STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN,
CONCURRING

Re: *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65 (Oct. 31, 2005).

Re: *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-75 (Oct. 31, 2005).

While I am deeply concerned about the concentration and loss of wireline competition that may occur as a result of these mergers, I concur in these Orders because they each include a minimum set of conditions that tip the balance, albeit narrowly, in favor of approval.

In these proceedings, we consider the mergers of the two largest incumbent telephone companies in the United States with the two largest long distance telephone companies. My job is to determine whether these proposed combinations will advance the public interest.

The Applicants have argued that these mergers will create two companies that are stronger competitors in the global marketplace and that will be better positioned to bring broadband and video services to American consumers. I support the Applicants' efforts to promote ubiquitous broadband and competitive video services and look forward to seeing their continued commitment to these goals.

At the same time, I am concerned about the potential harms of these mergers. AT&T and MCI are, without question, two of the leading providers of competitive choice across the country, and these combinations will, by any measure, create more concentration in markets that are already highly concentrated. We must be particularly careful where a proposed merger would lead to less competition rather than more, so I give these concerns great weight.

Based on my weighing of these potential benefits and harms, I could not support these mergers in the absence of reasonable conditions. Without conditions, there is a real possibility that these combinations would increase rates for both residential and business consumers and put at risk the continued existence of the open and robust Internet. So, my support here is based on the Applicants' offers to comply with a minimum set of conditions that will help promote consumer choice and the development competitive alternatives. Indeed, I would have preferred additional and more rigorous safeguards beyond those set forth in these Orders.

I am particularly pleased that the Applicants have agreed to offer a stand-alone DSL broadband product. Consumer advocates strongly supported this condition, which will substantially expand the options available to residential and small business consumers. By conditioning this merger on the offering of a stand-alone DSL broadband offering, we create an opportunity for the development of competitive Voice Over Internet Protocol (VoIP) and help spur innovative communications technologies. According to consumer advocates, many consumers will want bundled services, but when companies unilaterally mandate that broadband and phone services be purchased together, they diminish the incentive of consumers to purchase

VoIP phone service from competing providers or to rely on wireless service as their primary option. In addition, by committing to do annual reports that assess the competitiveness of the consumer broadband market, we also will have the ability to monitor whether these services are being made available to consumers at reasonable prices and under fair terms. Consumers deserve the option of choosing the combination of services that fits their needs, and encouraging greater purchasing flexibility through stand-alone DSL furthers this goal.

A stand-alone DSL offering is an important contribution to the marketplace, but I do not pretend that it is a panacea. It will not provide greater choice for those who cannot afford DSL or who do not have DSL available in their area. Especially vexing is that the stand-alone DSL offering outlined in this Order could also have been more robust. For example, we could have done more to enable consumers to purchase DSL services free from any voice service, rather than just traditional circuit-switched voice services.

Some have argued that AT&T and MCI had already made irreversible decisions to exit the entire consumer market, but it is worth noting that this exit was certainly hastened, if not precipitated, by the actions of this Commission and the courts. In a very tangible way, we reap what was sown in prior Commission decisions that consistently undercut competitors' ability to offer choice to American consumers. As many of you know, I was a frequent dissenter to those FCC decisions, which form the prologue for today's action. I predicted then that those decisions would lead to less choice for consumers. In some ways, these transactions fulfill that prophecy. So while I am pleased that we are able to take some meaningful steps in these Orders to promote the interests of consumers, this Commission must closely monitor the affordability and availability of the broadband services and the intermodal competition that we count on to fill the gaps.

I also find compelling that the Applicants have agreed to comply with the Commission's Internet Policy Statement as an enforceable condition of these mergers. Commenters have voiced concern that the horizontal and vertical integration of the Applicants' Internet backbone networks, particularly considering the two mergers together, may create an incentive and ability to discriminate against other providers in what has heretofore been a competitive market. Maintaining an open and robust Internet is absolutely critical. Just two months ago, the Commission set out in this Policy Statement a basic set of consumer expectations for broadband providers and the Internet. With this Statement, we sought to ensure that consumers are entitled to access the lawful Internet content of their choice, to run applications and use services of their choice, subject to the needs of law enforcement, and to connect their choice of legal devices that do not harm the network. While I applaud the Applicants for agreeing to comply with this statement of principles as an enforceable condition of their mergers, I must admit a deep foreboding that this commitment is only for two years. Given that it is Halloween, I hope that there are no tricks up anyone's sleeve. If any attempt to disrupt consumers' ability to unfettered access to the content of their choice occurs before or after the conditions expire, I expect the Commission will treat such a violation of the public trust and our policy with the seriousness it deserves.

The Applicants have also made notable commitments to protect against concentration in the Internet backbone market. In the face of concern over their Internet backbone practices, the

Applicants argued that there are sufficient incentives to facilitate a competitive market and that concerns about anticompetitive practices in the Internet backbone peering arrangements are ill-founded. By agreeing to publicly release their peering policies and by committing to maintain settlement-free peering with at least as many backbone providers as they peered with pre-merger, we give competitors important tools to assess and monitor the accuracy of these claims.

For American business customers, these mega-combinations may present the greatest risks. Although business users tend to have more options than residential users, the Commission concludes that there is still a high level of concentration in the enterprise market in most areas of the country today, and the record makes clear that AT&T and MCI are two of the largest sources of choice for business users and largest suppliers of wholesale special access services to competitive carriers. Indeed, the record suggests that even the mere presence of AT&T or MCI in the competitive bidding process results in lower wholesale prices. Based on these competitors' national positions and ability to apply competitive pressure to wholesale prices, I believe that a more substantial divestiture of overlapping facilities would have been appropriate with this merger. I am not convinced that the relatively minor number of facilities where the Applicants are required to lease high-capacity lines – representing far less than one percent of their commercial buildings – is sufficient by itself to remedy this significant loss of actual and potential competition. The Department of Justice's action leaves 99.9% of commercial buildings in SBC and Verizon territory wholly unprotected from the loss of competition that AT&T and MCI brought to bear.

In the absence of more thorough protections, I believe it is imperative that this Commission adopt safeguards to protect against the loss of competition. So, I am pleased that these Orders include price freezes for all four companies' current special access offerings. The Orders also include anti-discrimination provisions, which will help ensure that the combined companies do not discriminate in favor of their own affiliates or in favor of each other. I also commend the Applicants for including provisions to ensure against unreasonable grooming restrictions, which might otherwise prevent competitors from choosing the least cost option for providing service. While I would have gone further to ensure fair pricing of services to retail and wholesale customers, and done so for a longer period than thirty months, we do afford some modest protection from price hikes that could otherwise occur after the loss of such formidable competitors.

I also am pleased that the Applicants have agreed to freeze rates for the wholesale network elements used by competitors and to recalculate the impairment triggers for determining the availability of these elements. This later point was particularly critical for my support.

In approving these mergers, I rely specifically on the companies' assurances that they will fully implement the commitments they have made both in their applications and in their more recent filings. In these Orders, we state our expectation for increased competition among a broad array of intermodal and intramodal competitors. We also state our expectation for vigorous out-of-region competition by the Applicants. Unfortunately, the record on meeting past commitments on out-of-region competition is not what it could be. So, it is imperative that this Commission commit to monitor and vigorously enforce the terms of these merger orders.

The market changes approved in these Orders are historic in scope, but they are also part of a larger industry restructuring that is quickly changing the landscape for consumers of telephone, Internet and video services. The opportunities from these technologies are greater than ever, but so is the penalty for those left without options. We consider these mergers in light of these larger industry trends, but I must note that there is much analysis in these Orders that I find lacking or downright troubling. The Orders' sweeping conclusions about the lack of impact of these combinations requires us to take a lot on faith: more than consumers should expect. But given the willingness of my colleagues and the parties to compromise, we strike a reasonable balance. So, while I can agree to support the package of conditions agreed to by the Applicants and my colleagues, I can only concur to the Orders given my concern with the overall analysis in these items.

I would like to commend my colleagues for their cooperation and willingness to accommodate many of my concerns here. I also commend the staff of the Wireline Competition Bureau for their hard work on this item right down to the wire. These fine public servants have been willing to stay many late nights and weekends to move the business of the Commission forward and I thank them for their efforts.