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Before the
FEDERAL COMMUNICATIONS COMMISSION
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Joint Application for Consent To Transfer Control Filed By NorthPoint Communications, Inc. And Verizon Communications	))))	CC Docket No. 00-157

PETITION OF AT&T CORP. TO DENY JOINT APPLICATION

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October 2, 2000

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Pursuant to the Commission's September 1, 2000 Public Notice, AT&T Corp. ("AT&T") hereby respectfully submits this petition to deny the Joint Application of NorthPoint Communications, Inc. ("NorthPoint") and Verizon Communications ("Verizon") (collectively "Applicants") for authority to transfer control of NorthPoint's Section 214 authorizations to Verizon.

INTRODUCTION AND SUMMARY

As the fifth-year anniversary of the Telecommunications Act of 1996 ("the Act") approaches, it remains painfully clear that the Act's central objective of meaningful local exchange competition and choice for customers has not remotely been realized. Verizon, with over 95 million access lines, is unquestionably the dominant provider of residential voice telephone service in its vast service territory.[1] In most of its local service markets, Verizon faces little or no residential voice competition, and even in the single state in which new entrants have gained a toe-hold by purchasing access to combinations of unbundled network elements,

[1] *See Verizon and NorthPoint to Merger DSL Businesses to Creating Leading National Broadband Company* (August 8, 2000) (http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=41668) ("Verizon-NorthPoint Merger Press Release").

Verizon's monopoly remains firmly entrenched.[2] Verizon is also the largest provider of high-speed digital subscriber line ("DSL") service in its territory. Verizon has reported that its DSL customer base grew by nearly 50 percent in the last reported quarter alone and that it expects the base to double again by the end of the year to more than half a million subscribers.[3] Verizon has already deployed DSL facilities in more than 1,700 central offices in 84 metropolitan statistical areas ("MSAs") nationwide.[4]

NorthPoint is one of Verizon's most significant and aggressive DSL competitors. Currently, Verizon and NorthPoint compete head-to-head in about 665 central offices.[5] At the end of 1999, NorthPoint provided service in *all* of the major Bell Atlantic cities (Baltimore, Boston, New York, Philadelphia, Pittsburgh, and Washington, DC) and many of the major GTE cities, including Tampa, Los Angeles, and Houston.[6] NorthPoint's expansion plans for 2000

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[2] *See* Trends in Telephone Service, Common Carrier Bureau, Tables 9.3, 9.4 (March 2000). *See also* Patricia Brown, *As The Telecom Act Turns Four, The Bells Are Getting Their Wish To Provide Long-Distance Service*, tele.com, at 44 (Feb. 7, 2000) (quoting industry analyst that "[i]n New York, Bell Atlantic still has 99 percent of consumers and somewhere between 85 and 90 percent of business customers – that is overwhelmingly dominant"); *Verizon Communications Announces Second Quarter Results*, Cambridge Telecom Report (Aug. 14, 2000) ("Verizon ended the quarter with more than 100 million voice grade equivalents in service, as customers increasingly choose high-capacity, high-speed transport services for their communications needs. The number of voice-grade equivalents (access lines plus data circuits as measured in 64 kilobit/second units) in service jumped 14.5 percent. Switched access lines in service totaled 64.5 million, up 2.6 percent. Access minutes of use increased 2.5 percent.")

[3] *See Verizon Communications Announces Second Quarter Results* (August 8, 2000) (http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=41669) ("Verizon Second Quarter Results").

[4] *See* Verizon-NorthPoint Merger Press Release.

[5] Hazlett Dec., Att. 2.

[6] *See* Ing Barings Report, *xDSL-Data CLECs, Unleashing Bandwidth in the Local Loop* (June 8, 2000) ("Ing Barings DSL Report") (a copy of the relevant portions of this report is attached to the accompanying Declaration of Stephen Huels).

include many of the medium–sized cities served by Verizon.[7] Analysts have predicted that NorthPoint will match Verizon with more than 1,700 central office collocated with the facilities necessary to provide DSL service by year-end 2000.[8] And prior to the merger announcement, NorthPoint was actively engaged in negotiations with new local entrants to establish partnering relationships to expand its competition with Verizon through combined voice/data offerings.

Indeed, on the day that the merger was announced, NorthPoint issued a press release reporting the significant success it was enjoying in competing against Verizon and the other incumbent local exchange carriers ("LECs"). Its revenues were up more than 20 percent, its DSL subscribership had grown 50 percent, and the number of homes and businesses that NorthPoint could serve had increased to approximately 41 million.[9] NorthPoint also announced that it had expanded its network into 14 new markets and now has facilities to serve 99 MSAs.[10]

Thus, it is quite obvious how Verizon would benefit from the proposed merger. The merger would eliminate one of Verizon's most significant DSL competitors. By making it much more difficult for Verizon's UNE-P based rivals 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, threatening nascent competition in New York and discouraging local voice entry in Verizon's other local service markets. And, as icing on the cake, the merger would, in Verizon's view, permit Verizon to satisfy the "out-of-region" entry condition imposed on it by

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[7] *See id. See also* NorthPoint 10-K, at 4 (March 30, 2000).

[8] Ing Barings DSL Report. *See also* NorthPoint 10-K at 36 (stating that NorthPoint will be able to "achieve blanket coverage" in 60 markets by the end of the year).

[9] NorthPoint Reports Second-Quarter Results (Aug. 8, 2000) (http://www.northpointdsl.com/about_press.asp?PressReleaseID=1151) ("NorthPoint August 8 Press Release").

[10] *See id.*

the Commission in the *Bell Atlantic-GTE Merger Order*[11] without having to take any actions that would, in fact, increase competition, as the Commission intended.

The Commission's task, however, is to determine whether the merger is in the "public interest."[12] And before even considering "whether the merger promises to yield affirmative public interest benefits that could be achieved without the merger,"[13] the Commission must "first consider whether the . . . proposed transaction would result in a violation of the Communications Act."[14] The proposed transaction fails at this threshold inquiry.

Applicants' proposal here would result in *the very same violation* of the Communications Act unsuccessfully attempted earlier this year by Verizon's predecessors. In flat violation of 47 U.S.C. § 271, the proposed transaction would allow Verizon to own and control facilities used to provide in-region interLATA data services – over *the very same Internet backbone facilities* that the Commission ordered Verizon to divest only three months ago.

In the *Bell Atlantic-GTE Merger Order*, the Commission required Bell Atlantic and GTE to divest GTE's interLATA Internet backbone network prior to the merger closing. The Commission's order held out the possibility that Verizon could some day reacquire a controlling interest in Genuity – but *only* if Verizon opens its local markets to competition and "eliminates

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[11] Memorandum Op. and Order, *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, ¶ 351 (June 16, 2000).

[12] *See, e.g., Bell Atlantic-GTE Merger Order* ¶ 20. *See also* Memorandum Op. and Order, *Application of NYNEX Corp. and Bell Atlantic Corp. For Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd. 19985, ¶ 35 (1997) ("*Bell Atlantic-NYNEX Merger Order*") (Commission must balance public interest benefits and harms of proposed merger).

[13] *Bell Atlantic-GTE Merger Order* ¶ 22.

[14] *Id.* ¶ 26.

section 271 restrictions as to at least 95 percent of Bell Atlantic in-region lines within five years from merger closing."[15]

Verizon apparently was unwilling to wait to meet that condition. On June 27, 2000, eleven days after the Commission's order, GTE spun-off Genuity. *On the very same day*, NorthPoint announced the rollout of its own national Internet backbone network "built" in a day through NorthPoint's "partnership[]" with Genuity.[16] Only weeks later Verizon announced its proposed acquisition of NorthPoint, giving Verizon the use of the very same Genuity interLATA data facilities that it had just divested.

While silent as to the origin of NorthPoint's newly-minted Internet backbone network, Applicants do concede that NorthPoint uses that network to provide interLATA data services in Verizon's region and that, at least as the network is presently operated, Verizon could not "own" or "control" it without violating Section 271.[17] Applicants propose to "fix" the problem with targeted modifications to the handful of NorthPoint operations they grudgingly admit "may raise issues under Section 271."[18] But to the extent Applicants' explanations of how they intend to restructure NorthPoint's network are even comprehensible, the modifications that they propose are patently inadequate. Indeed, as explained below, there is at least one clear Section 271 violation for which Applicants propose no fix and for which there is none. For that reason alone, the Joint Application must be denied.

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[15] *Id.* ¶¶ 30, 468.

[16] *See* http://www.findarticles.com/m4PRN/2000_June_27/62976966/p1/article.jhtml. *See also* http://www.zdnet.com/intweek/stories/news/0,4164,2604871,00.html.

[17] *See* Public Interest Statement at 23.

[18] *Id.*

Even if Applicants were to restructure their merger and divest NorthPoint's interLATA data network, the merger would fail the Commission's public interest analysis because it would result in no public interest benefits while competition and consumers would clearly be harmed. The proposed merger would harm competition and consumers by entrenching Verizon's local *voice* monopoly and impeding competition from rivals using UNEs. Consumers increasingly demand voice and high speed data services over a single line. Verizon can and does satisfy this demand today. Providers using UNEs to offer local voice services must have the ability to partner with facilities-based DSL providers like NorthPoint in order to compete effectively with Verizon.

The merger, however, would eliminate NorthPoint as a willing, unbiased and trustworthy partner in such offerings. That is of enormous competitive significance in this crucial transition period in which UNE-based competition is just getting off the ground. As the Commission has repeatedly emphasized, use of UNE combinations to provide local telephone service is "integral to achieving Congress' objective of promoting competition in the local telecommunications markets."[19]

Applicants' principal defense – that DSL is just one of many technologies capable of delivering broadband data into the home and that Verizon and NorthPoint are just two of

[19] Memorandum Op. and Order, *Application for Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of New York*, 15 FCC Rcd. 3953, ¶ 230 (1999) ("*Bell Atlantic-New York 271 Order*"). *See also* Memorandum Op. and Order, *Application of BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide in-Region, InterLATA Services in South Carolina*, 13 FCC Rcd. 539, ¶ 195 (1997) ("*BellSouth South Carolina 271 Order*"); Memorandum Op. and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543, ¶ 332 (1997) ("*Ameritech Michigan 271 Order*").

numerous DSL providers[20] – is entirely irrelevant. What *is* relevant to this proceeding, as explained in detail below and in the accompanying Declaration of Mr. Stephen Huels (attached hereto as Appendix A), is that NorthPoint is one of a very few DSL providers that today has a deployed facilities "footprint" with coverage comparable to Verizon. In these circumstances, it is quite clear that the merger would further magnify Verizon's already daunting competitive advantage – by, for example, enabling Verizon to lock in residential consumers with long term DSL contracts – at a time when existing rules and anticompetitive incumbent LEC behavior have already pushed UNE economics to the brink.

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."[21] As the Commission has held in the *SBC-Ameritech Merger Order*[22] and the *Bell Atlantic-GTE Merger Order*,[23] 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

[20] Public Interest Statement at 2.

[21] 47 U.S.C. § 157 note (a).

[22] 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, ¶¶ 88-113 (1999).

[23] *Id.* ¶¶ 179-208.

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.

On the other hand, the parties have demonstrated no public interest benefits from the proposed merger. Verizon and NorthPoint cannot credibly claim that they must combine to succeed as DSL service providers.[24] Verizon is already the largest DSL provider in its territory, and NorthPoint was one of its most significant DSL competitors. Moreover, Verizon and NorthPoint identify no legitimate scale or scope economies. Applicants' claim that the merger is necessary to allow Verizon to distribute video programming because NorthPoint controls a "unique" technology that can be used to provide video "streaming" via the Internet is contradicted by Applicants' own expert.[25] And Applicants' claim that the "new" advanced services affiliate that they would create will be "most separate" and will ensure that Verizon does not discriminate against rival DSL providers,[26] could not be classified as a merger-specific benefit even if true. If, as the Public Interest Statement effectively concedes, Verizon's existing "separate" affiliate structure does not prevent such discrimination, Verizon should be required to take corrective action regardless of the Commission's ruling on its proposed merger. Moreover, the separate affiliate changes Applicants propose would, in fact, have no impact on Verizon's ability to anticompetitively leverage its bottleneck facilities.

[24] *See* Public Interest Statement at 3-7.

[25] *See* Hazlett Dec. ¶ 14, n.11.

[26] *See* Public Interest Statement at 11-13.

ARGUMENT

The standards for reviewing this Joint Application are well established. As discussed above, 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 enhance competition or provide other public interest benefits that outweigh any anticompetitive effects.[27] As explained below, Applicants fail to make the requisite showings.

I. THE MERGER WOULD VIOLATE SECTION 271 OF THE ACT.

Although, as demonstrated below, the proposed merger is almost certain to result in substantial public interest harms without any redeeming public interest benefits, there is an even more fundamental defect in Applicants' proposal that obviates any need for the Commission even to reach the question of whether, on balance, Applicants have demonstrated that the proposed transfers would serve the public interest. As the Commission recently explained in approving the license transfers required to create Verizon – but only after the applicants reluctantly agreed to make substantial divestitures – the Commission must, as a threshold matter, determine "whether the transaction would result in a violation of the Communications Act."[28]

[27] 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.

[28] *Bell Atlantic-GTE Merger Order* ¶ 22. *See also id.* ¶ 26 ("As an initial matter, we first consider whether the Applicants' proposed transaction would result in a violation of the Communications Act").

Incredibly, Applicants' proposal here would result in *the very same violation* of the Communications Act unsuccessfully attempted by Verizon's predecessors. In flat violation of 47 U.S.C. § 271, the proposed transaction would allow Verizon to own and control facilities used to provide in-region interLATA data services – indeed, *the very same Internet backbone facilities* that the Commission ordered Verizon to divest only three months ago.

It bears emphasis that this particular issue stands on an entirely different footing than the Commission's "balancing" of public interest benefits and harms. Congress has *categorically* prohibited Verizon from "own[ing]" or "control[ing]" facilities used to provide in-region interLATA services until it is first found to have opened its local markets to competition,[29] and has forbidden the Commission from waiving or forbearing from enforcing that prohibition.[30]

Section 271(a) states that "[n]either a Bell operating company [("BOC")], nor any affiliate of a BOC, may provide interLATA services" except as set forth in that section. "Section 271 of the Act prohibits a Bell operating company or its affiliate from entering the in-region, interLATA market unless and until the BOC demonstrates that its local market is open to competition by satisfying a checklist of market-opening and other requirements set forth in the statute."[31] Verizon (*nee* Bell Atlantic) is comprised of several BOCs, and, to date, has obtained Section 271 authorization only in New York.

Verizon is no stranger to merger-related Section 271 violations. On June 16, 2000, the Commission approved the merger of Bell Atlantic and GTE to form Verizon on the condition

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[29] 47 U.S.C. §§ 153(1), 271(a),(b).

[30] *Id.* § 160(d).

[31] *Bell Atlantic-GTE Merger Order* ¶ 26.

that GTE first divest (through an initial public offering) its multi-billion dollar interLATA Internet backbone network prior to the merger closing. The Commission's order was entered in the wake of an extraordinary chain of events in which Bell Atlantic and GTE initially failed even to disclose the existence of the interLATA backbone facilities that Bell Atlantic would own and control as a result of the merger.[32] When commenters brought this clear Section 271 violation to the Commission's attention, Verizon's predecessors responded with a seemingly unending series of proposals, each more fantastic than the last, designed to allow Verizon to retain GTE's "Genuity" Internet backbone network notwithstanding Section 271. Although Section 271 is a categorical ban on unauthorized BOC in-region interLATA services, Bell Atlantic and GTE urged the Commission to craft an "Internet" exception for their benefit – a gerrymandering scheme that would create a single "worldwide data LATA" (but only for Verizon).[33] And when it became clear that divestiture was the only answer, Verizon sought to retain ultimate ownership and/or control over Genuity's interLATA business through a temporary "blind trust," a tracking stock arrangement, a "sale" coupled with a guaranteed repurchase right (and management rights in the interim), and a riskless "non-option."[34] The Commission properly rejected all of these self-serving and unlawful schemes and did not approve the merger until Verizon agreed to reduce its voting and economic interests in Genuity below the 10 percent equity interest level

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

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

[34] *See generally* Opposition of AT&T Corp. to Applicants' Proposal Regarding GTE's InterLATA Operations, at 1-3 (Feb. 15, 2000) (filed in CC Docket No. 98-184) (detailing history of Bell Atlantic-GTE's proposals for "complying" with Section 271).

established in the Act.[35] The Commission's order held out the possibility that Verizon could some day reacquire a controlling interest in Genuity – but *only* if Verizon opens its local markets to competition and "eliminate[s] section 271 restrictions as to at least 95 percent of Bell Atlantic in-region lines within five years from merger closing."[36]

Verizon was apparently unwilling to wait until it met that condition. On June 27, 2000, eleven days after the Commission's order, GTE spun-off Genuity. *On the very same 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."[37] Coincidence? Hardly. NorthPoint's ready-made national backbone network was "built" through its "partnership[]" with Genuity.[38] Five weeks later Verizon completed the circle by announcing its proposed acquisition of NorthPoint – and hence its reacquisition of control over a portion of the very same Internet backbone facilities that it had just "divested."

Although Applicants omit any reference to the origin of NorthPoint's interLATA data network, they concede that NorthPoint uses that network to provide interLATA data services in Verizon's region and that, at least as the network is presently operated, Verizon could not own or control it without violating Section 271.[39] Applicants' propose to "fix" the problem with

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[35] *See Bell Atlantic-GTE Merger Order* ¶¶ 26-91. *See also* 47 U.S.C. § 153(1).

[36] *Bell Atlantic-GTE Merger Order* ¶¶ 30, 468.

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

[38] *See id.*

[39] *See* Public Interest Statement at 23.

targeted modifications to the handful of NorthPoint operations they admit "may raise issues under Section 271."[40] Even apart from the inadequacy of the proposed modifications to solve the Section 271 issues that Applicants recognize, *see infra*, there is a least one clear Section 271 violation for which Applicants propose no fix and which alone requires that the Joint Application be denied.

As the Public Interest Statement notes, NorthPoint's "Regional Connect" service allows Internet service providers ("ISPs") to interconnect with NorthPoint's national network at a single location and, with "private line" service purchased from NorthPoint, to provide ISP services to the million of homes passed by NorthPoint's DSL networks.[41] This Regional Connect service permits an ISP in one LATA to serve end users in other LATAs in which the ISP has no facilities.[42] Thus, as Applicants acknowledge, "[t]he end-user customer" of such an ISP "may be located in an in-region state for which Verizon has not received interLATA authority (*e.g.*, Pennsylvania)."[43] Stated differently, when the end-user customer in Pennsylvania originates a communication from his DSL-enabled computer to his DSL ISP, NorthPoint transports the call across LATA boundaries to the distant ISP (in, for example, California).

Applicants, however, propose to continue provide interLATA data services originating from Verizon in-region states in which Verizon has not obtained Section 271 authority.[44] But Section 271(b)(1) states unequivocally that a "Bell operating company, or any affiliate of that

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[40] *Id.*

[41] *Id.* at 24. *See also* Hagmueller Dec. ¶ 7.

[42] *Id.*

[43] Public Interest Statement at 24.

[44] *Id.* ("This arrangement does not need to be modified.").

Bell operating company, may provide interLATA services *originating in any of its in-region States*" only "if the Commission approves the application of such company for such State." (emphasis added). As noted, Verizon has received such authority only in New York.

Recognizing as much, Applicants mount a tortured statutory "defense" under Section 271(j). That subsection provides that *in addition to* prohibiting all interLATA communications that originate in-region, Section 271 also prohibits some interLATA communications that *terminate* in-region:

> (j) CERTAIN SERVICE APPLICATIONS TREATED AS IN-REGION SERVICE APPLICATIONS. – For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that –
>
> (1) terminate in an in-region State of that Bell operating company, and
>
> (2) allow the called party to determine the interLATA carrier, shall be considered an in-region service subject to the [advance approval] requirements of subsection (b)(1) of this section.[45]

Applicants recognize that Section 271 "prohibits a Verizon affiliate from providing Regional Connect service" from an ISP interconnected to NorthPoint in an in-region state in which Verizon lacks 271 authority "even if the ISP's end user is located in a state where Verizon may originate interLATA traffic."[46] In an effort reminiscent of Verizon's predecessors' claim that the Commission may exempt interLATA data traffic from Section 271 by creating a "worldwide" data LATA, however, Applicants urge the Commission to rule that the Section 271(j) prohibition against providing interLATA service that terminates in-region is also an implicit *grant* of authority to provide interLATA service that *originates* in-region. In other words, Applicants

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[45] 47 U.S.C. § 271(j).

[46] Public Interest Statement at 26.

claim that they may originate private line data traffic from in-region states in which Verizon has no Section 271 authority so long as it terminates out-of-region or in a state in which Verizon has Section 271 authority.

Subsection 271(j) does not grant Verizon authority to do anything, much less to violate subsection (b)(1), which, by its terms, applies to all interLATA services that originate in-region. Applicants' argument to the contrary rests solely on their characterization of Section 271(j) as "revers[ing] the usual presumption of where interLATA traffic originates" with respect to private line services.[47] Section 271(j) does nothing of the sort. Indeed, it says nothing at all about where calls originate. Rather, it merely recognizes that the ability of a BOC to leverage its local monopoly to interfere in a customer's free choice among competing interLATA carrier extends to situations in which the customer seeks to establish private line service between areas that the BOC dominates and areas that it does not, regardless of which direction the traffic flows. As its plain language (and title) makes clear, Section 271(j) simply *expands* what is "considered an in-region service" to reflect this reality, and does not reverse any presumptions of where interLATA traffic originates. That is why, for example, the Commission required Qwest and U S WEST, as part of their merger-related divestiture plan to "discontinue . . . interLATA private line voice and data services *originating or terminating* in the US WEST region that cross LATA boundaries."[48] In short, the proposed transaction as contemplated by Applicants would unquestionably violate Section 271, and the Joint Application should be denied for that reason alone.

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[47] *Id.* at 25.

[48] Memorandum Op. and Order, *Qwest Communications Int'l Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd. 5376, ¶ 15 (2000) ("*Qwest-U S WEST Merger Order*") (emphasis added).

Moreover, in the few areas in which Applicants concede that the proposed transaction would violate Section 271 absent modifications to NorthPoint's network or operations, the proposed modifications are woefully inadequate to solve the Section 271 violations. For example, Applicants' claim that they could avoid Section 271 issues simply by arranging for a third party to act as dumb pipe for the LATA boundary-crossing "portion" of interLATA calls to Regional Connect ISPs that interconnect with NorthPoint in in-region states in which Verizon does not have interLATA authority is foreclosed by the *Qwest Teaming Order*.[49] In that order, the Commission expressly rejected the claim that Section 271's prohibitions are limited to *transmission* of the interLATA portions of a telecommunications service. Instead, the Commission ruled that determining whether a BOC is "providing" interLATA service in violation of Section 271 requires an examination of the totality of a BOC's involvement in an interLATA offering.[50] Under the scheme proposed by Applicants, the "new" NorthPoint (*i.e.*, Verizon) would for all intents and purposes be reselling the interLATA services of another carrier, which the Commission found to be one of the hallmarks of "providing" interLATA services within the meaning of Section 271.[51] Regional Connect customers presumably would have no relationship with the carrier providing the physical "transmission" – indeed, it is doubtful they would even know that such service is being provided – but instead would naturally

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[49] Memorandum Op. and Order, *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd. 21438 (1998).

[50] *Id.* ¶ 37.

[51] *Id.* ¶ 48.

view Verizon – the entity with which they have a contractual arrangement and that handles customer care and does all billing – as the service provider for the entire service.[52]

Finally, Applicants' vague assurances that they will modify other aspects of their network configuration to comply with Section 271 cannot be credited given Verizon's history in this area. As the Commission knows all too well, in the merger proceeding that lead to Verizon's creation, the Commission and the parties wasted over a year dealing with Bell Atlantic's omissions, obfuscations, and patently inadequate proposals for dealing with the Section 271 issues that continued until Bell Atlantic and GTE were ultimately forced to get serious by the pending expiration of their merger agreement.[53] The Commission should accordingly make clear to Applicants that their Joint Application cannot be approved until they describe in much greater detail the interLATA operations they propose to acquire and put forward a clear and detailed proposal that addresses all of the significant Section 271 issues raised by this transaction.[54]

II. THE MERGER WOULD BOTH FURTHER DIMINISH THE PROSPECTS OF MEANINGFUL LOCAL TELEPHONE COMPETITION AND IMPEDE THE DEPLOYMENT OF ADVANCED SERVICES.

Even if the merger were restructured to satisfy Section 271, it would still not serve the public interest. That is because the merger would harm competition and consumers by entrenching Verizon's *voice* monopoly and impeding competition from rivals using UNEs.

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[52] *See id.* ¶¶ 45-47.

[53] *See generally* Opposition of AT&T Corp. to Applicants' Proposal Regarding GTE's InterLATA Operations, at 1-3 (Feb. 15, 2000) (filed in CC Docket No. 98-184) (detailing history of Bell Atlantic-GTE's Section 271 "proposals").

[54] The Commission followed precisely that approach in the Qwest-U S WEST merger proceeding when the applicants there failed to provide sufficient detail as to how they would comply with Section 271 with regard to Qwest's interLATA services originating in U S WEST's territory. *See Qwest-U S WEST Merger Order* ¶¶ 3, 25-27.

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.

A. The Merger Would Substantially Lessen Local Telephone Competition And Further Entrench Verizon's Historic Monopoly Over Local Services By Raising Verizon's UNE-Based Rivals' Costs Of Entry.

As noted, despite the best efforts of Congress and the Commission, Verizon continues to dominate the residential local telephone services markets in its service areas. And while AT&T – after spending tens of billions of dollars to acquire and upgrade cable facilities – is now beginning to offer facilities-based choices to consumers, even when fully implemented this strategy will only enable AT&T to reach a fraction of residential consumers in Verizon's territory.[55]

Thus, the ability of competitive LECs to use UNEs to provide local telephone service is "integral to achieving Congress' objective of promoting competition in the local telecommunications markets."[56] As the Commission explained, "[u]sing combinations of unbundled network elements provides a competitor with the incentive and ability to package and market services in ways that differ from the BOCs' existing service offerings in order to compete in the local telecommunications market."[57] Indeed, the Commission has emphasized that local

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[55] For example, AT&T possesses no cable facilities in the most important telecommunications market in the U.S. – New York City.

[56] *Bell Atlantic-New York 271 Order* ¶ 230.

[57] *Id.*

markets cannot be considered irreversibly open to competition – and, thus permit BOC in-region long distance entry – unless new entrants can purchase UNE combinations.[58]

Verizon has fought tooth-and-nail to block the availability of UNE combinations to competitive LECs. Verizon refused to comply with Commission Rule 315(b) until it was ultimately upheld by the Supreme Court. After that setback, Verizon switched course and argued that it should not be required to unbundle key network elements, such as transport and switching.[59] And when that failed, Verizon's operation support system ("OSS") lost thousands of "UNE-platform" orders in New York, which prompted millions of dollars in fines from this Commission.[60]

Fledgling UNE-based competition has finally gotten off the ground in New York, and Verizon is now, unsurprisingly, looking for new ways to kill it. This is a critical transition time; UNE-based competition is just emerging and is very fragile. If Verizon is able to block the emergence of UNE-based competition now, it may never develop once Verizon has established itself as the only carrier that can offer on a mass market basis a packaged offering of local and long distance voice and data services. A competitive LEC that "earns" a poor reputation for service because of discrimination by Verizon may never fully recover in the marketplace.[61]

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[58] *Id. See also BellSouth South Carolina 271 Order* ¶ 195; *Ameritech Michigan 271 Order* ¶ 332.

[59] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696, ¶¶ 243, 320 (1999) ("*UNE Remand Order*").

[60] *See* http://www.fcc.gov/eb/LoTelComp/271.html.

[61] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of The Local Competition Provisions of The Telecommunications Act of 1996*, 15 FCC Rcd. 3696, ¶ 87 (1999) (noting competitive LECs are at a reputational disadvantage because "competitive LECs must establish a brand name and develop a reputation for service quality

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Similarly, Verizon can further deter entry by establishing a reputation for willingness to engage in predatory conduct.[62] Indeed, Verizon's trench warfare tactics have already resulted in many rivals having to rethink their attempts to serve residential customers.[63]

Verizon's latest ploy to block the emergence of UNE-based competition is to exploit the increasing desire of residential customers to purchase over a single line local and long distance phone service and high speed Internet access. Verizon has met this demand by widely deployed the DSLAMs and other equipment necessary to provide DSL services over existing lines and has been aggressively marketing packaged voice and data offerings to its customers.[64] If competitive LECs are unable to provide a comparable offering, customers will have no choice but to turn to the one carrier who can meet that demand – Verizon.[65] And to the extent that customers sign up

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(. . . continued)
before they can overcome the incumbents' long- standing relationships with their customers."); *SBC-Ameritech Merger Order* ¶ 237 (reputational harms inflicted by incumbent LECs limit the ability of competitive LECs to enter the local telephone services market). *See also In re Digital Equipment Corporation, Complaint, Decision and Order*, FTC Docket No. C-3818, 1998 FTC LEXIS 75 (July 14, 1998); Proposed Consent Order and Analysis to Aid Public Comment, 63 Fed. Reg. 24544 (May 4, 1998). *See generally* Neal R. Stoll, *Current Developments in Federal Antitrust Enforcement: Solutions, Settlements and Surrender*, 795 PLI/Corp 413 (1992).

[62] *See* Janusz A. Ordover & Carth Saloner, *Predation, Monopolization, and Antitrust*, in Handbook of Industrial Organization 550 (Richard Schmalensee & Robert D. Willig eds., 1989) (discussing the benefits derived by the dominant firm through its reputation earned due to its predatory pricing activities); George A. Hay, *The Economics of Predatory Pricing*, 51 Antitrust L.J. 361, 365 (1982) (demonstrating predatory pricing based on the reputational effects of the dominant firm).

[63] *See, e.g.*, David DeKok, *State College, Pa., Telecom Firm Blames Verizon for Phone Delays*, Knight-Ridder Tribune Business News: The Patriot-News - Harrisburg, (Sept. 29, 2000) (2000 WL 27468843).

[64] Huels Dec. ¶ 6.

[65] *See* Goldman Sachs Investment Research Report, *The Race to Build the Broadband Kingdom*, at 26 (August 12, 1999) ("*Broadband Kingdom*") ("In order to make their services 'sticky,' DSL carriers must have the ability to bundle services to offer the cost-cutting advantages of having all products – data, voice, and Internet access – over a single copper line. A carrier's success will

(continued . . .)

for long-term contracts for Verizon's DSL service, they will be effectively locked into Verizon for voice service as well.

In stark contrast, Verizon's most significant local telephone rivals do not have the DSL equipment deployed that would allow them to offer widely to residential customers a combined voice and data service using UNEs.[66] And because the Commission eliminated DSLAMs from the list of network elements subject to unbundling, competitive LECs do not have the option of leasing that equipment from Verizon.[67]

Thus, Verizon knows that even where UNE combinations are available it can still maintain its dominant position so long as it can prevent competitive LECs from offering voice and data over a single line. That is why Verizon has thus far stalled all attempts by competitive LECs to engage in "line splitting." Such arrangements allow a competitive LEC providing voice services via UNEs to partner with a DSL provider so that together they can offer consumers a combined voice/data offering over a single line. Fortunately, the New York Public Service Commission has required Verizon to accommodate line splitting.

By acquiring one of the leading facilities-based DSL providers in the United States, Verizon would also impede the ability of UNE-based competitive LECs to engage in such partnering arrangements even in those states that eventually mandate line splitting

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(. . . continued)
ultimately be determined by its ability to deliver local, long distance, and Internet access over the same pipe").

[66] *See* Huels Dec. ¶¶ 18-19.

[67] *UNE Remand Order* ¶ 306.

arrangements.[68] While there are a number of small facilities-based DSL providers, these entities generally are not suitable partners for UNE-based competitive LECs serving the residential mass market. Rather, the only efficient way for UNE-based entrants to provide these customers with voice and data over a single line is to partner with the few facilities-based DSL providers that today have large footprints and that would be able to support consumer offerings on a mass-market basis.[69]

As explained in detail in the accompanying Declaration of Mr. Huels, the costs of partnering with numerous DSL providers are prohibitive.[70] The reasons for this are straight-forward. In a combined residential voice/data offering, the separate voice and data providers must coordinate closely. That means, of course, that the voice carrier must establish OSS interfaces with the data provider.[71] These OSS interfaces are extremely complicated interfaces because the combined service consists not only of voice and DSL data transport, but also Internet access service. In many instances the OSS must be sufficiently robust that a competitive LEC can offer a bundled service offering to consumers where the service uses networks owned not

[68] To date, the only Verizon states that have mandated line splitting are New York and Texas. In New York, the Commission's written order has not yet been released, and thus AT&T does not yet know the degree to which the Commission addressed the need for competitive LECs to be able to submit UNE orders, where DSL is present or added, in the same manner in which it currently submits UNE orders. This is not a mere detail. The ability of competitive LECs to place UNE orders where DSL is involved in a seamless and efficient manner will be critical to their ability to capitalize on the right to engage in line splitting.

[69] Huels Dec. ¶¶ 21-33.

[70] *Id.* ¶¶ 27-33

[71] *Id.* ¶ 28.

only by the competitive LEC, but also by the incumbent LEC, the DSL provider, and the Internet access provider.[72]

These OSS interfaces, therefore, must handle a broad range of interactions. For example, once an order is placed for a combined voice/data offering, the competitive LEC providing voice service must inform the underlying DSL provider so that the DSL provider can undertake the necessary work to provide the data service to the customer.[73] The DSL provider likewise must give the voice carrier access to the database that would allow the voice carrier to know the work can be done and when it can be done.[74]

In addition, the OSS interfaces must support billing.[75] Because in these combined offerings the voice provider will generally have the customer relationship, the competitive LEC will collect from the customer the charges for the entire package. The competitive LEC providing the voice service must therefore remit to the DSL provider the agreed-upon portion of that charge. Similarly, OSS interfaces must support maintenance and repair issues that arise.[76] Finally, the OSS systems are necessary to coordinate any customer premises equipment ("CPE") installation that must be done.[77] Again, while the competitive LEC providing the voice service is likely to have the customer care relationship, it is the DSL provider that does CPE installation

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[72] *Id.*

[73] *Id.* ¶ 29.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* ¶¶ 30, 32.

and therefore the OSS systems must be sufficiently robust to allow the competitive LEC to provision the installation.

As the Commission has repeatedly recognized, while properly functioning OSS interfaces are "critical" to local residential competition, developing even a single interface capable of supporting pre-ordering, ordering, maintenance and repair and billing activities is an extremely difficult task.[78] Attempting to develop multiple interfaces for numerous DSL partners could not help but delay and impede competition – a point the Commission recognized when it required Bell Atlantic to provide a uniform OSS interface as a condition of its acquisition of NYNEX.[79] But because there are no standard OSS interfaces in this context, a competitive LEC likely would have to develop a new interface for each DSL supplier.

But the difficulties inherent in trying to provide a combined voice/data residential offering with multiple DSL providers are not limited to OSS. Not all DSL providers support the same CPE. Thus, for carriers that want to use a "voice over DSL" approach, many DSL providers are not suitable voice/data partners because the CPE they use is not compatible with that approach.[80]

These difficulties multiply for competitive carriers such as AT&T that have collocated voice facilities and lease only the loop from the incumbent LEC. In those cases, the competitive LEC must connect to the DSL providers' facilities. Many smaller DSL providers, however, do

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[78] *Ameritech Michigan 271 Order* ¶¶ 130, 134-43.

[79] *Bell Atlantic-NYNEX Merger Order* ¶ 183.

[80] Huels Dec. ¶ 32.

not employ an architecture that permits such connections.[81] In addition, many smaller providers would be unwilling to permit such connections because they eat up scarce collocation space in the DSL provider's cage.[82]

Thus, because of these and similar considerations, it is simply not feasible today for a competitive LEC to partner with DSL providers in order to cobble together a sufficient DSL footprint that would allow the competitive LEC to offer voice services to residential customers at the mass-market level. Rather, competition from competitive LECs such as AT&T that aspire to compete broadly with incumbent LECs will clearly be impeded unless these competitive LECs can partner with DSL providers with large, established footprints.

Currently, there are only three independent DSL providers with a national presence: NorthPoint, Rhythms and Covad.[83] And there can be little doubt that the proposed merger would reduce the number of willing, trustworthy partners to two. Applicants have made no claim in their Public Interest Statement that the "new" NorthPoint would remain willing to assist competitive LECs that wish to offer consumers an alternative to Verizon's monopoly voice offerings. That is not surprising because Verizon would have little incentive to assist competitive LECs in competing against it. And given Verizon's well-earned reputation, a competitive LEC would have to think long and hard about whether it could trust any partnering offer from a Verizon affiliate.

[81] *Id.*

[82] *Id.*

[83] *Id.* ¶ 22 (citing data). *See also* Carol Wilson, *Workhorse DSL Service Due For Overhaul*, Interactive Week from ZDWire (May 8, 2000) (2000 WL 4066324) (citing "Covad, NorthPoint Communications and Rhythms NetConnections" as "the three largest DSL competitors with national network build-outs").

Clearly, the ability of new entrants to offer competitive voice/data offerings is impaired with the removal of NorthPoint as a potential partner. At a minimum, competitive LECs' ability to reach reasonable agreements is much greater when there are three potential national partners rather than two. Indeed, antitrust authorities have routinely blocked mergers that would result in customers (even large, sophisticated customers) having only two potential suppliers to choose among.[84] Further, it is not even clear that Covad can now be considered "independent" in light of the recent investment in Covad by SBC.[85]

Additionally, in many other central offices in which NorthPoint is collocated either Covad or Rhythms is not.[86] Thus, in these central offices, competitive LECs post-merger would have only one of the three DSL providers with national coverage available as a potential partner.

Undoubtedly, Applicants will argue that the barrier to entry this merger would create is not subject to scrutiny in this proceeding because there is no "market" for voice/data services over a single line and, even if there were, competitive LECs can simply construct the type of networks that NorthPoint has built out over the last five years. Neither assertion has merit.

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[84] For example, the Department of Justice blocked the proposed acquisition of Northrop Grumman by Lockheed Martin because the government would be left with only Boeing and Lockheed Martin as suppliers for military aircrafts. *See* http://www.usdoj.gov/atr/cases/f1600/1609.htm. *See also FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 50 (D.D.C 1998); *United States v. Signature Flight Support Corp.*, 62 Fed. Reg. 7,041 (1997) (proposed final judgment and competitive impact statement).

[85] Covad recently announced that it has agreed to drop its antitrust litigation against SBC, has been promised hundreds of millions of dollars in resale revenue by SBC, and has accepted $150 million of SBC investment. News Release, *SBC Communications, Inc., Covad and SBC to Deliver Broadband Networks* (Sept. 11, 2000) (http://www.sbc.com/News_Center/Article.html?query_type+article&query=20000911-01).

[86] Attached hereto in Confidential Appendix B is an analysis of Applicants' data regarding the extent and scope of DSL collocation arrangements in Verizon's territory. As explained in Confidential Appendix B, the data provided by Applicants is deficient in numerous respects and cannot be relied upon to approve Applicants' merger.

The Commission has made clear that it views its "public interest" analysis to encompass potential, future markets that may develop. For example, in the Bell Atlantic-NYNEX merger the Commission evaluated the merger's effect "in a market for bundled local and long distance telecommunications."[87] Although no such "market" yet existed, the Commission found that "[t]he evidence in the record demonstrates that many of these mass market customers would like to purchase both local and long distance telecommunications services as part of a single bundled service."[88] More generally, the Commission has stated that it will not approve a merger that "impede[s] the development of future competition" even if it "does not decrease the current level of competition."[89]

Likewise, even where it is economic for competitive LECs to collocate the necessary data facilities, that ability is of little value unless such entry can happen swiftly. As explained above, if UNEs are to emerge as a viable alternative to incumbent LEC facilities, it is critical for competitive LECs to be able *today* to offer a seamless and economical package of voice and data over a single line. But Verizon can significantly delay and impede the ability of competitive LECs to build the necessary DSL networks in a timely fashion.

Unlike Verizon's data affiliate, which began its existence with ownership of all of Verizon's already-collocated advanced services equipment, competitive LECs must go through the tortuous process of obtaining suitable collocation arrangements for their DSL-related

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[87] *Bell Atlantic-NYNEX Merger Order* ¶ 114.

[88] *Id.*

[89] Memorandum Op. and Order, *In the Matter of Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd. 18025, ¶ 14 (1998) ("*MCI-WorldCom Merger Order*").

facilities. As the record in the Commission's ongoing collocation proceeding makes clear, incumbent LECs such as Verizon have resorted to numerous tactics to deny rivals the necessary collocation arrangements. Incumbent LECs have required competitive LECs to "wait as long as six to eight months after their initial collocation requests" to make space available;[90] refused to permit competitive LECs "to construct adjacent vaults when space is exhausted within an office";[91] and have "warehoused" space with claims that it is necessary for unspecified "future use."[92] While the Commission addressed some of the most blatant anticompetitive tactics in its most recent order in this proceeding, many important issues such as minimum space requirements, collocation at remote premises, line sharing, provisioning intervals, and space reservation polices have still not been fully addressed by the Commission.[93] Thus, Verizon still has a broad array of tactics that it can use to deny or delay the ability of rivals to collocate in its bottleneck central office space.

Moreover, even where collocation space is available, in many circumstances construction would not be economically viable due to the small percentage of local customers each voice competitive LEC has.[94] For example, a competitive LEC providing local voice service using UNE combinations will most likely have customers spread throughout its service area. However, to provide data services to such a geographically diverse customer base, such a

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[90] Order On Reconsideration and Second Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, ¶ 14 (Aug. 10, 2000) ("*Collocation Remand Order*").

[91] *Id.* ¶ 41.

[92] *Id.* ¶ 49.

[93] *See id.* ¶¶ 99-117.

[94] Huels Dec. ¶ 19.

competitive LEC would be faced with the economically unsound prospect of having to deploy assets in thousands of central offices.[95] By contrast, a DSL provider can offer data services to the voice customers of different competitive LECs with whom it partners, not to mention customers serviced by Verizon for voice. Thus, by working together it becomes possible for voice and data providers to offer customers both services in competition with Verizon. But, as explained above, the merger greatly impedes the ability of competitive LECs to enter into such partnership arrangements while meaningful competitive opportunities remain available.

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

The Commission's "public interest analysis . . . entail[s] assessing whether the merger will affect the quality and diversity of communications services or will result in the provision of new or additional services to consumers."[96] The proposed merger, however, would also greatly impede the deployment of advanced services because it would increase Verizon's incentives to discriminate against rival advanced service providers. As the Commission has held in the *SBC-Ameritech 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. The reason for this is because there are significant "spillover" effects when an incumbent LEC discriminates against its local service rivals.

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[95] *Id.*

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