BRIEF FOR AMICI CURIAE THE UNITED STATES
AND THE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 07-1401

MCIMETRO ACCESS TRANSMISSION SERVICES OF
VIRGINIA, INC., D/B/A VERIZON ACCESS TRANSMISSION
SERVICES OF VIRGINIA,

Plaintiff-Appellant,

v.

MARK C. CHRISTIE, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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BRIEF FOR AMICI CURIAE THE UNITED STATES
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STATEMENT OF INTEREST AND QUESTION PRESENTED

The United States and the Federal Communications Commission file this amicus curiae brief in response to the Court's request for the government's view on whether federal law preempts a merger condition imposed by the State Corporation Commission of Virginia ("Virginia Commission") on the offering of interstate special access or private line services by Appellant MCIMetro Access

Transmission Services of Virginia, Inc., d/b/a Verizon Access Transmission Services of Virginia ("Verizon Access").[1]

The Federal Communications Commission ("FCC") is the federal regulatory agency charged by Congress with the responsibility to "regulat[e] interstate" common carrier communications services, 47 U.S.C. § 151, and to ensure that the rates, terms, and conditions of such services are just and reasonable and free of any undue discrimination or preference, *id.* §§ 201(b), 202(a). In addition, the FCC must ensure that any transaction involving the transfer of lines used in interstate communications from one carrier to another complies with "public convenience and necessity." *See id.* § 214(a). The United States Department of Justice ("DOJ") also reviews proposed acquisitions or mergers for potential violations of the federal antitrust laws.

STATEMENT OF FACTS

Special access services, which are sometimes called "private line" services, provide dedicated bandwidth for a customer's usage. Because special access lines usually carry both interstate and intrastate traffic, the FCC has drawn a bright-line rule for jurisdictional purposes: Special access lines carrying both intrastate and interstate traffic are classified as interstate for rate regulation and other purposes

[1] Order, No. 07-1401 (Jan. 2, 2008); *see also* Order, No. 07-1401 (Jan. 22, 2008) (granting extension of time to file until February 19, 2008).

"if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line." 47 C.F.R. § 36.154(a). Interstate traffic that "amounts to ten percent or less of the total traffic on a special access line" is deemed de minimis, and that line is classified as intrastate for jurisdictional purposes. *MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660, 5660, para. 2 (1989) ("*Special Access 10% Order*").

The Virginia Commission approved the merger of Verizon Communications, Inc. and MCI, Inc. on October 6, 2005, with several conditions. As relevant here, the Virginia Commission required that MCI (now Verizon Access), as a condition of merging, "continue to offer to wholesale customers in Virginia its available intrastate *and interstate* special access, private line or its equivalent, and high capacity loop and transport facilities, without undue discrimination, [on] pre-merger terms and conditions and at prices that do not exceed pre-merger rates." *Joint Petition of Verizon Communications and MCI, Inc. for approval of agreement and plan of merger*, Order Granting Approval, Case No. PUC-2005-00051, at 28 (Va. St. Corp. Comm'n Oct. 6, 2005) (JA 52) (emphasis added) ("*Virginia Approval Order*"). The condition applies to both existing and future customers of MCI and will remain in effect until the Virginia Commission

determines that competition from other carriers will ensure "adequate service to the public at just and reasonable rates." *Id.* at 28–29 (JA 52–53).

The United States Department of Justice investigated the merger for possible violations of the federal antitrust laws. It filed a complaint and proposed consent decree in the United States District Court for the District of Columbia on October 27, 2005. *See* Complaint ¶¶ 26 (JA 16). The court approved the consent decree under the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h), and entered it on March 29, 2007. *See U.S. v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.C. Cir. 2007) (entry of Verizon-MCI consent decree is in the public interest). The antitrust consent decree, which required specified divestitures covering fiber optic lines (including certain lines in Virginia), did not impose any conditions or restrictions on the pricing of telecommunications services.

On November 17, 2005, the FCC issued its decision under sections 214 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 214, 310(d), permitting the transfer of lines associated with the merger. *See Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433 (2005) ("*FCC Order*") (JA 60–100). The FCC adopted as binding legal commitments several conditions that Verizon and MCI offered voluntarily, including the commitment that "[f]or a period of thirty months following the Merger Closing Date, Verizon/MCI shall not increase the rates paid

by MCI's existing customers (as of the Merger Closing Date) of the DS1 and DS3 wholesale metro private line services that MCI provides in Verizon's incumbent local telephone company service areas above their level as of the Merger Closing Date." *FCC Order*, 20 FCC Rcd at 18560 (JA 91). The FCC also stated that its conditions were not intended "to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these Conditions, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these Conditions." *Id.* at 18559 (JA 90).

After Verizon and MCI consummated the merger, Verizon Access petitioned the Virginia Commission to remove its merger condition insofar as it pertained to interstate special access services. The Virginia Commission denied the request "without prejudice." *Petition of MCIMetro Access Transmission Services of Virginia, Inc., d/b/a Verizon Access Transmission Services of Virginia for removal of certain provisions of the October 6, 2005, Order in Case No. PUC-2005-00051*, Order Denying Petition, Case No. PUC-2006-00057, at 10 (Va. St. Corp. Comm'n July 10, 2006) (JA 110).

In November 2006, Verizon Access filed a complaint in the United States District Court for the Eastern District of Virginia challenging the Virginia Commission's authority to impose a merger condition related to interstate special

access services. *See* Complaint ¶ 6 (JA 10). On March 27, 2007, the district court dismissed the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The court found that "there is no [federal] preemption of special access lines in particular or the field of telecommunications in general," D. Ct. Op. at 8 (JA 127), and rejected the argument that the state-imposed condition "conflicts with the policy judgments made by the FCC and DOJ in their respective approvals of the merger," *id.* at 10 (JA 129). Verizon Access appealed.

ARGUMENT

Verizon Access has contended that the *FCC Order* and the antitrust consent decree preempt the Virginia Commission's merger condition. Verizon Access also argues more generally that the condition is preempted by the federal Communications Act. The Virginia Commission disagrees and contends that the *FCC Order* ratified its merger condition. The government wishes to make three primary points. First, the Virginia Commission's merger condition does not conflict with and is not preempted by the *FCC Order* or the antitrust consent decree. Second, the *FCC Order* did not authorize, endorse, or ratify the Virginia Commission's condition. Third, separate from the *FCC Order*, the Communications Act of 1934, as amended, generally grants the FCC exclusive authority to regulate the rates, terms, and conditions under which interstate

communications services are sold. The Virginia Commission therefore lacks authority to regulate interstate special access services through a merger condition. In the government's view, the merger condition at issue in this case is therefore preempted.

1. Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, federal law preempts any conflicting state laws or regulatory actions that would prohibit a private party from complying with federal law or that "stand[] as an obstacle to the accomplishment and execution" of federal objectives. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (internal quotation marks omitted); *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (noting that "state laws can be pre-empted by federal regulations"). Verizon Access has argued that the *FCC Order* or the antitrust consent decree preempts the challenged merger condition. *See* Complaint ¶¶ 41–42 (JA 22–23). Contrary to Verizon's contention, however, the condition adopted by the Virginia Commission does not conflict with and is not preempted by the *FCC Order* or the antitrust consent decree.

Verizon Access cannot claim that it would be impossible to comply with both the state condition and the *FCC Order*: If Verizon Access offers its wholesale, special access services at pre-merger rates and on pre-merger terms and conditions to all comers (the state condition, JA 52), it would necessarily "not

increase the rates" paid by MCI's existing special access customer base (the federal condition, JA 91).

Verizon Access's argument that the state-merger condition contravenes the FCC's objectives also fails in light of the savings clause of Appendix G. There, the FCC made explicit its intention that the conditions in its *Order* not "restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these Conditions, or . . . limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these Conditions." *FCC Order*, 20 FCC Rcd at 18559 (JA 90). In other words, the savings clause clarifies that the FCC's special access condition (like the others in the *FCC Order*) was intended to be a minimum safeguard of competition. It was not the product of a fine-tuned balancing of the benefits and burdens of regulation that would foreclose state action on the same subject. *Cf. Hillsborough County*, 471 U.S. at 721 (finding no preemption when agency regulations set "minimum safety standards" rather than "a particular balance between safety and quantity"). Because the Virginia Commission's condition is "not inconsistent" with the private line condition in the *FCC Order*, the *FCC Order* does not preempt it.

There is likewise no basis for the claim that the Virginia Commission's condition conflicts with the antitrust consent decree. Complaint ¶¶ 41–43 (JA 22–

23). The decree does not regulate the prices, terms, and conditions of any telecommunications services, and the *Virginia Approval Order* has no effect on the divestitures required by the decree, which have already been consummated.

2. The Virginia Commission and the district court go too far, however, in asserting that the savings clause in Appendix G granted general authority to the States to impose regulations on interstate special access services. *See* D. Ct. Op. at 11 (JA 130) (asserting that the FCC intended the States to have authority "over matters which are not reserved to the [S]tates by the Act, but which do appear in the Conditions"); Va. Comm'n Br. at 20 (claiming that the savings clause "envisions (in the FCC's view) a dual federal-state regulatory regime over the matters addressed in the FCC conditions"). The text of the savings clause makes clear that the federal conditions do not "*alter* state or local jurisdiction . . . or . . . limit state authority." *FCC Order*, 20 FCC Rcd at 18559 (JA 90) (emphasis added). In other words, the FCC left undisturbed whatever authority state commissions had before the *FCC Order*. There is simply no textual support for the notion that this savings clause confers additional authority on the States or ratifies merger conditions that States did not have jurisdiction to impose otherwise. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (holding that a savings clause stating that the Telecommunications Act of 1996 does not "modify, impair, or supersede" the antitrust laws "does not create

new claims that go beyond existing antitrust standards"); *see also United States v. Locke*, 529 U.S. 89, 106 (2000) (refusing to read a savings clause to "upset the careful regulatory scheme established by federal law").

The FCC repeatedly has used savings clauses such as this to make clear that its orders do not disturb existing state authority,[2] and no court or state commission has previously construed these savings clauses to impart new authority to the States. Contrary to the Virginia Commission's claim that Appendix G's savings clause has "no other plausible meaning" than to grant the State authority it otherwise does not possess, Va. Comm'n Br. at 20, the clause's most plausible meaning is that it leaves state authority unchanged.[3]

The district court's reliance on the FCC's "continuing silence" is similarly misplaced. D. Ct. Op. at 12 (JA 131). The court found it significant that a representative of XO Communications discussed the Virginia Commission's

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[2] *See, e.g.*, *AT&T Inc. and BellSouth Corp. Application*, 22 FCC Rcd 5662, 5807 (2007); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee*, 14 FCC Rcd 14032, 14262 (2000); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, 14 FCC Rcd 14712, 14968 (1999) (subsequent history omitted).

[3] In any event, the Virginia Commission could not have relied on Appendix G to the *FCC Order* because the State adopted its merger condition 25 days before the FCC issued its decision. Rather, the Virginia Commision asserted that it "is not . . . prohibited from conditioning Transfers Act approval on matters related to federal authority," citing cases in which it had conditioned approval on the merging parties' receiving federal approvals. *Virginia Approval Order* at 29 (JA 53).

merger condition with legal advisers to two FCC Commissioners shortly before the FCC voted to approve the transfers. *See id.* (citing Letter from Thomas Cohen, Kelley Drye & Warren LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-65, 05-75 (filed Oct. 7, 2005) (JA 118–19)). From that isolated communication, the District Court surmised — and the Virginia Commission contends in this Court, *see* Va. Comm'n Br. at 25, 28 — that "if the FCC had any concerns about the substance of the [Virginia Commission's] condition, it would have made them known," D. Ct. Op. at 12 (JA 131). That view misapprehends the law as well as the reality of agency decision-making. As a practical matter, the FCC cannot necessarily respond to every piece of information put into the administrative record, and there is no legal or logical basis for treating its failure to do so as an implicit statement of its views on the merits. Furthermore, the district court's assumption that the FCC had "actual knowledge" of the state-imposed condition is irrelevant: whether particular state-imposed conditions might be preempted by federal law was not an issue in the federal proceeding, which focused on the transfer of control and on the federally-imposed conditions that served the public interest. The fact that the FCC did not go out of its way to mention an issue not before it is unsurprising and establishes nothing as to its opinion on the matter. Similarly, no conclusions should be drawn from the FCC's "continuing silence in the wake of this litigation." D. Ct. Op. at 12

(JA 131). Like other federal agencies, the FCC has limited resources to expend on litigation and cannot be said to approve of a particular judicial result merely because it chooses to focus those resources on cases in which it is a party.

3. Because the *FCC Order* neither limited nor expanded state jurisdiction, the general rule that the FCC has exclusive jurisdiction over interstate communications services applies. *See, e.g.*, 47 U.S.C. § 151 (creating the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio"); *id.* § 201(b) (requiring all charges for interstate and foreign common carrier communications services to be "just and reasonable"); *id.* § 203(a) (requiring carriers to file tariffs specifying those charges with the FCC); *Vonage Holdings Corp.*, 19 FCC Rcd 22404, 22412, para. 16 (2004) (stating that the FCC has "exclusive jurisdiction over 'all interstate and foreign communication'"); *Mobile Telecommunications Technologies Corp.*, 6 FCC Rcd 1938, 1941 n.6 (1991) ("Under the Communications Act, [S]tates may not engage in tariff regulation of interstate services. The Act grants this Commission exclusive authority to regulate the charges and services of interstate common carriers.").[4]

[4] *See also, e.g., Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1516–17 (2007) (noting that Title II of the Communications Act of 1934 sets up a "traditional regulatory system" in which the FCC "would determine a rate's reasonableness"); *Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) ("The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates."); *NARUC v. FCC*, 746

And although special access lines often carry both interstate and intrastate traffic, the FCC has classified as jurisdictionally interstate all special access lines whose traffic is more than ten percent interstate. *See* 47 C.F.R. § 36.154(a); *Special Access 10% Order*, 4 FCC Rcd at 5660, para. 2.[5]

The enactment of the Telecommunications Act of 1996 did not change the statutory allocation of jurisdiction in any way relevant to this case. The district court's suggestion that the 1996 Act and the Commission's *Local Competition Order* opened up the entire field of telecommunications to joint federal and state regulation, *see* D. Ct. Op. at 8 (JA 127), is incorrect. Although the 1996 Act altered the traditional dual regulatory system and "expand[ed] the applicability of . . . state rules to historically interstate issues," *Local Competition Order*, 11

F.2d 1492, 1498 (D.C. Cir. 1984) ("Interstate communications are totally entrusted to the FCC . . . ."); *AT&T and the Associated Bell System Cos. Interconnection With Specialized Carriers*, 56 FCC.2d 14, 20, para. 21 (1975) ("[T]he States do not have jurisdiction over interstate communications . . . ."), *aff'd*, *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977) (per curiam).

[5] The district court's reliance on *Qwest Corp. v. Scott*, 380 F.3d 367 (8th Cir. 2004), to resolve this issue is misplaced. In *Scott*, the Eighth Circuit confronted the narrow issue of whether the FCC's holding in the *Special Access 10% Order* prohibited a State from requesting performance reports for traffic over special access lines. It did not, however, address the issue here: the general scope of state authority under the Communications Act to regulate the rates, terms, and conditions of interstate special access services. *See* 380 F.3d at 374 ("[W]hen the *10% Order* is read as a whole, the Commission's expressed intent to preempt state regulation does not extend to performance measurements and standards."). Neither the FCC nor the United States was a party to that litigation.

FCC Rcd 15499, 15544, para. 83 (1997), it did so only to a limited extent. States in carefully defined circumstances now have limited authority over certain interstate matters involving interconnection agreements arising "pursuant to section 252." *Id.* at 15544, para. 84; *see* 47 U.S.C. § 252; *see generally Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 491–93 (2002) (outlining the interplay of sections 251 and 252); *MCIMetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc*., 352 F.3d 872, 874–76 (4th Cir. 2003) (same). Here, however, the Virginia Commission neither acted pursuant to such procedures nor claims any authority under section 252. Thus, that provision is of no moment here.

The Virginia Commission therefore had no jurisdiction to regulate Verizon Access's interstate special access services. That it attempted to do so as part of a merger approval does not change the analysis. A state regulator cannot leverage its authority in one field to regulate another field entrusted to federal oversight alone. *See, e.g.*, *Sperry v. Florida*, 373 U.S. 379, 385 (1963) ("A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give the State's licensing board a virtual power of review over [activities sanctioned by federal authorities]." (footnote and internal quotation marks omitted)); *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 323–25 (2d Cir. 2000). Because the Virginia Commission's condition undeniably seeks to

regulate Verizon Access's offering of interstate special access services, federal law preempts it.

CONCLUSION

Federal law preempts the Virginia Commission's condition insofar as that condition applies to the rates, terms, and conditions on which Verizon Access offers interstate special access services.[6]

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[6] The United States and the FCC take no position on any issue before this Court that is not addressed in this brief.