Merger Guidelines:

> The demand substitution test confirms that the mid-sized business market is a discrete, relevant market. It is geographically localized and it has a different technology basis and different product requirements than the mass market (it typically requires DS1-level or higher access facilities, while the mass market is based on voice-grade facilities). In comparison to the market for telecommunications services provided to very large business customers with a national or international scope (so-called "enterprise" customers), the mid-sized business market has different price and service requirements. Typically, very large business customers are characterized by multiple locations, specialized product needs, and often specialized contracts with service providers that cover multiple locations. In contrast, mid-sized businesses may have a single or relatively small number of locations and purchase the services they need at a local level. They rarely receive specialized treatment (committed account representatives, for example) and usually do not obtain customized contracts or service arrangements, but instead buy from available suppliers at tariffed rates. Thus, a "small but significant non transitory price increase" by a firm with market power in the mid-sized business market would not be defeated by customers substituting a service offered by suppliers operating in the large business or residential markets.[10]

24. The Applicants disagree, contending that all business services can be categorized as either "small" or "enterprise." Verizon's and MCI's own service and marketing practices belie that position. Both Verizon and MCI target mid-sized or "medium" business customers separately from small businesses and enterprise customers.[11] Verizon and MCI cannot claim for regulatory purposes that no separate market for mid-sized business services exists while publicly identifying and directing businesses to service offerings and groups specifically designed for customers with needs for just such services.

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[10] *Id.* at 14-15.
[11] *Id.* at 16-17.

25. The Commission, therefore, should consider the impact of Verizon's proposed acquisition of MCI on mid-sized business services as a separate market, not as part of the market for large enterprise services.

b. The acquisition will constrain competition in the market for mid-sized business services.

26. The Staff of the New York Public Service Commission undertook a thorough analysis of the enterprise market in that state – including large and mid-sized business customers – and concluded that Verizon's acquisition of MCI would result in a "precipitous increase in market concentration" that would significantly constrain competition.[12] The Staff of the Virginia State Corporation reached a similar conclusion.[13] Verizon and MCI failed to present sufficient evidence of conditions in the markets for mid-sized or other business services in Washington to enable the Commission to make a comparable analysis.[14] The Commission should reject the proposed transaction on this basis alone.

27. Available evidence nevertheless demonstrates that the acquisition will have a significant adverse effect on end user customers in the mid-sized business services market. The Merger Guidelines "analysis asks whether or not a merger could result in potential adverse competitive effects including a 'small but significant and nontransitory' price increase." Verizon's proposed acquisition of MCI easily could result in such effects. CLECs offering mid-sized business services require physical access to the buildings in which the customers are located, and Verizon is the primary source of such access within its local service territory. "[T]here is no real argument that the time and fixed (and sunk) costs required for a substitute provider to complete the physical provisioning of building access facilities demonstrates that this

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[12] *Id.* at 21, lines 12-24; Ex. 302 (NYPSC Staff White Paper).
[13] *Id.* at 22, lines 1-11.
[14] *Id.* at 22, lines 13-19.

market can sustain significant nontransitory price increases for a considerable period of time."[15] Competitors cannot offer lower priced alternatives if they cannot obtain the necessary facilities at cost-based rates, and the elimination of MCI as an alternative source of such facilities will further enhance Verizon's virtual monopoly on local exchange services within its service territory.

28. The Applicants make several counter-arguments, none of which withstand scrutiny. Verizon and MCI first contend that wireless services, cable telephony, and VoIP provide effective substitutes for Verizon's wireline services. "In order for a purported 'intermodal alternative' to represent a viable substitute that can constrain prices, it *must* (1) include capabilities sufficient to permit the customer's needs to be met, (2) be available at the customer's location, and (3) not rely on the existing wireline facilities (or their equivalent) currently being utilized by the customer."[16] None of the alternatives the Applicants propose satisfy this standard.

29. VoIP is nothing more than "a technology that permits a broadband connection to be used to provide voice service."[17] A VoIP provider faces the same limitations as a traditional CLEC – it cannot provide service unless it has physical access to the customer premises, which in the vast majority of cases will be owned and controlled by Verizon. Wireless services have not progressed to the point where they are an effective substitute for the DS1 level services demanded by mid-sized business customers. Fixed wireless services in particular have yet to be fully deployed, remain subject to unresolved technical and economic issues, and still require wireline access to the buildings in which such services are provided.[18] Cable telephony is

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[15] *Id.* at 23, lines 17-21.
[16] *Id.* at 34, lines 15-18 (emphasis in original).
[17] *Id.* at 38, lines 6-7.
[18] *Id.* at 41-46.

limited to the reach of the cable television network, which serves predominantly residential locations. Even where the services are available to business customers, technical constraints limit the viability of cable telephony to substitute for the wireline services demanded by mid-sized business customers.[19] Verizon and MCI have produced no evidence that any of these alternatives currently constrain Verizon's prices for mid-sized business services, or that they reasonably could be expected to provide such constraints in the future.

30. The Applicants also claim that CLECs have constructed their own fiber networks that are in close proximity to many business customer locations. The implication is that it would be a simple matter for one or more CLECs to extend their networks into these buildings in response to Verizon price increases. The facts do not support that implication. Even MCI concedes that constructing the necessary facilities would cost "in the few hundred thousand dollar range" and would not be undertaken without substantial long-term commitments from customers in the building to justify such costs.[20] CLECs, moreover, use their own facilities to "serve less than 4% of the Washington market overall, despite massive capital expenditures."[21] The Applicants cannot seriously maintain that building access does not represent a significant barrier to entry and expansion, much less an effective constraint on Verizon's rates for the mid-sized business services.

31. Verizon and MCI further argue that MCI has only a few network facilities in Verizon's service territory in Washington and that the acquisition by Verizon will not substantially alter the competitive landscape. Given the paucity of competitive activity in Verizon's service territory, however, the loss of even one alternative source of building access is significant. The Applicants also lowered by more than half their estimate of the number of

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[19] *Id.* at 46-48.
[20] Tr. at 295-97 (MCI Beach).

buildings in Verizon's service territory that are served by competitors with their own facilities, which substantially increases the percentage of such buildings served by MCI.[22] MCI, moreover, is the sole competitor in most of those buildings. The data also demonstrates that independent CLECs remaining in the wake of the SBC/AT&T and Verizon/MCI transactions have a minority of the total building connections, and the record is devoid of any indication that these CLECs make those connections available to other carriers at wholesale rates that are significantly lower than Verizon's rates, as MCI (and AT&T) has historically done. The loss of MCI as an independent CLEC will have a significantly adverse impact on competition in Verizon's local service territory in Washington.

32. Finally, the Applicants criticize Mr. Wood's analysis as lacking state specificity. Verizon and MCI, however, are hardly in a position to make such a criticism when their own market analysis, what little there is, is barren of factual support, much less Washington-specific evidence. It was incumbent on Verizon and MCI to present the evidence needed to undertake an appropriate analysis, and they did not do so. Mr. Wood relied on the information that was available. To the extent that he did not have access to Washington-specific data, that deficiency should be laid at the Applicants' door.

33. Verizon and MCI have the burden to prove that the proposed transaction is in the public interest, and they failed to do so. The Commission, therefore, should not approve Verizon's acquisition of MCI, at least not without substantial conditions to mitigate the competitive harms that will result from the transaction.

[21] Ex. 301T (XO Wood Response) at 27, lines 5-6.
[22] Ex. 526 (Verizon Response to Record Requisition No. 6)

4. Will the Transaction Adversely Affect Competition for Special Access Services?

34. Competition for special access services is virtually nonexistent. "[P]rice levels for ILEC special access services are exorbitant and likely reflect monopoly profits."[23] The little competitive pressure on Verizon that existed to reduce its special access rates came from AT&T and MCI, the two largest purchasers. The acquisitions of these two carriers by ILECs will eliminate such pressure on Verizon entirely. MCI, to the extent that it even continues to exist as a separate entity, obviously will not constrain its affiliate's special access pricing, and the AT&T that emerges from the SBC/AT&T transaction is highly unlikely to compete vigorously outside of its ILEC region. The result will be higher prices for consumers both directly from Verizon and from CLECs who pass along to their customers the inflated rates that they must pay Verizon for the necessary facilities.[24]

35. Verizon and MCI no doubt will contend that the freeze on special access rates adopted by the FCC in its order approving the acquisition addresses this concern. As Mr. Wood explained, however, "[e]ven if the FCC were to place a freeze on Verizon's special access tariffs tomorrow, the adverse competitive impacts would still occur, because special access rates are not competitively established and, based on current returns, are higher than the level that could be sustained in an effectively competitive market."[25] "By removing competitive pressure on Verizon to reduce its special access rates, and by denying customers the opportunity to purchase comparable facilities from other carriers at rates that are below existing special access, the

[23] Ex. 301T (XO Wood Response) at 50, lines 12-13.
[24] *Id.* at 49-80.
[25] *Id.* at 51, lines 15-19.

proposed merger itself creates the adverse increases in costs of access to mid-sized customers' premises."[26]

5. Will the Transaction Create Other Adverse Effects?

36. Verizon's proposed acquisition of MCI adversely affects telecommunications markets indirectly, as well as directly, by effectively silencing one of the loudest voices for the development of effective local exchange competition in Washington. MCI was a leading participant in proceedings before this Commission to develop the conditions necessary to open local markets in Verizon's and Qwest's service territory. MCI, for example, developed and forcefully advocated positions and contract language in the Verizon generic interconnection agreement docket (Docket No. UT-011219) and in the Verizon TRRO amendment arbitration (Docket No. UT-043013). Once acquired by Verizon, MCI will no longer play such a role, even if MCI continues to exist as a separate entity.[27]

37. The CLEC ranks in Washington continue to dwindle, and the loss of MCI and the acquisition of AT&T by SBC will significantly impact the ability of competitors to bring issues before the Commission for resolution. No other CLEC has the resources that AT&T and MCI devoted to regulatory proceedings, and their efforts benefited all CLECs, as well as consumers who rely on competition to reduce prices and improve service quality. The effective withdrawal of MCI and AT&T leaves the remaining CLECs will less resources to combat an even more dominant incumbent. Verizon continues to retain a monopoly share of the local exchange markets in its service territory in Washington, and its acquisition of MCI, from both a market and regulatory standpoint, will only solidify that position for the foreseeable future.

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[26] *Id.* at 52, lines 6-10.
[27] *See* Tr. at 283-85 (MCI Beach) ("Certainly any contract between the companies wouldn't be subject to 251/252" although the Applicants "haven't completed the transition planning with respect to the services that will be offered and so forth.").

B. Will the Transaction Provide Benefits to Washington?

38. Verizon's proposed acquisition of MCI will not provide any benefits to Washington. Verizon and MCI fail to identify any specific benefits to Washington consumers. Rather, the Applicants speak only in generalities, stating for example, "Large enterprise customers will benefit from the creation of a strong new company with the network reach and financial resources that enable it to compete in this technologically intense and highly competitive market segment."[28] Verizon and MCI never even attempt to explain how customers for mid-sized business services in Washington will benefit from the combination of Verizon's virtual monopoly local exchange network and MCI's facilities.

39. The Applicants no doubt will point to the statements made in the press releases issued by the DOJ and the FCC concerning the alleged consumer benefits of the proposed acquisition. Such statements, however, are hardly ringing endorsements. The DOJ states that "the transactions are *likely* to generate substantial efficiencies that *should* benefit consumers."[29] Similarly, the FCC opines that the transactions "will give the companies increased economies of scale and scope, which *should* increase their incentives and resources to engage in basic research and development" and "*should* result in substantial cost savings, which *should* benefit consumers throughout the country."[30] Such speculative benefits apparently were sufficient for the DOJ and the FCC, but this Commission should not be so easily satisfied.

40. The record before this Commission is devoid of evidence that would support any tangible benefits to Washington, at least in the mid-sized business services market. Verizon and MCI witnesses repeatedly professed a lack of knowledge about how they will operate following

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[28] Ex. 21T (Applicants Danner Direct) at 17, lines 11-13.
[29] Ex. 512 (DOJ Press Release) at 1 (emphasis added).
[30] Ex. 511 (FCC Press Release) at 1 (emphasis added).

the close of the acquisition because "the post merger planning has just begun."[31] The Applicants trumpet Verizon's announced intent to invest $2 billion in MCI's network, for example, but they do not know whether any of that investment will occur in Washington, the time period over which the funds will be invested, whether the investment will be within or outside Verizon's local service territory, or whether the money will be used to construct additional outside plant.[32]

41. In short, Verizon and MCI essentially contend that bigger is better and ask the Commission to accept on faith that this will be the case in Washington. The Commission should refuse to accept the Applicants' unsupported representations, and should conclude that the proposed acquisition will have no demonstrable benefits to Washington consumers.

C. Should Conditions Be Imposed?

42. The proposed acquisition will not result in any benefits in Washington and threatens significant competitive harm. Accordingly, if the Commission approves the transaction, the Commission should do so only with conditions that will mitigate the negative results. XO has proposed several such conditions, all of which the Commission should adopt.

1. Public Counsel's Proposed Conditions

43. XO takes no position on Public Counsel's proposed conditions.

2. XO's Proposed Conditions

a. Reduce Prices for Intrastate Special Access Services to Cost-Based Levels

44. Staff recommended in its testimony that the Commission require Verizon to reduce its intrastate special access rates to cost-based levels.[33] XO has consistently advocated

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[31] *E.g.*, Tr. at 233, lines 15-16 (Applicants Danner).
[32] Tr. at 293-94 (MCI Beach).
[33] Ex. 101T-HC (Staff Roth) at 27-29.

such action,[34] and proposes that the Commission condition any approval of the proposed acquisition on Verizon establishing wholesale special access rates at levels comparable to those the Commission has established for high capacity loops and transport. Such a requirement would help to ensure that competitors have access to the facilities they need to offer effective alternatives to Verizon's local exchange services, regardless of whether MCI (and AT&T) continues to offer such facilities to other carriers if it becomes a Verizon affiliate.

45. Staff settled for less than this condition, believing that the issue is not urgent because Verizon has claimed that high capacity transport between just two of its wire centers is the only UNE that satisfies the FCC's nonimpairment standard and that consequently no longer will be available after March 11, 2006.[35] Staff, however, did not consider the other aspects of the TRRO that limit the availability of UNEs in Verizon service territory in Washington, even where impairment continues to exist, including the elimination of entrance facilities, dark fiber loops, and the limit of 10 DS1 loops to any one building and 10 DS1 transport circuits on any one route.[36] Verizon, moreover, continues to challenge the TRRO, pressing for the elimination of *all* high capacity UNEs, and Verizon consistently has resisted its legal obligations to competitors. Whether as a legal or a practical matter, high capacity UNEs will become increasingly unavailable in the foreseeable future, to the ultimate detriment of the consumers who rely on competitive providers of local exchange service.

46. The Commission cannot control federal law or more specifically how the FCC implements Section 251 of the Act, and should not continue to rely entirely on the FCC to ensure that alternative service providers in Washington have access to needed facilities. The

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[34] Mr. Wood endorsed a comparable price cap proposal in prefiled testimony that was not offered into the record because of Covad's withdrawal from this docket. *See* Ex. 301T (XO Wood Response) at 82, lines 8-12.
[35] Tr. at 575-76 (Staff Roth).

Commission regulates the intrastate services that Verizon provides in Washington, including DS1 and DS3 special access services. CLECs use or can use those services to provide local exchange service.[37] By establishing cost-based rates for such services when they are provided to CLECs, the Commission can mitigate the loss of MCI (and potentially AT&T) as a source of wholesale high capacity facilities and take an important step toward furthering the Commission's and the Legislature's goal of fostering the development of effective local exchange competition in Washington. The Commission, therefore, should condition any approval of Verizon's acquisition of MCI on Verizon lowering its intrastate rates for special access services provided to CLECs.

b. Recalculation of Locations Where High Capacity Loop, Dedicated Transport, and Dark Fiber UNEs Must Be Provided

47. XO has proposed that Verizon be required to treat AT&T and MCI as non-qualifying fiber-based collocators and to recalculate the locations where Section 251 high capacity UNEs are no longer available. The FCC expressly defined "fiber-based collocator" to exclude affiliates of the ILEC,[38] and Verizon should not be permitted to count AT&T and MCI as fiber-based collocators simply because they were not ILEC affiliates when the FCC issued the TRRO. As Mr. Wood explained, "The absorption of MCI and AT&T by the RBOCs wholly undermines the theoretical and factual underpinnings of the *TRRO*."[39] This condition is consistent with the Applicants' voluntary commitments that the FCC adopted as part of its order approving the AT&T and MCI acquisitions.[40] The Commission, therefore, should adopt this condition.

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[36] *Id.* at 600; *see* TRRO ¶¶ 128, 141, and 181-82.
[37] *See* Tr. at 285 (MCI Beach).
[38] 47 C.F.R. § 51.5 (definition of "Fiber-based collocator").
[39] Ex. 301T (XO Wood Response) at 84, lines 9-10.
[40] Ex. 511.

c. Waiver of TRRO's 10 DSL Loop and Dedicated Transport Circuit Cap for Buildings and Routes

48. The FCC requires ILECs to provide only 10 DS1 loops to a single CLEC to any one building and 10 DS1 transport circuits between any two ILEC wire centers. XO proposes that the Commission condition approval of Verizon's acquisition of MCI on Verizon's agreement to "waive these caps to ameliorate the anticompetitive effect of the loss of MCI as a meaningful participant in the wholesale market."[41] The Applicants contend that the Commission is without authority to second-guess the TRRO, but such an argument misses the point.

49. This Commission, not the FCC, is responsible for the development of effective local exchange competition in Washington. Verizon maintains a virtual monopoly on local service within its Washington service territory, which Verizon's acquisition of MCI will only enhance. The Commission has no obligation to approve such an acquisition when it is not consistent with the public interest. Conditioning approval on Verizon's agreement to make UNEs more broadly available than it is otherwise required to do will partially mitigate the negative impacts of the transaction and further Commission efforts to foster competition. Such an objection does not contravene the letter or the spirit of the TRRO. The Commission, therefore, should adopt this condition.

d. Reinitialize Existing Interconnection Agreements and Make Current Verizon-MCI Interconnection Agreement Available for Adoption for 3-5 Years

50. MCI and AT&T have been the most significant checks on Verizon's monopolistic behavior. MCI has been particularly active in proceedings to develop contract language for interconnection agreements (as stated above), and AT&T is the only CLEC to have engaged in a substantial arbitration to establish reasonable interconnection terms and conditions with Verizon.

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[41] Ex. 301T (XO Wood Response) at 85, lines 9-10.

Indeed, MCI not long ago "re-adopted" the AT&T-Verizon agreement that was arbitrated in 1997.[42] Verizon, however, has not made that option universally available to other CLECs. Rather, Verizon contends that the initial term of the AT&T agreement has expired and requires CLECs whose agreements have also expired to negotiate and arbitrate their own new agreements.[43]

51. The elimination of MCI and AT&T as independent CLECs means, in part, that the remaining CLECs individually either must undertake the enormously expensive and time-consuming negotiation and arbitration process, or accept Verizon's anti-competitive terms and conditions. The Commission should not permit Verizon to impose such a barrier to competition. The Commission has established or approved reasonable interconnection terms and conditions in the form of the AT&T-Verizon agreement, as well as in the interconnection agreements under which the remaining CLECs currently operate. The Commission recently arbitrated amendments to all existing Verizon interconnection agreements to incorporate the requirements of the latest FCC orders, which will bring existing agreements into full compliance with current law. There is no need for any CLEC to be forced to renegotiate interconnection terms and conditions.

52. The Commission, therefore, should condition any approval of Verizon's acquisition of MCI on Verizon continuing to honor the terms and conditions in its existing interconnection agreements and to make the AT&T-Verizon agreement available to any and all CLECs for adoption for five (or at least three) years from the date of the Commission's order.

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[42] *Request of Verizon and MCI for Approval to Adopt, in its Entirety, the Interconnection Agreement Previously Approved in Docket No. UT-960307*, Docket No. UT-043001.

[43] Ex. 301T (XO Wood Response) at 85-86. Verizon did not address, much less refute, this testimony in its reply testimony.

3. Staff's and Integra's Proposed Conditions

53. Except as discussed above, XO takes no position on Staff's or Integra's proposed conditions.

D. Public Comment

54. XO takes no position on any public comment.

VI. CONCLUSION

55. The Applicants have failed to prove that Verizon's acquisition of MCI would be consistent with the public interest. To the contrary, the record evidence demonstrates that the proposed transaction will result in significant harm to competition and produce no benefits to consumers in Washington. Accordingly, the Commission should not approve the acquisition or should condition any approval on the conditions that XO has proposed.

RESPECTFULLY SUBMITTED this 23rd day of November, 2005.

DAVIS WRIGHT TREMAINE LLP
Attorneys for XO Communications Services, Inc.

By
Gregory J. Kopta

CERTIFICATE OF SERVICE Docket No. UT-050814

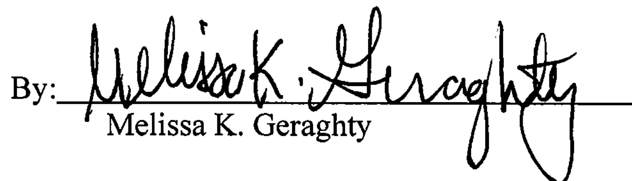
I hereby certify that on the date given below, in the above referenced docket, the original and 8 true and correct copies of Post-Hearing Brief of XO Communications Services, Inc., were sent by Federal Express overnight delivery and by electronic filing to:

Ms. Carole J. Washburn, Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504-7250
Email: http://www.wutc.wa.gov/e-filing

On the same date, a true and correct copy was sent by regular U.S. Mail, postage prepaid, and by email to:

Arthur A. Butler Ater Wynne 601 Union Street, Suite 5450 Seattle, WA 98101 Email: aab@aterwynne.com	Judy Endejan Graham & Dunn Pier 70 2801 Alaskan Way, Suite 300 Seattle, WA 98121-1128 Email: jendejan@grahamdunn.com
Jonathan Thompson Assistant Attorney General PO Box 40128 Olympia, WA 98504-0128 Email: jthompso@wutc.wa.gov	Simon ffitch Office of the Attorney General 900 Fourth Avenue, Suite 2000 Seattle, WA 98164 Email: simonf@atg.wa.gov
John P. Nusbaum Integra Telecom of Washington, Inc. 1201 NE Lloyd Blvd., Suite 500 Portland, OR 97232 Email: jay.nusbaum@integratelecom.com	Gregory T. Diamond Covad Communications Company 7901 Lowry Blvd. Denver, CO 80230 Email: gdiamond@covad.com
John O'Rourke Citizens Utility Alliance 212 W. 2nd Ave., Suite 100 Spokane, WA 99201 Email: orourke@snapwa.org	

DATED this 23rd day of November, 2005.

By: 
Melissa K. Geraghty