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Federal Communications Commission
Washington, DC 20554

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| In the Matter of | ) | |
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| Joint Applications of OnePoint Communications | ) | |
| Corp. and Verizon Communications for Authority | ) | |
| Pursuant to Section 214 of the Communications | ) | CC Docket No. 00-170 |
| Acct of 1934, as Amended, to Transfer Control of | ) | |
| Authorizations to Provide Domestic Interstate | ) | |
| and International Telecommunications Services | ) | |
| as a Non-Dominant Carrier | ) | |

# PETITION OF AT&T CORP. TO DENY JOINT APPLICATIONS

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October 23, 2000

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## PETITION OF AT&T CORP. TO DENY JOINT APPLICATIONS

Pursuant to the Public Notice issued by the Commission on September 22, 2000 (DA 00-2155), AT&T Corp. ("AT&T") respectfully submits its Petition to Deny the Joint Applications of OnePoint Communications Corp. ("OnePoint") and Verizon Communications, ("Verizon") (collectively "Applicants") for authority to transfer control of OnePoint's Section 214 authorizations to Verizon.

## INTRODUCTION AND SUMMARY

It has now been nearly five years since the Telecommunications Act of 1996 ("the Act") was passed. During that time, the Commission has approved mergers that have resulted in the number of Regional Bell Operating Companies ("RBOCs") shrinking from seven to six to five to four. Each time the merging RBOCs have promised that their combination would further the pro-competitive purposes of the Act, but these mergers have done nothing but create larger, better financed bottleneck monopolists.

By eliminating the possibility of competition from each other and making benchmarking more difficult, these mergers have also enhanced the ability of the resulting super-RBOCs to stifle competition by new entrants. Indeed, the RBOCs' resistance to the market opening conditions of the Act has proven so successful that the competitive local exchange carrier ("LEC") industry now stands on the verge of collapse. Competitive LECs have become "marginalized" because they do not "own the strategic assets" necessary to compete but must "rely on the ubiquitous Bell network" – a network that remains largely closed to new entrants.[1] "[I]nvestors [have] los[t] confidence in the fundamentals of the CLEC business model,"[2] "there has been 'carnage' among CLEC stocks,"[3] and numerous competitive LECs have filed (or are on the verge of filing) for bankruptcy.[4]

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[1] Janet Whitman, *New Entrants: Battling the Bells*, Wall Street Journal, at R17 (Sept. 18, 2000). *See also* Brian Ploskina, *It's Open Season For CLEC Consolidators*, Interactive Week (Oct. 11, 2000) (reporting that competitive local exchange carriers are "facing hard times" because they are forced to rely "on incumbent carriers").

[2] Mike Farrell, *ICG Tanks, Depressing Other CLECs*, Multichannel News (Oct. 2, 2000).

[3] John T. Mulqueen, *ICG Hit Hard by Revenue Shortfall, Resignations*, Interactive Week (Oct. 8, 2000). *See also id.* ("Another piece of the crumbling new carrier industry has plummeted to the ground").

[4] Paul Sherer, *Deals & Deal Makers: Too Much Telecom*, Wall Street Journal, at C1 (Aug. 15, 2000) ("[T]he telecom landscape is littered with troubled firms."); Jeff St.Onge, *Amer MetroComm Asks to Abandon Cisco Gear It Calls Faulty*, Dow Jones News Service (Oct. 10, 2000) (reporting on Aug. 23 Chapter 11 filing and ongoing bankruptcy proceedings); Jeff St. Onge, *A Bankruptcy Boom Is Starting To Have Ripple Effects*, Dow Jones News Service (Oct. 5, 2000) ("[I]n just the past few months, dozens of [ISPs] and telecom start-ups have filed for bankruptcy."); Heather Draper, *ICG's Tumble A Wake-Up Call to Telecom Firms*, Denver Rocky Mountain News, at 1G (Sept. 24, 2000) ("Certainly, ICG is at risk of bankruptcy and other CLECs will be in the same boat"); John T. Mulqueen, *Carrier's Purchasing Plans In Question*, Interactive Week (Oct. 1, 2000) ("Several [securities analysts] noted that some competitive local exchange carriers were not meeting revenue projections, some had gone bankrupt and that the capital markets, especially junk bonds, were closed to new carriers."); *Darwin Claims Another CLEC*, Communications Today (Oct. 4, 2000) ("Nettel is just the latest telecom casualty in the dog-eat-dog CLEC arena."); Janet Whitman, *McLeodUSA's CapRock Buy May Mark New Consolidation Round*, Dow Jones News Service (Oct. 3, 2000) ("Troubled CLECs that don't

(continued . . .)

Verizon has now begun a campaign to pick off the few competitive LECs that might still pose a threat to its continued dominance. First, Verizon announced its plan to take over NorthPoint Communications. Not only would this transaction eliminate one of the most vigorous DSL competitors in the critically important advanced services market, it would create further barriers to entry into the local voice market.[5] By making it more difficult for Verizon's rivals using the "UNE-Platform" to partner with data competitive LECs to offer residential customers voice and data services over a single line, the merger would significantly raise the costs of Verizon's residential voice competitors and thereby discourage local voice entry.

The current Verizon target is OnePoint. OnePoint is the "nation's largest competitive local exchange carrier focused on residential customers," particularly "residents of apartment communities."[6] As the Commission knows, competition for multiple dwelling units ("MDUs") has been extremely slow to develop.[7] By way of this merger, Verizon would inherit OnePoint's contracts with thousands of MDUs[8] (many of which may be exclusive) and thereby foreclose altogether competition for those customers.

In light of these facts, Applicants must shoulder a particularly heavy burden to demonstrate that their merger serves the "public interest."[9] However, in their Public Interest

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(. . . continued)
manage to secure additional funding" are "likely to face bankruptcy" unless they can find a buyer).

[5] *See generally* Petition of AT&T Corp. to Deny Joint Applications, CC Docket No. 00-157 (filed October 2, 2000) ("AT&T Petition to Deny Verizon-NorthPoint Merger")

[6] http://www.onepointcom.com/investors/news/pressrelease.asp?prID=48&userType=investor.

[7] *See* Comments of AT&T Corp., WT Docket No. 99-217, CC Docket No. 96-98, at 4-8, 25-30. (filed Aug. 27, 1999) ("AT&T Building Access Comments").

[8] OnePoint 1999 10-K, at 1 (March 31, 2000) ("OnePoint 10-K").

[9] *See* Memorandum Op. and Order, *Applications of NYNEX Corp. and Bell Atlantic Corp. for*
(continued . . .)

Statement, Applicants make no attempt to provide any detailed information regarding the numbers and locations of subscribers, and types of services provided in each relevant market or any rigorous competitive analysis of the effects of the proposed transaction.[10] The reason Applicants have so downplayed the competitive analysis should be obvious. The Commission has repeatedly held that when a dominant incumbent LEC such as Verizon acquires even one of several significant "potential entrants" into its local services market, the merger is anticompetitive.[11] *A fortiori*, a merger such as this – which in the absence of any real competitive benefits would combine the nation's largest incumbent local exchange monopolist and the "nation's largest competitive local exchange carrier focused on residential customers" –

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*Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd. 19985, ¶ 2 (1997) ("*Bell Atlantic-NYNEX Merger Order*"); Memorandum Op. and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd. 18025, ¶ 1 (1998) ("*MCI-WorldCom Merger Order*").

[10] This absence of data contrasts sharply with GTE's claims in other contexts regarding the obligations of applicants in proceedings such as these. GTE asserted that the Commission could not approve the MCI-WorldCom merger on the basis of "bare assertions" regarding the level of competition each party faces. Petition to Deny of GTE Serv. Corp., CC Docket No. 97-211, at 9 (filed Jan. 5, 1998). Rather, it stated, merger applicants shoulder the affirmative obligation to provide "studies" and "data" regarding "their market shares, their facilities [and] the extent of their competitive overlaps." *Id.* at 5, 8-9 (citing *BA-NYNEX Merger Order*). GTE's observation about MCI and WorldCom is apt here: despite Applicants' lofty claims of extensive competition, "[n]ot only is there no meat on their bones, but the bones themselves are missing." *Id.* at 10.

[11] *See Bell Atlantic-NYNEX Merger Order* ¶ 10; Memorandum Op. and Order, *Applications of Ameritech Corp. and SBC Communications, Inc. For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, 14 FCC Rcd. 14712, ¶¶ 87, 93 (1999) ("*SBC-Ameritech Merger Order*"); Memorandum Op. and Order, *GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, FCC 00-221, ¶¶ 118, 122-25 (June 16, 2000) ("*Bell Atlantic-GTE Merger Order*").

disserves the public interest. And the competitive concerns are heightened in the case of this merger because, as Applicants concede,[12] OnePoint is one of the few competitive LECs targeting MDUs that has not been forced into bankruptcy.

Applicants only defense is to say that there are some competitive carriers in some Verizon markets that offer some of the same services to MDUs that OnePoint offers. Even if true, Applicants miss the fundamental point that the relevant *geographic* markets are local.[13] The fact that a competitive LEC may serve MDUs in, for example, New York City provides no competitive constraint on Verizon in suburban New York, let alone other states. The critical question is whether MDU residents in the specific regions *served by OnePoint* have significant alternatives so that the loss of OnePoint as an independent competitor will not strengthen Verizon's market power over those customers.[14] On this critical issue, Applicants provide no evidence.

In addition, the merger would greatly increase Verizon's incentives to discriminate against advanced service providers and thereby frustrate Congress' objective in Section 706 of the Act to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[15] As the Commission has held in the *SBC-Ameritech Merger Order*, the *Qwest-US WEST Merger Order*, and the *Bell Atlantic-GTE Merger*

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[12] Stavig Dec. ¶ 7 ("[M]any comparable competitive carriers that have targeted the residential multi-dwelling unit market with competitive telephony services over the past five years have failed. Companies such as Optel, Cable Plus, GE ResCom, ICS and MTS have either declared bankruptcy or been forced to sell their assets at significant losses.").

[13] *See MCI-WorldCom Merger Order* ¶ 166 (rejecting use of state-wide geographic markets for exchange access and adopting markets of "discrete local areas"); *Bell Atlantic-NYNEX* ¶¶ 54-56 (same).

[14] *See Bell Atlantic-NYNEX Merger Order* ¶ 44.

[15] 47 U.S.C. § 157 note (a).

*Order*,[16] when an incumbent LEC acquires another provider of local services outside its territory, that acquisition increases the incentives of the incumbent LEC to discriminate against rivals *within* its territory. That is because there are significant "spillover" effects when an incumbent LEC discriminates against its local service rivals. By increasing Verizon's "footprint," the merger would allow Verizon to "internalize" the benefits of discriminating in-region where it controls bottleneck facilities.

These consumer and competition harms are not offset by the public interest benefits touted by Applicants. Applicants have failed to substantiate their claim that OnePoint must merge with Verizon in order to survive. Indeed, even if OnePoint were on the verge of bankruptcy, it would be highly perverse to justify the merger on the grounds that Verizon would be supplying OnePoint the needed capital when it has been incumbent LEC market power abuses that have made it extremely difficult for competitive LECs such as OnePoint to thrive. Similarly, Applicants' claim that Verizon needs to merge with OnePoint in order to compete effectively "out of region" are mere contrivances and expressly contrary to statements made by Verizon's predecessors in the context of their merger proceeding.

Finally, the Joint Applications should also be denied because they fail adequately to address serious Section 271 concerns implicated by this merger. Publicly available information shows that OnePoint owns, or is deploying, facilities that are used to provide a range of high-speed Internet, data, and IP-telephony services, all of which involve interLATA transport of communications. But the Public Interest Statement includes only a vague and incomplete

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[16] *SBC-Ameritech Merger Order* ¶¶ 88-113; *Qwest Communications Int'l Inc. and US WEST, Inc. Applications for Transfer of Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd. 5376, ¶ 42 (March 10, 2000) ("*Qwest-US WEST Merger Order*"); *Bell Atlantic-*
(continued . . .)

description of the interLATA facilities owned and services provided by OnePoint and promises merely that Applicants will divest OnePoint's traditional "voice" long distance customers.[17]

The Commission, however, "will not conclude that [a proposed transaction] results in a merger that would comply with section 271 without first carefully evaluating the details of the actual [transaction], and permitting the public the opportunity for notice and comment."[18] Strict scrutiny of the Section 271 implications of this merger by the Commission is particularly necessary in light of the Verizon's prior untenable position that there is an Internet "exception" to Section 271 and its recent failure to disclose fully the interLATA transport facilities at issue in the NorthPoint transaction.[19] Accordingly, because Applicants have failed to provide a Public Interest Statement that gives interested parties a meaningful opportunity to comment on the proposed transaction and that would permit the Commission to adequately judge whether the proposed transaction satisfies the Act, the Joint Applications must be denied.

## ARGUMENT

The standards for reviewing the Joint Applications are now well-established. Applicants bear the burden of proof and the Commission must determine whether the transaction would "result in a violation of the Communications Act or any other applicable statutory provision" or "result in a violation of the Commission's rules" and whether the proposed merger would

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*NYNEX Merger Order* ¶¶ 179-208.

[17] Public Interest Statement at 12.

[18] *Qwest-US WEST Merger Order* ¶ 23.

[19] AT&T Petition to Deny Verizon-NorthPoint Merger at 4-6, 10-13.

enhance competition or provide other public interest benefits that outweigh any anticompetitive effects.[20] As explained below, Applicants fail to make the requisite showings.

## I. APPLICANTS' MERGER IS ANTICOMPETITIVE

The proposed merger disserves the public interest and should not be approved by the Commission. That is because the merger would harm competition and consumers by further entrenching Verizon's local exchange bottlenecks, particularly its dominant position with regard to local services provided to consumers that reside in MDUs. Further, the merger threatens the wide spread deployment of advanced services in Verizon's territory because it would increase Verizon's incentives to discriminate against rival advanced service providers. On the other hand, there are no significant offsetting public interest benefits.

### A. The Commission Has Repeatedly Held That A Merger Between An Entrenched Monopolist And A New Entrant Enhances Market Power And Facilitates Collusion

The Commission has repeatedly stated that merger applicants have an affirmative obligation to demonstrate that their combination serves the "public interest."[21] Applicants have utterly failed to shoulder this burden. The only "product" market Applicants acknowledge is "bundled services to residents in MDUs."[22] But Applicants provide no evidence or data that this is a "relevant" market – *i.e.*, that if a hypothetical monopolist were to raise the price of a bundle of services, customers would not buy the individual components of the bundle separately.

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[20] Memorandum Op. and Order, *Application of Consent for the Transfer of Control Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd. 9816, ¶ 9 (2000) ("*AT&T-MediaOne Merger Order*"); *see also Bell Atlantic-NYNEX Merger Order* ¶¶ 2-3.

[21] *See Bell Atlantic-NYNEX Merger Order* ¶ 2; *MCI-WorldCom Merger Order* ¶ 1.

[22] Public Interest Statement at 11.

Applicants, of course, cannot truly believe that the relevant market is a bundle of local exchange, long distance and data services because, as Applicants' acknowledge,[23] this merger would preclude OnePoint from offering such a bundle in many of its markets. Post merger, OnePoint would become subject to Section 271 of the Act and therefore no longer be permitted to offer long distance in Virginia, Maryland, Washington, D.C., Pennsylvania and Delaware. Hence, it is plain that Applicants' propose a "bundled services market" in order to distract the Commission's attention from the impact of the merger on the provision of local exchange services to MDUs.

Ultimately, however, the Commission need not determine whether there is a discrete relevant product market of "bundle of communications services" because even if there were, the Commission would still be required to assess the impact of this transaction on competition for local exchange services. That is because only carriers that are able to provide *all* of the components of the bundle could compete in the "market." For example, if consumers truly demanded a "one-stop" bundle of local exchange and high speed Internet access, the fact that there might be numerous companies that provide high speed Internet access services does not mean that there would be competition for providing consumers with a bundled offering. Rather, only those carriers capable of providing the local exchange component would be able to compete in that "market."

Applicants, however, provide no evidence regarding how its merger would impact local exchange or any of the other component services, let alone the type of detailed competitive analysis the Commission has required of merger applicants.[24] The reason that Applicants seek to

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[23] *Id.* at 12.

[24] *See* Bell *Atlantic-NYNEX Merger Order* ¶¶ 128-143; *MCI-WorldCom Merger Order* ¶¶ 16-18,
(continued . . .)

avoid discussing the impact of the merger on competition is because such an analysis would bring into sharp focus the fact that this merger would enhance Verizon's local exchange market power.

Verizon is the dominant provider of local exchange services throughout its region.[25] Applicants themselves acknowledge that "many comparable competitive carriers that have targeted the residential multi-dwelling unit market with competitive telephony services over the past five years have failed. Companies such as Optel, Cable Plus, GE ResCom, ICS and MTS have either declared bankruptcy or been forced to sell their assets at significant losses."[26]

Thus, this merger would eliminate one of the handful of remaining competitive LECs targeting MDUs. OnePoint describes itself as the "nation's largest competitive local exchange carrier focused on residential customers," particularly "residents of apartment communities."[27] OnePoint today is offering local services that compete directly with Verizon in several of Verizon's key markets: Philadelphia, Delaware, Washington D.C., Maryland and Virginia.[28] In April 2000, OnePoint reported an "increase in telephony subscribers [of] 10 percent . . . over fourth quarter 1999 results and an 85 percent growth over first quarter 1999 results. 'The growth in our telephony customer base continues to be solid and promising, as exemplified in our first

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36-39; *SBC-Ameritech Merger Order* ¶¶ 106-124; *Bell Atlantic-GTE Merger Order* ¶¶ 96-126. *See also* Order, *Motion of AT&T Corp. to be Declared as a Non-Dominant Carrier*, 11 FCC Rcd. 3271, ¶¶ 38-44, 67-72 (1995).

[25] *See Bell Atlantic-GTE Merger Order* ¶ 104 (noting that "Bell Atlantic and GTE remain dominant within their traditional service areas")

[26] Stavig Dec. ¶ 7.

[27] http://www.onepointcom.com/investors/news/pressrelease.asp?prID=48&userType=investor.

[28] Further, OnePoint has announced that it intends to enter Florida – a state in which GTE has extensive incumbent territories – "this year." OnePoint 10-K at 1.

quarter 2000 results,' said OnePoint president and CEO William Wallace. 'With the launch of DSL-based data service in January, OnePoint is aggressively expanding its lead in providing bundled voice and data services to residents of multiple dwelling units.'"[29] And that announcement came on the heels of an over 100 percent increase in telephone subscribership in 1999.[30]

Given these undisputed facts, the Joint Applications must be denied. "As a general matter, a monopolist's acquisition of a 'likely' entrant into the market in which monopoly power is held is presumptively anticompetitive."[31] In this regard, recognizing the "importa[nce of] preserv[ing] all th[e] significant possibilities of eroding the monopoly to holders of significant monopoly power, [t]he acquisition *of any firm that has the economic capabilities for entry and is a more-than-fanciful possible entrant is presumptively anticompetitive*."[32] Indeed, the "case for condemnation is strongest where [as here] the acquired firm has actually made attempts to enter the monopolist's market."[33]

The Commission has repeatedly held that when a dominant incumbent LEC such as Verizon acquires even one of several significant potential entrants into its local services market that the merger is anticompetitive.[34] As the Commission explained in the *Bell Atlantic-NYNEX Merger Order*:

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[29] http://www.onepointcom.com/investors/news/pressrelease.asp?prID=46&userType=investor.

[30] *See* http://www.onepointcom.com/investors/news/pressrelease.asp?prID=43&userType=investor.

[31] Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 701d, at 135 (rev. ed. 1996).

[32] *Id.* ¶ 701d at 136 (emphasis added).

[33] *Id.* ¶ 701d at 135.

[34] *See Bell Atlantic-NYNEX Merger Order* ¶ 10; *SBC-Ameritech Merger Order* ¶¶ 87, 93; *Bell Atlantic-GTE Merger Order* ¶¶ 118, 122-25.

> Merging a dominant market participant . . . with a participant ranked no less than fifth by competitive significance in terms of its impact on the relevant market . . . has two predictable effects. First, such a merger strengthens [the dominant provider's] market power against competitive erosion by one of the most significant market participants. Second, the merger would by its own terms increase likelihood of coordinated action among the remaining participants to raise prices, reduce quality or restrict output.[35]

Here, OnePoint is not merely a "potential entrant" into Verizon's territories, but as noted, is already competing in numerous Verizon markets and, indeed, claims to be the "nation's largest competitive local exchange carrier focused on residential customers."

The only competitive "analysis" offered by Applicants is to point to some press releases and newspaper articles that, at most, shows that a handful of competitive carriers offer some form of bundled services to MDUs in some Verizon markets.[36] For example, Applicants note that AT&T offers some bundled services to MDUs in Massachusetts, that RCN offers bundled services in New York City, and that SBC has begun offering bundled services in its region.[37] Likewise, Applicants claim that some real estate investment trusts ("REITs") are entering the local services market, but do not say whether such entry is occurring in Verizon's territory.

Applicants miss the fundamental point that the relevant *geographic* markets are local.[38] The fact that Time Warner may serve MDUs in New York provides no competitive constraint on

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[35] *Bell Atlantic-NYNEX Merger Order* ¶ 11.

[36] Also troubling is the absence of any citation or documentation for Applicants' claims regarding the number of customers that OnePoint serves. AT&T is concerned that this is more than a mere oversight. For example, Applicants say that "OnePoint serves only 43,000 customers nationwide." Public Interest Statement at 11. OnePoint's web site states that it serves more that 68,5000 customers. *See* http://www.onepointcom.com/investors/aboutus/aboutus.asp?userType= investor.

[37] Public Interest Statement at 9-11.

[38] *See MCI-WorldCom Merger Order* ¶ 166 (rejecting use of state-wide geographic markets for exchange access and adopting markets of "discrete local areas"); *Bell Atlantic-NYNEX* ¶¶ 54-56.

Verizon in D.C., Baltimore or Philadelphia. The critical question is whether MDU residents in the regions *served by OnePoint* have significant alternatives so that the loss of OnePoint as an independent competitor will not strengthen Verizon's market power over those customers.[39]

On this issue, Applicants have little to say. Applicants do not even purport to claim that there are *any* competitive carriers other than OnePoint currently providing local exchange service to MDUs in two Verizon markets – Philadelphia and Delaware[40] – and relegate to a footnote the competitive alternatives that exist in two other Verizon markets currently served by OnePoint. That footnote states in its entirety that "[i]n Maryland, RCN and Jones Communications (now Comcast) are among the carriers providing bundled services to residential customers in MDUs. In Virginia, RCN/Starpower, Jones (Comcast) and Cox provide bundled offerings to residential customers in MDUs."[41]

This "analysis" is patently insufficient. Applicants do not even claim that RCN, Comcast and Cox compete in the parts of Maryland and Virginia that OnePoint *actually serves* but state only they provide service somewhere in those states.[42] Nor do Applicants provide any data regarding these "competitors," whether they use their own facilities, whether they have the same capabilities as OnePoint, whether they target the same types of MDUs, or whether they offer the same "bundle" of services that OnePoint can offer. In short, Applicants have failed to provide

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[39] *See Bell Atlantic-NYNEX Merger Order* ¶ 44.

[40] Applicants appear to believe that no such showing is required for these markets because OnePoint has only recently entered and provides service to only a few hundred customers. *See* Public Interest Statement at 11. The Commission, however, has made clear that the full-blown *Bell Atlantic-NYNEX* analysis applies to transactions even where a dominant firm acquires a firm that is only a *potential* competitor of the dominant firm. Hence, clearly there can be no *de minimis* "exception" for a merger involving *actual* competition.

[41] Public Interest Statement at 12 n.29.

[42] *Id.*

any evidence that shows that the loss of OnePoint as an independent entity will not enhance Verizon's market power in any of the Verizon markets that OnePoint currently serves.

Further, even if it were the case that RCN, Comcast and Cox in fact served the same areas as OnePoint, that would not save this merger. As noted, the Commission found that the elimination of one of four or five significant *potential* entrants into an incumbent LEC's local market was anticompetitive.[43] By definition, the elimination of a significant *actual* competitor to Verizon – indeed, the largest competitive LEC targeting MDUs – is anticompetitive.

Moreover, not only would this merger eliminate one of the few competitors that has been able to establish a presence in the MDU "market," but Verizon would inherit OnePoint's contracts (including, if past experience is any guide, exclusive contracts) thereby assuring that it would not face any competition for many MDUs in its region for the foreseeable future. "Together, Verizon and OnePoint currently have 650,000 MDUs under contract in 31 major markets across the country [and] Verizon [expects] to have an additional two million properties under contract over the next five years."[44]

### B. Because of "Spillover" Effects, The Merger Increases Verizon's Incentives To Use Its Bottleneck Facilities To Discriminate Against Its Rivals.

The Commission has recognized that pursuant to Section 706 of the Act it must carefully assess the impact of a LEC merger on "the provision of new or additional services to consumers."[45] Heightened scrutiny of mergers involving incumbent LECs is also required because advanced service providers are particularly vulnerable to an incumbent LEC's

[43] *See Bell Atlantic-NYNEX Merger Order* ¶ 11; *SBC-Ameritech Merger Order* ¶¶ 87, 93; *Bell Atlantic-GTE Merger Order* ¶¶ 118, 122-25.

[44] http://www.onepointcom.com /investors/news/pressrelease.asp?prID=52&userType=investor.

[45] *AT&T-MediaOne Merger Order* ¶ 11.

anticompetitive use of its bottleneck facilities. The Commission has expressly held that incumbent LECs have both the incentive and ability to "discriminate against companies that depend on the incumbents[] for evolving types of interconnection and access arrangements necessary to provide new services to customers"; "to limit or control the development of new services"; and "to forc[e] competitors to provide [advanced] services identical to the incumbent's . . . [and thereby] stifle competitors' ability to innovate."[46]

The proposed merger would enhance Verizon's incentives to discriminate against rival advanced service providers and thereby impede the deployment of advanced services. As the Commission has held in the *SBC-Ameritech Merger Order,* the *Qwest-US WEST Merger Order* and the *Bell Atlantic-GTE Merger Order,* where an incumbent LEC acquires another provider of local services outside its territory, that acquisition increases the incentives of the incumbent LEC to discriminate against rivals within its territory.[47] That is because there are significant "spillover" effects when an incumbent LEC discriminates against its local service rivals.[48] If, for example, Verizon makes it less profitable for a carrier to provide advanced services in DC, "less money is available to cover [its] fixed costs" and the advanced services provider is less likely to

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[46] *Bell Atlantic-GTE Merger Order* ¶¶ 181-82.

[47] *SBC-Ameritech Merger Order* ¶¶ 88-113; *Qwest-US WEST Merger Order* ¶ 42; *Bell Atlantic-GTE Merger Order* ¶¶ 179-208.

[48] Verizon, while not disputing the economic validity of this analysis, claims that the Commission held in the *Qwest-US WEST Merger Order* that this "spillover theory" "applies only when an incumbent LEC expands the footprint over which it operates as incumbent." Reply Comments of NorthPoint and Verizon, CC Docket No. 00-157 (filed Oct. 17, 2000). That claim is puzzling. In the *Qwest-US Merger Order,* the Commission expressly found that "we agree with [the] argument that, by combining US WEST incumbent LEC businesses and Qwest's competitive LEC and interexchange businesses, the merged entity *will have an increased incentive to discriminate against competitive LECs currently competing or entering the US WEST region and against competing interexchange carriers.*" *Qwest-US WEST Merger Order* ¶ 41 (emphasis added).

provide service in other cities or to be as effective.[49] Thus, by increasing Verizon's "footprint" the merger allows it to "internalize" better the benefits of discriminating in-region where it controls bottleneck facilities.

## II. APPLICANTS' ASSERTED PRO-COMPETITIVE JUSTIFICATIONS CANNOT WITHSTAND SCRUTINY

These competition harms are not offset by the two pro-competitive benefits Applicants claim the merger would create. First, Applicants state OnePoint "needs additional long-term capital to survive" and that this merger would provide OnePoint with the necessary funds.[50] Second, Applicants assert that the merger would make the combined company a more effective competitor.[51] Both justifications are mere contrivances.

Applicants' "failing firm" defense cannot be credited. As an initial matter, it flies in the face of OnePoint's repeated statements that its business is thriving and that it has established a strong presence in the MDU business. For example, in April 24, 2000 Press Release entitled "OnePoint Communications Corp. Reports Continued Strong Revenue Growth," OnePoint announced "an 80 percent increase in revenue over first quarter 1999."[52] OnePoint's telephony customer base increased at a comparable rate.[53]

Beyond that, the supporting Declaration of John Stavig, OnePoint's Chief Financial Officer, does not support Applicants' strong assertion that "neither debt nor equity funding is a

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[49] *Ameritech-SBC Merger Order* ¶ 192. *See also* *Bell Atlantic-GTE Merger Order* ¶ 183 ("Economies of scale and scope, and network effects imply that when incumbent LECs weaken a competitive service in one region, this weakens it in other regions as well.").

[50] Public Interest Statement at 3.

[51] *Id.* at 3-5.

[52] http://www.onepointcom.com/investors/news/pressrelease.asp?prID=46&userType=investor.

[53] *Id.*

viable short-term option for OnePoint."[54] Rather, the Declaration has been carefully crafted so as to not actually say that OnePoint is unable raise the capital it claims to need from the equity markets. Rather, Mr. Stavig asserts only that "equity funding . . . does not *appear* to be an attractive option."[55] And while Mr. Stavig asserts that "equity funding takes considerable time,"[56] it defies common sense to suggest that a company as successful as OnePoint claims would be unable to undertake the necessary market transactions in less time that the time it will take for this merger to be approved by the Commission.

AT&T recognizes that numerous competitive LECs are losing significant sums of money and may soon exit the market. But even if Applicants had adequately demonstrated that OnePoint were such a competitive LEC, that would still not be sufficient grounds to permit this merger. The obvious reason for the financial difficulties sweeping the competitive LEC industry is that Verizon and the other incumbent LECs continue to refuse to open their local markets to competition and it is simply not possible profitably to offer local services in competition with these entrenched monopolists. It would be, to say the least, highly perverse to allow incumbent LECs such as Verizon to snap up these competitive LECs when the incumbents are the root of the problem.[57] Rather, the Commission should strengthen its efforts to ensure that competitive LECs and incumbent LECs compete on a level playing field.

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[54] Public Interest Statement at 3.

[55] Stavig Dec. ¶ 6.

[56] *Id.*

[57] *Cf.* 1992 Horizontal Merger Guidelines § 5.2 (requiring merger applicants seeking to use the "failing firm defense" to show "unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger").

Applicants' other pro-competitive justification is likewise a make-weight. Applicants tout the fact that the merger would enhance their ability to offer a bundle of local exchange, long distance, data, and video services.[58] But Verizon cannot offer such a package in the overwhelming majority of its states because it has yet to obtain the necessary Section 271 authorizations. Thus, the merger would actually *reduce* the scope of the service OnePoint can legally offer.

Further, there simply can be no claim that Verizon could not enter out-of-region local markets *de novo*. While claiming that OnePoint possesses significant complementary assets to Verizon, Applicants identify only two – that OnePoint has strong relationships with MDU owners and that it has an extensive sales and marketing force.[59] But given that Verizon is already among the largest provider of local phone services to MDUs in the country – with facilities and personnel stretching throughout the U.S. – it strains credibility to the point of breaking to suggest that Verizon need to acquire OnePoint in order to offer services to MDUs outside of its region.

Indeed, this "out-of-region" entry benefit is the very same public interest "benefit" that Bell Atlantic and GTE repeatedly assured the Commission would be realized if only the Commission allowed their merger into Verizon. According to Verizon, *that* was the merger that was to "finally enable one of the Bell companies to attack the local markets of the other Bells on a widespread and effective basis . . . with its local telephone facilities broadly dispersed

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[58] Public Interest Statement at 3-5.

[59] *Id.*

throughout the United States, *GTE is the 'enabler'* that will allow Bell Atlantic to attack other Bell company strongholds across the country."[60]

## III. APPLICANTS HAVE FAILED TO SATISFY THEIR BURDEN OF SHOWING THAT THE MERGER WOULD COMPLY FULLY WITH SECTION 271 OF THE ACT

Section 271 unconditionally prohibits a BOC such as Verizon from providing in-region interLATA services without first opening its local markets to competition and obtaining Commission approval.[61] To date, Verizon has been able to obtain Section 271 authority in one state, New York. Thus, Verizon may not "own" or "operate" any facilities that are used to provide in-region, interLATA services except in New York.[62]

Because of the critical importance of Section 271, the Commission has carefully scrutinized an RBOC's attempt to acquire entities that currently provide interLATA services.[63] When undertaking this review, the Commission "will not conclude that [a proposed transaction] results in a merger that would comply with section 271 without first carefully evaluating the details of the actual [transaction], and permitting the public the opportunity for notice and comment."[64] And it is the merger applicants that bear the burden of providing a public interest statement that provides sufficient detail so that the Commission may determine whether the proposed transaction complies with Section 271.[65] Applicants have failed to meet this burden.

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[60] Public Interest Statement of Bell Atlantic and GTE, CC Docket 98-184, at 1 (filed Oct. 2, 1998) (emphasis added).

[61] *See* 47 U.S.C. § 271.

[62] *See id.* § 153(1).

[63] *See generally Qwest-US WEST Merger Order* ¶¶ 11-27; *Bell Atlantic-GTE Merger Order* ¶¶ 26-95.

[64] *Qwest-U S West Merger Order* ¶ 23.

[65] *Id.* ¶¶ 23-24.

From publicly available information, it appears that the merger could result in several Section 271 violations. Post-merger, Verizon would gain control of OnePoint's "network" and associated transport facilities being deployed to provide high-speed Internet access and IP-based voice services. In August of 1999, OnePoint and Lucent Technologies entered into a $50 million deal involving the deployment of "integrated telephone and high-speed Internet services."[66] This "IP-based voice and data network" supports provision of both local and long distance voice services as well as broadband Internet.[67] And, according to OnePoint's most recent 10-K, this network is being deployed on a "national" basis.[68]

Post-merger, Verizon would acquire OnePoint's wireless assets. Red Herring reports "a multimillion-dollar contract" between OnePoint and Glenayre Technologies "to deploy a [wireless] voice and data network tailored for apartment-dwelling customers.[69] OnePoint also owns traditional circuit-switched telephone facilities that are used to provide both local exchange and interLATA services and the merger would result in Verizon's ownership and control of these facilities too.[70]

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[66] *OnePoint Communications and Lucent Technologies Sign $50 Million Agreement for Integrated IP-Based Voice and Data Network*, Cambridge Telecom Report (Aug. 30, 1999) (reporting that deployment "will enable OnePoint to deliver voice and data service through a cost-effect single network platform").

[67] *Id.*

[68] *See, e.g.*, OnePoint 10-K at 1 ("The Company's deployment of a next generation internet protocol based network, . . . enables the delivery of voice, data, and certain video services over a single integrated network," with planned provision "on a national basis").

[69] Peter D. Henig & Scott T. Shafer, *In Spite of a Few Failures, 1999 was a Banner Year For Technology Stocks*, Red Herring (March 1, 2000).

[70] *OnePoint Communications*, PR Newswire (Nov. 8, 1999).

Finally, Verizon would step into OnePoint's shoes as an Internet Service Provider ("ISP") in some areas.[71] And OnePoint's announcement that it will "expand its data services to include web hosting, content software, and certain E-Commerce services" further increases the likelihood that post-merger Verizon would be providing interLATA transport originating from within its vast region.[72] OnePoint's "last mile" DSL service may also involve interLATA transport. For example, in areas such as metropolitan Washington, D.C. (a key OnePoint market) it is quite common for competitive LECs to transport DSL calls across LATA boundaries to a central node.[73]

At this time, however, it is impossible to determine whether this merger would in fact result in a violation of Section 271 because Applicants provide absolutely no information regarding these OnePoint interLATA facilities and services. The only Section 271 issue addressed by Applicants are the several thousand traditional voice long distance customers OnePoint currently serves in states where Verizon lacks authority to provide interLATA services. Despite the numerous interLATA Internet facilities owned and operated by OnePoint, Applicants say only that "[t]he merger raises no Section 271 issues because OnePoint will divest its in-region long distance customers prior to closing."[74]

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[71] *See* OnePoint 10-K at 2 ("With the installation of its IP-based network, OnePoint is providing high speed internet access at speeds ranging up to 1.5 Mbps by leveraging DSL technology"); *id.* (describing joint marketing agreement with CAIS Internet, a Tier 1 ISP for provision of high-speed Internet to "*off-network properties*") (emphasis added).

[72] *Id.* at 1.

[73] *See* Declaration of Gary Hagmueller ¶¶ 4-5 (attached to Joint Application of NorthPoint and Verizon for Transfer of Control, CC Docket No. 00-157 (filed Aug. 24, 2000)).

[74] Public Interest Statement at 2 n.2.

This unsupported and unexplained assurance would be wholly insufficient even if offered by a party who did not have a history of adopting unreasonably narrow constructions of the scope of Section 271. Such a bald assertion should be accorded no weight in the case of Verizon, which has repeatedly attempted to consummate mergers that would violate Section 271.

In their initial application to merge, Bell Atlantic and GTE failed even to disclose the existence of the interLATA backbone facilities that Bell Atlantic would own and control as a result of the merger.[75] When this clear Section 271 violation was brought to the Commission's attention, Verizon's predecessors responded with a series of "proposals" demonstrating just how far their interpretation of Section 271 varies from the Commission's.[76] The Commission properly rejected all of these self-serving schemes.[77]

Finally resigned to the necessity of divestiture, on June 27, 2000, eleven days after the Commission's order, GTE spun-off Genuity. On that very day, NorthPoint announced the rollout of its national Internet backbone network, described as "a fully redundant, point-to-point national ATM backbone," that would instantaneously give NorthPoint the ability to provide interLATA transport from "local DSL networks that currently pass more than 37 million homes and businesses in 42 major U.S. markets."[78] NorthPoint's ready-made national backbone network, however, was "built" in large part through its "partnership[]" with Genuity.[79] And, five

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[75] *See generally* Public Interest Statement of Bell Atlantic and GTE, CC Docket No. 98-184 (filed Oct. 2, 1998).

[76] *See* Joint Reply of Bell Atlantic and GTE to Petitions to Deny and Comment, CC Docket No. 98-184, at 16-18 (filed Dec. 23, 1998).

[77] *See Bell Atlantic-GTE Merger Order* ¶¶ 26-91.

[78] *See* http://www.findarticles.com/m4PRN/2000_June_27/62976966/p1/article.html.

[79] *See* AT&T Petition to Deny Verizon-NorthPoint Merger at 5, 12.

weeks later, Verizon sought to close the circle by acquiring NorthPoint and thereby regaining control over the very same Internet backbone facilities that it had just "divested."

Not only did Verizon fail to provide adequate information regarding NorthPoint's facilities and services in its initial application, it went on to propose a "fix" for the few Section 271 "difficulties" recognized in the application by means of a patently unlawful interpretation of Section 271(j).[80] In the few areas in which applicants' conceded that the proposed transaction might violate Section 271 absent modifications to NorthPoint's network or operations, the proposed modifications were woefully inadequate.[81]

In short, Applicant's bare assertion that any and all Section 271 violations will be remedied is patently insufficient to meet Applicants' burden of resolving "all ambiguity surrounding [Verizon's] provision of interLATA services."[82] The Joint Applications should be denied.

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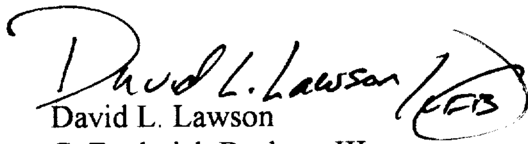
[80] *See id.* at 14-16.

[81] *See id.* at 16-17.

[82] *Qwest-US WEST Merger Order* ¶ 24.

## CONCLUSION

For the reasons stated above, the Joint Applications should be denied.

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October 23, 2000

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of October, 2000, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be hand-delivered for filing with the Federal Communications Commission to the persons below.

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