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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 1, 2000

BY HAND

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **CC Dkt. No. 00-157**
(Ex Parte Filing)

Dear Ms. Salas:

Network Access Solutions Corporation ("NAS") explained in its Comments that three characteristics of the market for high-speed business-class data transmission services make this proposed merger especially problematic.[1] First, this market is highly concentrated, with the combined market share of only five carriers representing an estimated 98 percent of total subscribership. Second, Verizon already dominates this market, having an estimated 86 percent market share within its service area through its provision of HDSL service. Finally, the handful of carriers that compete with Verizon on a geographically broad scale do so over their own SDSL networks, with the second largest SDSL network belonging to Verizon's proposed merger partner, NorthPoint. Given the FCC's finding that "the loss of even one significant market participant can adversely affect the development of competition,"[2] NAS urged the Commission either to disapprove the merger or approve it subject to stringent conditions designed to protect competition in this market.

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1. *See generally* NAS Comments at 2-3 (Oct. 2, 2000).

2. *NYNEX/Bell Atlantic Merger Order*, 12 FCC Rcd. 19985 at ¶ 66 (1997).

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In their Reply, Verizon/NorthPoint do not dispute market characteristic number 1 described above – that the overwhelming majority of business data transmission customers subscribe to the high-speed data offerings of only a few carriers. They also do not dispute market characteristic number 2 – that within its service area, Verizon, through its HDSL offering, is *by far* the largest supplier of high-speed data services to business customers. Instead, they dispute only the third market characteristic described by NAS – that the merger will result in the loss of one significant market participant. This will not occur, according to Verizon/NorthPoint, because SDSL service provided by NorthPoint and other CLECs does not compete with Verizon's HDSL offering.[3]

Below, we show that Verizon/NorthPoint are wrong in claiming that HDSL and SDSL services do not compete. We make this showing now rather than earlier since we had no previous opportunity to respond to this Verizon/NorthPoint claim given that they made it for the first time in their Reply.

DISCUSSION

Verizon/NorthPoint contend first that Verizon's HDSL service does not compete with the CLECs' SDSL service because HDSL service is "typically provided with a guaranteed bandwidth that is the same as the maximum rated speed, whereas SDSL is provided with a 'committed information rate' that is typically half of the maximum rated speed."[4] In fact, it is not true that CLECs typically guarantee an information rate for SDSL service of only half the maximum rated speed. For example, NAS's quality of service ("QOS") guarantee to its SDSL customers is the availability, 99.99 percent of the time, of one hundred percent of the port speed of the local DSL loop. While NAS's QOS guarantee is among the best in the industry, the company believes that other CLECs providing SDSL service *often* guarantee that bandwidth availability will be better than just half the maximum rated speed as Verizon/NorthPoint assert.

Second, there is no merit to the claim that Verizon's HDSL service does not compete with the SDSL offerings of CLECs on grounds that the four-hour mean time to repair Verizon's HDSL service is less than the 24-hour mean time to repair a typical CLEC's SDSL service[5] since NAS believes CLECs often commit to better than a 24-hour mean time to repair. For example,

3. *See generally* Verizon/NorthPoint Reply at 16-19 (Oct. 17, 2000).

4. *Id.* at 17.

5. *Id.*

although its repair policy is among the best in the industry, NAS commits to a three hour mean time to repair its SDSL service.

Third, the assertion that Verizon's HDSL service fails to compete with SDSL since the Verizon HDSL offering costs three to five times as much as SDSL service of comparable bandwidth[6] likewise is false since HDSL service is *less* expensive and SDSL service is *more* expensive than Verizon/NorthPoint contend. With regard to Verizon's 1.544 Mb/second HDSL service, Verizon/Northpoint claim that an end user desiring a high speed Internet connection might pay as much as $692 per month for Verizon's HDSL service-- presumably if service is purchased on a month-to-month basis in a rural area under an expensive state tariff.[7] However, Verizon's FCC tariff shows that an end user subscribing to the company's HDSL service in a *metropolitan area* would pay $421 per month if the customer purchases service pursuant to Verizon's FCC *tariff* under a three-year contract and $355 per month if it purchases service pursuant to FCC tariff under a five year contract.[8] The $355 - $421 per month figure estimates more fairly what it *really* costs to use Verizon's 1.544 MB/second HDSL service to connect to the Internet since the overwhelming majority of HDSL customers are located in metropolitan areas and purchase service under long-term contracts rather than on a month-to-month basis. Moreover, it would be unlawful for Verizon to sell HDSL service for Internet access on terms set forth in a *state* tariff since the FCC has held that a service providing dedicated access to the Internet is interstate service to which Verizon's *FCC tariff* applies.[9]

Not only is a customer of Verizon's 1.544 Mb/second HDSL service likely to pay *less* than Verizon/NorthPoint claim, an end user subscribing to a CLECs 1.544 Mb/second SDSL

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6. *Id.* at 10.

7. *Id.,* Carleton/Sider Aff'd at ¶¶ 20-21 (asserting that the *reta*il price of Verizon's HDSL service can be as much as four times the $173 per month *wholesale* price at which Northpoint sometimes sells its SDSL service to resellers).

8. *See* The Bell Atl. Teleph. Co. Tariff F.C. C. No. 1, § 7.5.16 (price under three-year contract is $176.55 per month for each of two channel terminations plus $67.53 per month in channel mileage charges assuming two miles of mileage charges; price under seven year contract is $150 per month for each of two channel terminations plus $55.38 per month in channel mileage charges assuming two miles of mileage charges).

9. *DSL Jurisdiction Order (Bell Atl./BellSouth),* 13 FCC Rcd. 23,667 (1998). *See also DSL Jurisdiction Order (GTE)*, 13 FCC Rcd. 22,466 (1998), *recon. denied,* FCC 99-41 (rel. Feb. 26, 1999).

service is likely to pay *more* than the $173 per month that some *wholesalers* apparently pay for the NorthPoint service.[10] For example, NAS markets its 1.544 Mb/second SDSL offering to end users for $264 per month pursuant to a term contract.[11] Moreover, even if one were to assume that NorthPoint sold its 1.544 Mb/second SDSL service to *all* wholesalers at an average of $173 per month rather than selling the service for $173 only to its very *largest wholesaler*, an *end user* subscribing to the NorthPoint SDSL service likely would pay at least $250 per month.[12]

Finally, there is no validity to the contention that the FCC should not consider NorthPoint as competing with Verizon's HDSL offering merely because NorthPoint markets its SDSL service to ISPs rather than to businesses for whom high QOS is essential.[13] The FCC has made clear that a company will be deemed to be a participant in a given market segment even when it has not technically entered that market if it has made plans to do so.[14] NorthPoint should be deemed to be a participant in the high speed business data transmission market that Verizon's HDSL offering presently dominates since NorthPoint plainly has made plans to enter that market given that (i) it has invested several hundred million dollars to build its SDSL network and (ii) only modest additional investment would be required in order for it to provide QOS guarantees comparable to those that Verizon provides to its HDSL customers and that other CLECs make available to their SDSL customers.

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10. Verizon/Northpoint Reply at 18.

11. NAS's $264 charge is the price of the service alone. The price is $294 per month if the $30 per month price of customer premises equipment necessary to make the service work is included.

12. It is likely that the *average* wholesale price for NorthPoint's 1.544 Mb/second SDSL service is more than $173 per month since the company states in its most recent *SEC Quarterly Report* that it markets this service to wholesalers for $250 per month before volume discounts. *See* NorthPoint Comm. Group Inc. 10-Q for quarter ending June 30, 2000 at 12-13. While NorthPoint may sell SDSL at $173 per month to its largest reseller (31 percent below its undiscounted wholesale price), it does not seem likely that it gives all resellers combined an average discount of 31 percent of its advertised wholesale price.

13. Verizon/NorthPoint Reply at 16-18.

14. *See, e.g., Bell Atlantic/NYNEX Merger Order*, *supra*, 12 FCC Rcd. at ¶¶ 58-78.

CONCLUSION

The Verizon/NorthPoint merger is not in the public interest in the absence of new regulatory requirements designed to protect competition since the merger would eliminate the second largest of only a handful of competitors in the high speed business data transmission service market that Verizon already dominates in its geographic service area.

Sincerely,

Donald H Sussman /rlg

Donald H. Sussman
Director of Regulatory Affairs

cc/ Michelle Carey (FCC) (by hand)
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