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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

OCT 17 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

REPLY COMMENTS OF XO COMMUNICATIONS, INC.
IN OPPOSITION TO JOINT APPLICATION

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October 17, 2000

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Pursuant to the September 1, 2000 Public Notice of the Federal Communications Commission (“FCC” or the “Commission”), XO Communications, Inc. (“XO”)^{1/} hereby respectfully submits these reply comments in opposition to 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 (the proposed “Merger”).

INTRODUCTION AND SUMMARY

The initial comments submitted in opposition to the Applicants’ proposed Merger demonstrate that the Merger will harm competition by substantially increasing the difficulties that competitive local exchange carriers (“CLECs”), like XO, already face in obtaining access to Verizon’s facilities in order to offer consumers a competitive choice in voice and data services. As a threshold matter, Verizon repeatedly has delayed or refused to fill XO’s orders for special access service that are essential to XO’s ability to provide service to its customers. The Merger will further impede competition by removing NorthPoint as an independent source for DSL

^{1/} XO Communications, Inc. is formerly NEXTLINK Communications, Inc.

services from the marketplace. Such a result is of particular concern to XO, because Concentric, now merged with XO, utilizes NorthPoint wholesale DSL services in areas where XO has not yet deployed its own facilities to provide DSL services. After the Merger, there will be only one independent carrier, Covad, that can efficiently meet XO's needs. The Merger also poses the substantial risk that the "new" NorthPoint will receive preferential treatment as Verizon's affiliate, such as by enabling Verizon to assume equipment costs that should be borne by NorthPoint, which will place XO, and other CLECs that must bear such costs themselves, at substantial competitive disadvantage.

For these reasons, XO joins Covad Communications Company, Prism Communication Services, Network Access Solutions Corp. and others in their request that the Commission act to prevent these anticompetitive effects from flowing from the Merger. Specifically, the Commission should adopt the performance measurements and penalties proposed by Covad in its initial comments.^{2/} In addition, the Commission should establish meaningful performance measurements and self-executing remedies related to ordering, provisioning, repair, and maintenance of special access services.

ARGUMENT

I. THE MERGER WOULD UNDERMINE THE COMMISSION'S EFFORTS TO PROMOTE COMPETITION IN THE MARKET FOR ACCESS SERVICES

XO's experiences dealing with Verizon confirm that as demonstrated in the initial comments in this proceeding,^{3/} Verizon has made and continues to make concerted efforts to block competition to its services by preventing new entrants from gaining access to the necessary

^{2/} Comments of Covad at 11 ("Covad").

^{3/} Comments of Prism Communications at 3-5 ("Prism").

facilities Verizon controls. Because the Merger “merely sets a larger stage on which Verizon may continue to play out its anticompetitive performance in the marketplace,”^{4/} and because the Commission’s responsibility is to promote competition in the market for access services,^{5/} the Commission may not approve the Parties’ Application without imposing competitive safeguards designed to prevent Verizon’s ability to impede the development of a competitive marketplace.

A. Verizon’s Anticompetitive Practice of Failing to Fill Orders for Special Access Service Already Hampers XO’s Ability to Provide Its Customers with Requested Service.

As explained by AT&T and others,^{6/} consumers increasingly desire to deal with a single provider for a bundle of services, including Internet-based services. Thus, the ability to offer an integrated voice/data service is now essential to competitive success. XO has responded to this challenge by developing XOptions, an integrated product targeted at small and medium-sized businesses that includes local, long-distance, Internet access and web hosting services. Although XOptions has been available only for a short time, there is already a great demand for the service from XO’s customers. However, like AT&T, Covad, and others,^{7/} XO’s ability to offer this service in competition with Verizon and other providers has been stymied by Verizon’s bottleneck control over the facilities on which XO depends to provide service.

Verizon’s anticompetitive behavior has prevented XO from meeting many of its customers’ requests for service in Verizon’s service territory with the high degree of

^{4/} Prism at 3.

^{5/} See generally, e.g., Third Report and Order, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (November 5, 1999); First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (August 8, 1996).

^{6/} See Comments of AT&T Corp. at 20 (“AT&T”); Covad at 19-21.

^{7/} See AT&T at 19-24; Comments of Cavalier Telephone, LLC at 1-3 (“Cavalier”); Covad

(continued . . .)

responsiveness and initiative that generally characterizes its customer service relationships. Although XO offers its voice and data services to its customers by using its own facilities wherever possible, in areas where it either has not yet physically collocated in the necessary central offices or where Verizon has refused to provision the facilities unless ordered as special access services, XO must order special access service from Verizon in order to be able to provide its customers with service. Verizon, however, has not filled those orders in a timely manner, resulting in a backlog of more than 10,000 lines for special access service from XO in Verizon's region as of today.

In New York, where Verizon's provision of special access service is governed by the New York Public Service Commission's Special Service Guidelines, Verizon consistently fails to meet the standards set forth in those Guidelines. When XO places an order for special access service, Verizon repeatedly fails to issue a Firm Order Commitment ("FOC"), acknowledging receipt of an order and stating a date for work completion, in a timely manner as required under the Guidelines, often delaying issuance of the FOC for several weeks. Even when Verizon does issue a FOC, it has not met the completion date stated therein. As a result, since XO's customers clearly cannot wait six months or more to receive telephone and data service, they are forced to turn elsewhere -- most often, to Verizon, which thus benefits doubly from its delay tactics.

These problems are not unique to XO, but are shared by all Verizon's competitors seeking access to Verizon's bottleneck facilities. Indeed, Focal Communications Corporation of New York recently filed a complaint with the New York Public Service Commission requesting

(. . . continued)
at 5 & n.4; Prism at 3-4, 6.

the NY PSC to find Verizon's provisioning of special access services to Focal discriminatory and contrary to the pro-competitive goals of the 1996 Act.^{8/} Thus, pre-Merger, Verizon's behavior is already a source of serious competitive concern.

B. By Eliminating NorthPoint as an Independent Market Participant, the Merger Will Increase Verizon's Ability to Block Competition.

The comments also demonstrate that by eliminating one of its major competitors, and reducing competitors' options for access arrangements with non-Verizon facilities, the Merger will significantly increase Verizon's ability to hamper its competitors' ability to provide service.^{9/} XO agrees. In early 2000, XO (then NEXTLINK) merged with Concentric Network Corporation, so that the companies could offer a full menu of telecommunications and Internet-based services. Prior to the merger with NEXTLINK, Concentric served its customers through wholesale DSL arrangements with Covad and NorthPoint. In those areas where XO has not yet built out its DSL facilities, XO continues to rely on those arrangements, and will likely continue to do so for the foreseeable future, because establishing the necessary collocations arrangements is an extremely lengthy process that would significantly delay XO's ability to compete. NorthPoint and Covad are the only carriers in the market able to meet XO's needs efficiently. By depriving XO of a choice of independent DSL provider, the Merger would enable Verizon to impede XO's efforts to compete to an even greater extent than before. Further, as noted in the initial comments, these effects are widespread: if XO gains a reputation for being unable to deliver promised service in one area, the "spillover" effects impact its service throughout its service territory, even in areas not served by Verizon.^{10/} Without Commission intervention, the

^{8/} See Verified Complaint of Focal Communications Corporation of New York v. New York Tel. Co. d/b/a Bell Atlantic - New York (filed Aug. 7, 2000) (demonstrating that for orders since January 1, 2000, Verizon has taken an average of 15.5 days just to provide Focal with a FOC date; taken an average of more than seven weeks to fill an order for special access service; and has failed to complete the work by the FOC date 83.7% of the time).

^{9/} See Comments of The Commercial Internet Exchange Association at 4-6 ("CIX"); Comments of Network Access Solutions at 2-3 ("Network Access Solutions"); Prism at 3-4.

^{10/} See AT&T at 7-8; 19-20, citing *Bell Atlantic-GTE Merger Order* ¶ 183 ("Economies of

(continued . . .)

Merger will give Verizon both the greater opportunity and the greater incentive to abuse its bottleneck monopoly position to the detriment of competitors. Accordingly, the Commission should adopt performance measures and remedies to ensure that Verizon provides access to its network facilities in a timely and non-discriminatory manner. The Commission also should require that Verizon accelerate the provision of space in facilities for collocation.

II. THE MERGER CREATES A SUBSTANTIAL LIKELIHOOD THAT VERIZON'S "NEW" AFFILIATE WILL RECEIVE PREFERENTIAL TREATMENT AT THE EXPENSE OF ITS COMPETITORS

The record is now replete with evidence that although the Commission already recognized a need for Verizon to provide advanced services such as DSL through a "separate affiliate,"^{11/} and that need is only heightened by the proposed Merger, Applicants' assertion that the new affiliate they intend to create will be sufficiently "separate" to prevent Verizon from using its bottleneck facilities to discriminate against rival advanced service providers is unsupported and likely disingenuous.^{12/} Contrary to its protestations of innocent intentions, Verizon will have a large economic interest in the affiliate and, thus, a powerful incentive to discriminate in ways that favor its affiliate's business. The "new" NorthPoint could benefit from reduced collocation costs wherever it shares equipment with Verizon and Verizon uses the

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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.").

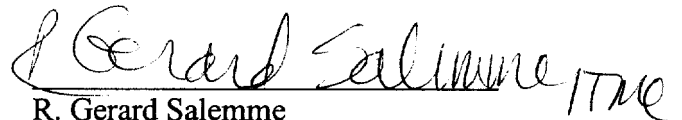
^{11/} Memorandum Op. and Order, *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, ¶ 280 (June 16, 2000) ("*Bell Atlantic-GTE Merger Order*").

^{12/} See Public Interest Statement at 11-13; see also Cavalier at 2; Covad at 5-8; Network Access Solutions at 6; Prism at 4-6.

equipment to provide non-DSL service (and thus absorbs all or much of the equipment costs);^{13/} it could gain an exclusive right to occupy Verizon premises outside of a central office (which could include the right to collocate equipment inside the remote terminals);^{14/} it could serve Verizon's purposes of denying or delaying CLEC access to its facilities by assuming facility ownership;^{15/} or it could otherwise be used to serve Verizon's purposes of avoiding procompetitive requirements.^{16/} As such, in the absence of competitive safeguards, Verizon's affiliate will have a clear advantage over its competitors, such as XO, that do not enjoy these advantages.

CONCLUSION

For the foregoing reasons, the Commission should approve the Application only if it simultaneously imposes competitive safeguards sufficient to curb Verizon's ability and incentive to harm the development of competition.



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^{13/} See Network Access Solutions at 3-4.

^{14/} See Network Access Solutions at 4.

^{15/} See Covad at 17-18.

^{16/} See Covad at 11 n.12, 16-17.

CERTIFICATE OF SERVICE

I, Margaret D. Davis, hereby certify that on this 17th day of October, 2000, I caused true and correct copies of the foregoing "Reply Comments of XO Communications, Inc. in Opposition to Joint Application" to be served via first class mail, postage prepaid or hand delivered (*) on the following persons:

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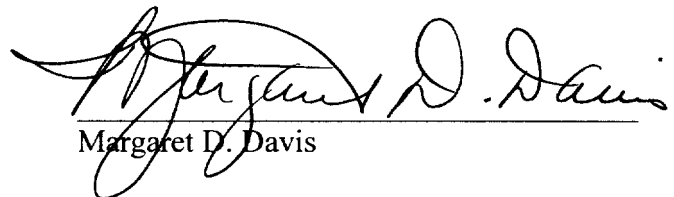
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