Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application for Consent to Transfer of Control	)	WC Docket No. 05-75
filed by Verizon Communications, Inc. and	)	
MCI Inc.	)	

COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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I. SUMMARY

Verizon Communications Inc. ("Verizon") and MCI Inc. ("MCI") seek approval from the Federal Communications Commission ("Commission") of Verizon's takeover of MCI and its subsidiaries. The National Association of State Utility Consumer Advocates ("NASUCA")[1] submits that this merger, as currently structured, does not serve the public interest, convenience and necessity, as required by the governing statutes and this Commission's rules.[2] In that

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[1]NASUCA is a voluntary association of 43 advocate offices in 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

[2] NASUCA recently filed comments on the proposed merger of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T"). See *In the Matter of AT&T Corp. and SBC Communications Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of AT&T Corp. to SBC Communications Inc.*, WC Docket No. 05-65, Comments of the National Association of State Utility Consumer Advocates (April 25, 2005) ("NASUCA SBC/AT&T Comments"). As noted in the NASUCA SBC/AT&T Comments (at 5, 7, 18), the Commission should examine the proposed mergers in tandem. That is, the Commission cannot ignore the Verizon/MCI merger when examining the SBC/AT&T merger, and cannot ignore the SBC/AT&T merger when examining the Verizon/MCI merger. These comments on

respect, the Verizon/MCI merger is substantially the same as the SBC/AT&T merger. As with the SBC/AT&T merger and other mergers previously considered by this Commission, the proposed merger will not serve the public interest, convenience and necessity unless definitive and enforceable conditions are adopted that will promote competition in the local, broadband and long distance markets for residential and small business consumers; protect residential and small business customers from negative impacts of the merger, such as declines in Verizon's or MCI's service quality; and provide additional benefits to residential and small business customers. The Verizon/MCI merger, like the SBC/AT&T merger, is both qualitatively and quantitatively different -- more likely prejudicial to consumers -- from the mergers of regional Bell Operating Companies ("RBOCs") considered in years past by the Commission. The conditions in this merger, therefore, must be more substantial and more effectively enforceable than the conditions previously adopted.

This merger would join MCI, the Nation's second largest long distance carrier, which is also a large competitive local exchange carrier ("CLEC"), with Verizon, one of the largest long distance carriers, which is also the nation's largest incumbent local exchange carrier ("ILEC"). The merger would also join two of the largest providers of broadband service in the nation, as well as join two competitors that provide Voice over Internet Protocol ("VoIP") service.

This merger, like the SBC/AT&T merger, follows the last major round of mergers that recombined RBOCs, so that now, instead of seven RBOCs, there remain only four. The combination of Verizon and MCI together with the SBC/AT&T merger would, unfortunately, go a long way to reestablishing dominant carriers in the local and long distance markets that will

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Verizon/MCI incorporate much of the substance of NASUCA's SBC/AT&T comments. This shows that the two mergers have much in common in terms of risk to the public interest.

reverse the trend away from a single national carrier like AT&T prior to the divestiture of the RBOCs.

The proposal for this merger occurs after a series of decisions by the United States Court of Appeals for the District of Columbia Circuit and this Commission that had a devastating impact on the competition that was just beginning to develop for local wireline service for residential and small business customers. This merger would create a situation that would make the further development of wireline competition for residential and small business customers even less likely, even if those judicial and regulatory decisions are reversed.

Thus residential and small business consumers would be relegated to the possibility of so-called "intermodal" opportunities, involving services that are not really substitutes for wireline local and long distance service. Even this "competition" from wireless and broadband service would be unreasonably limited, however, because of the dominance of the merged firm in the "intermodal" wireless and broadband industries.

In its totality, this merger -- as currently structured -- fails to pass the public interest test. The concerns raised by this merger are substantially heightened, however, by the SBC/AT&T merger currently under consideration. Taken together, the two mergers would result in the elimination of competition far greater than for each merger taken individually. In assessing both mergers, the Commission must consider the interrelationship and cumulative effect of the mergers, rather than looking at them in isolation.

NASUCA's comments consist of the following parts:

1) A recitation of the law applicable here.

2) A description of the current competitive landscape. This description and the remainder of the comments, like NASUCA's SBC/AT&T comments, are

greatly aided by the attached white paper, "Confronting Telecom Industry Consolidation: A Regulatory Agenda for Dealing with the Implosion of Competition" ("*Confronting Consolidation*"), prepared for NASUCA by the consulting firm Economics and Technology Inc. ("ETI"). The description here also challenges the description of the competitive landscape included in the application by Verizon and MCI.

3) A description of the competitive harms that can reasonably be expected to result from the proposed merger, including local, long distance and broadband markets and addressing both intramodal and intermodal opportunities. This responds to the Verizon/MCI claims of limited, or indeed, beneficial impacts.

4) A discussion and rebuttal of the public interest benefits claimed by Verizon and MCI for their merger.

5) A presentation of a wide range of efficiently-enforceable conditions that would be needed in order to bring this merger within the public interest. The list presented here is not intended to be all-inclusive; NASUCA may add to the list based on other submissions in this record. As noted above, this merger is more serious from the consumer perspective than those previously authorized by this Commission that were approved subject to numerous conditions; hence the conditions proposed here are broader in scope than those previously ordered.

6) A conclusion.

There are also three attachments to the comments. Attachment A is the ETI White Paper, *Confronting Consolidation*. Attachment B is a list of pertinent news articles. Attachment C is the list of conditions that the Commission placed on the SBC/Ameritech and Bell Atlantic/GTE

mergers in order for those mergers to be found to be in the public interest.

II. INTRODUCTION

These comments are filed in response to the Commission's Public Notice released March 24, 2005.[3] NASUCA's comments are submitted in the context of the Commission's previous major round of merger approvals, which provide much guidance on how this merger -- and the merger of SBC with AT&T -- should be treated.[4] Yet as a result of a concatenation of events -- many of them Commission-initiated[5] -- the competitive environment that was anticipated and nourished in the SBC/Ameritech[6] and Bell Atlantic/GTE[7] mergers has been choked almost out of existence. This has occurred at a time when Verizon's operating companies have been deregulated -- either through state legislative or regulatory action -- based on the presumption of a level of competition that was never really reached, and is unlikely to be reached in the future absent major action by the Commission.

In the last major round of mergers, the Commission reviewed the mergers in detail,

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[3] DA 05-762.

[4] See *In re Applications of Ameritech Corp. and SBC Communications Inc., for Consent to Transfer Control*, CC Docket No. 98-141, Memorandum Opinion and Order ("*SBC/Ameritech Order*"); *In re Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control*, CC Docket No. 98-184, Memorandum Opinion and Order ("*BA/GTE Order*").

[5] *In the Matter of Unbundled Access to Network Elements,* WC Docket No. 04-313, *Review of the Section 271 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Report and Order and Order on Remand, FCC 03-36 (rel. August 20, 2003) ("*Triennial Review Order*"), rev'd *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"); *id*., Order on Remand, FCC 04-290 (rel. February 4, 2005) ("*Triennial Review Remand Order*"); *In the Matter of Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed Rulemaking, FCC 03-224 (rel. September 15, 2003).

[6] *SBC/Ameritech Order*, ¶¶ 148-166.

[7] *BA/GTE Order*, ¶¶ 260-323.

finally approving the mergers after two rounds of comments, negotiation among some stakeholders, and major concessions by the applicants. The importance of the Verizon/MCI merger is even greater. And this merger deserves even greater scrutiny because Verizon and MCI customers -- like SBC and AT&T customers -- deserve more than the unfulfilled promises arising from the SBC/Ameritech and Bell Atlantic/GTE mergers.

III. THE LAW PLACES THE BURDEN ON VERIZON AND MCI TO DEMONSTRATE THAT THEIR MERGER WILL SERVE THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

The Commission's task in reviewing the proposed merger is, pursuant to 47 U.S.C § 214(a), to "determine whether the Applicants have demonstrated that the public interest would be served" thereby.[8] The Commission is to "weigh the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that the Applicants have shown that, on balance, the merger serves the public interest, convenience and necessity."[9] As the Commission affirmed in the *SBC/Ameritech Order*, "The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest."[10] NASUCA submits that, as filed, the Verizon/MCI petition does not meet

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[8] *SBC/Ameritech Order*, ¶ 46.

[9] *Id*. (citation omitted).

[10] *Id*., ¶ 48, citing *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd at 3160, 3169-70, ¶ 15 (1999) (*AT&T/TCI Order*). *See also WorldCom/MCI Order*, 13 FCC Rcd at 18031, ¶ 10 n.33, citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant); *American Telephone and Telegraph Co. and MCI Communications Corporation Petitions for the Waiver of the International Settlements Policy*, File No. USP-89-(N)-086, Memorandum Opinion and Order, 5 FCC Rcd 4618, 4621, ¶ 19 (1990) (applicant seeking a waiver of an existing rate bears the burden of proof to establish that the public interest would be better served by the grant rather than the denial of the waiver request); *LeFlore Broadcasting Co., Inc.*, Docket No. 20026, Initial Decision, 66 FCC 2d 734, 736-37, ¶¶ 2-3 (1975) (on the ultimate issue of whether the applicants have the requisite qualifications and whether a grant of the application would serve

this burden. Specifically, this merger, as presently structured, is not in the public interest.

IV. THE CURRENT COMPETITIVE LANDSCAPE IS BLEAK.

Confronting Consolidation conclusively shows that the current competitive landscape is such that the competitive promise of the 1996 Act, which was designed to "secure lower prices and higher quality services" for American consumers,[11] -- has largely been stifled.[12] Six years ago, in the *SBC/Ameritech Order* and the *BA/GTE Order*, the Commission adopted conditions that recognized that competition had yet to develop. In the *SBC/Ameritech Order*, the Commission stated:

> All evidence suggests that competition has been slow to emerge in the territories of these Baby Bells and that not all geographic areas, and not all types of customers, are receiving the benefits of competition. Furthermore, this merger application comes at a critical juncture when competitive LECs may shortly be able to take advantage of more favorable market conditions resulting from: (1) recent court decisions; (2) final prices for interconnection, UNEs and resale that have been determined in state cost proceedings; and (3) extensive section 271 collaborative processes supervised by state commissions.[13]

The Commission's citation to favorable court decisions was to *Iowa Utils. Bd*., which upheld the Commission's rulemaking authority to carry out local competition provisions of the Telecommunications Act of 1996, and upheld the "pick and choose" rule, but remanded the Commission's interpretation of the "necessary and impair" standard of the 1996 Act in its network element unbundling rules.[14]

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the public interest, as on all issues, the burden of proof is on the licensees).

[11] P.L. 104-104, Preamble.

[12] *Confronting Consolidation*, Chapter 2.

[13] *SBC/Ameritech Order*, ¶ 29 (footnotes omitted).

[14] *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366 (1999) ("*Iowa Utils. Bd*.").

Since that time, of course, the D.C. Circuit Court of Appeals, under its interpretation of the Act, has made unbundling the exception rather than the rule.[15] Removal of the unbundling requirements of 47 U.S.C. 251(c)(2) means that **if** CLECs have access to the ILECs' networks, it will be at "market-based" prices. And, as shown in *Confronting Consolidation*, the "market" in question is the ILECs' bottleneck.[16] For the few UNEs that remain at cost-based total long run incremental cost ("TELRIC") rates, the Commission's pricing pronouncements have resulted in substantial price increases.[17] The value of the "section 271 collaborative processes supervised by state commissions" is severely constrained by these other environmental factors. And the Commission itself has eliminated the "pick and choose" rule.[18] Thus the current market conditions -- caused by these regulatory and judicial decisions -- are not exactly conducive to competition.

In the *SBC/Ameritech Order*, the Commission noted that a key SBC response to the competitive urging of the Act was merging with other RBOCs.[19] Verizon and MCI both have spent much energy and money on mergers as well. Verizon has now moved beyond taking over other RBOCs and ILECs, who were *potential* competitors; with this merger, Verizon is eliminating the *current* competition. Further, as noted at length in *Confronting Consolidation*, Verizon -- like SBC and the other RBOCs -- has engaged in a running battle to limit competitors'

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[15] *USTA II*; *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

[16] *Confronting Consolidation* at 17-23.

[17] *Triennial Review Order*, ¶¶ 668-691; *In the Matter of Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed Rulemaking, FCC 03-224 (rel. September 15, 2003).

[18] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, FCC 04-164 (rel. July 13, 2004).

[19] *SBC/Ameritech Order*, ¶ 26.

access to its networks.

The Joint Applicants assert here that their merger will not reduce competition because providers of wireless, cable and Internet Protocol-based services, including VoIP, are competitors to the merged company.[20] **This "intermodal" competition is largely a myth**. As detailed by *Confronting Consolidation*, the notion of intermodal competition has been used by RBOCs primarily to expand the view of the relevant competitive telephone market in order to claim lower market shares so that their mergers will seem less detrimental to competition.[21] The intermodal "competitors" cited by the Applicants do not compete ubiquitously throughout Verizon's service territory or for certain customer segments, and their services are mostly complements to Verizon's services.[22]

For example, there is no "intermodal" competition for residential basic local exchange service, i.e., dial tone service that does not include features or other services. Wireless, cable and IP-based service providers tend to offer bundled services exclusively.[23] The Joint Applicants acknowledge this focus on packages.[24] Only Verizon offers standalone residential basic local exchange service ubiquitously -- or at all -- in its service territory.

In addition, cable, wireless and VoIP have limitations that make these services less than

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[20] Application, Public Interest Statement ("PI Statement") at 19, 34-46.

[21] *Confronting Consolidation* at 24-25.

[22] *Id*. at 36.

[23] See, e.g., Verizon Wireless (http://www.verizonwireless.com/b2c/store/controller?item=planFirst&action=viewPlanDetail&sortOption=priceSort&catId=323&cm_re=Home%20Page-_-Personal%20Box-_-Individual%20Plans) ; Time Warner (http://www.timewarnercable.com/corporate/products/digitalphone/unlimitedcallingdigitalphone.html); Vonage (http://www.vonage.com/products.php).

[24] PI Statement at 45.

adequate substitutes for Verizon and MCI local service. For example, consumers cannot subscribe to telephone service over cable unless they reside in the cable provider's franchise territory. Although the cable company may provide broadband service throughout its "footprint"[25] there is considerable distance between individual footprints. The franchise territories of a particular cable company are often not contiguous and generally do not coincide with Verizon's telephone service territories. Thus, some Verizon customers might have competition available through their local cable system, while others might not. In addition, because the type, price and quality of service may vary from cable company to cable company, the nature of competition may vary from franchise area to franchise area.

Wireless service is more widespread than cable yet there are still plenty of blank spots on the coverage maps.[26] Further, the cost of using wireless service for some purposes is often greater than the cost of wireline service, due to higher base costs, and roaming and overage charges that may accrue. In addition, wireless is not a substitute for certain data transmission purposes, such as alarm systems.

VoIP service is also not a suitable substitute for wireline in many instances, largely because of the requirement to have a broadband connection. Few VoIP providers offer reliable E-911 service, and many VoIP providers encourage customers to maintain a landline phone for E-911 purposes.

Further, much of the intermodal "competition" cited by the Applicants involves other

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[25] *Id*. at 2.

[26] See, e.g., http://www.verizonwireless.com/b2c/CoverageLocatorController?requesttype=ZOOM%20LEVEL%20STATE; http://onlinestore1.cingular.com/html/Maps/nation_GSM_map.htm.

portions of their own companies. As noted in *Confronting Consolidation*, a large portion of Verizon's "lost" residential access lines have gone to other Verizon companies, whether wireless or DSL.[27]

V. THE IMPACT OF THE MERGER ON THE COMPETITIVE LANDSCAPE WILL BE SUBSTANTIAL HARM TO THE PUBLIC INTEREST.

Verizon and MCI would have it that the absorption of the Number Three carrier by the Number One carrier in Verizon territory will not "adversely affect" competition in any market.[28] Part of that theory is that Verizon and MCI are merely two among a large number of significant market participants.[29] The Joint Applicants' claim for the mass market (residential and small business),[30] is that the two companies are not actually competitors, but rather that some segments of their product lines are merely complementary.[31] Even if that were true, it is safe to say that in the majority of their operations, Verizon and MCI are current competitors.

Verizon and MCI -- like SBC and AT&T -- attempt to minimize the impact of their merger by arguing that the takeover target is no longer in the residential service market.[32] MCI's residential service is said to be in an "irreversible decline."[33] Yet MCI continues to serve hundreds of thousands of residential local service customers across the country.

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[27] PI Statement at 25, 28, 32-33.

[28] *Id*. at 18.

[29] *Id*. at 19.

[30] *Id*. at 34-46.

[31] *Id*. at 6.

[32] *Id*. at 4; see SBC/AT&T Application at 7.

[33] PI Statement at 4. The SBC/AT&T Application described the decision of AT&T to exit the residential market as "irreversible." SBC/AT&T Application. at 7.

Whatever the level of the current Verizon/MCI competition, wherever it is and however structured, that competition will disappear in the merger. The application touts the efficiency of the combined firm.[34] This amounts to nothing more than a "bigger is better" argument, that cannot, on its own, meet the public interest test.

In the *SBC/Ameritech Order*, the Commission found that the merger "significantly decreases the **potential** for competition in local telecommunications markets by large incumbent LECs."[35] The Commission noted that with SBC and Ameritech "[b]oth firms have the capabilities and incentives to be considered most significant market participants in geographic areas adjacent to their own regions, and in out-of-region markets in which they have a cellular presence."[36] With Verizon and MCI, clearly both firms have the capabilities and incentives to be considered most significant market participants in geographic areas within the Verizon region.

As discussed in *Confronting Consolidation*, the combination of Verizon and MCI would be anti-competitive.[37] In the *SBC/Ameritech Order*, the Commission found that

> the proposed merger also would increase the incentives and ability of the larger merged entity to discriminate against rivals in retail markets where the new SBC will be the dominant incumbent LEC. The merger will lead the merged entity to raise entry barriers that will adversely affect the ability of rivals to compete in the provision of retail advanced services, interexchange services, local exchange and exchange access services, thereby reducing competition and increasing prices for consumers of those services.[38]

Virtually the same incentives and similar abilities will be seen with the larger merged entity of

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[34] PI Statement at 14.

[35] *SBC/Ameritech Order*, ¶ 56 (emphasis added).

[36] *Id*.

[37] *Confronting Consolidation* at 23, 40-42, 42-44.

[38] *SBC/Ameritech Order*, ¶ 60.

Verizon and MCI.

In the *SBC/Ameritech Order*, the Commission also stated:

> We conclude that the merger causes a public interest harm by eliminating SBC and Ameritech as among the most significant potential participants in the mass market for local exchange and exchange access services in each other's regions.[39]

If Verizon and MCI merge, one of them will be eliminated as among the most significant participants in the mass market in the country.[40] As the Commission also stated in the *SBC/Ameritech Order*:

> The Act's goal was to introduce competition in these markets to the ultimate benefit of customers, both as entrants attempted to win consumers' business with lower prices and improved services, and as incumbents were forced in turn to respond to the entrants or lose customers. **The realization of this goal is jeopardized if the incumbent and one of the most significant competitors in its region choose to merge instead of compete.**[41]

In the *SBC/Ameritech Order*, the Commission found that the merger, as initially proposed, would seriously weaken oversight of the applicants' behavior toward competitors.[42] The Commission also found that the merger would "increase predation while weakening our ability to combat it."[43] The Commission found that, specifically, "incumbent LECs, such as SBC and Ameritech, have the incentive and ability to discriminate against competitors in the provision of advanced services, interexchange services, and circuit-switched local exchange services" and

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[39] *Id*., ¶ 66; see also *id*., ¶¶ 71, 99.

[40] It seems unlikely that after the merger, whatever remains of MCI will be allowed to continue competing for residential customers outside Verizon territory.

[41] *Id*., ¶ 92 (emphasis added). The Commission found this to be true even for the potential competition between Bell Atlantic and GTE; the concern should be heightened with the actual competition between Verizon and MCI.

[42] *Id*., ¶ 57.

[43] *Id*., ¶ 186.

that "such incentive and ability will increase as a result of the merger."[44]

The merger between Verizon and MCI will also increase the merged entity's incentive and ability to discriminate. It will "result in a public interest harm, because it will adversely affect national competitors' provision of services … and, as a further result, will harm consumers who ultimately will be forced to pay more for retail services, with reduced quality and choice."[45]

In the *SBC/Ameritech Order*, the Commission found that the increased ability to discriminate would harm residential and small business customers disproportionately: "We believe that this increased discrimination particularly will be aimed at, and harmful to, competitive providers of local exchange services to mass market customers (smaller businesses and residential customers)."[46] It is not reasonable to believe that the merger of Verizon and MCI will have any different result.

The Commission noted an important public interest detriment to the merger between SBC and Ameritech: the loss of diversity in positions. Specifically, the Commission said that "[t]he loss of Ameritech's independence would be especially severe because Ameritech frequently has taken an approach that differs from the position taken collectively by the other RBOCs."[47] Although not quite as active as AT&T, MCI has been a continual source of contrary views to Verizon and the other RBOCs.[48] Also extremely important has been the presence of MCI along with AT&T as a "policy competitor" to Verizon and the RBOCs. Both on the national level and

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[44] *Id*.

[45] *Id*., ¶ 186; see also *id*., ¶¶ 190, 193.

[46] *Id*, ¶ 236.

[47] *Id*., ¶ 149.

[48] See also *id*., ¶¶ 57-59.

in the states, MCI had been one of the few with the resources to stand in opposition to Verizon. Now Verizon is "buying out" its main competitor in the economic marketplace as well as in the political and regulatory arenas.[49]

As discussed above, in the *SBC/Ameritech Order*, the Commission viewed the merger in the context of the contemporaneous competitive landscape. The Commission stated,

> [A]s the 1996 Act is being implemented and local markets are opening to competition, it is necessary to use an analysis of competitive effects that accounts for the transitional nature of these local markets. This "transitional market" analysis is relevant to the examination of a merger under the Communications Act because the Act requires this Commission actively to promote the development of competition in telecommunications markets, not merely to prevent the lessening of competition, which is the policy objective of antitrust laws.[50]

The merger of Verizon and MCI must also be addressed in the context of the current competitive environment. We are again in a "transitional market"; this time, unfortunately, it is the transition from a market that was beginning to show widespread competition to a market where wireline competition is dying, at least for residential and small business customers. The presence of complementary intermodal services[51] does not make this merger any less market-constraining.

Given the foregoing, it is vitally important that these actual competitors provide more information on their operations to the Commission in order that the impact of their merger on competition can be accurately assessed. So far, the applicants have presented only generalities.[52]

In order to accurately assess the application, Verizon and MCI should provide the

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[49] "MCI and AT&T Leave Little Guys Behind", Washington Post, March 3, 2005, at http://www.washingtonpost.com/wp-dyn/articles/A2825-2005Mar2.html (accessed on April 19, 2005).

[50] *SBC/Ameritech Order*, ¶ 63 (footnote omitted).

[51] *Confronting Consolidation*, Chapter 4; see also Section V, *supra*, at 8-10.

[52] See, e.g., PI Statement at 19, 36, 41, 44.

Commission substantive data on their competitive positions -- at least on a state by state basis, if not wire center by wire center -- for local service, long distance service and broadband.

Further, as previously mentioned, the Commission cannot address this merger in isolation. **The horizontal and vertical implications of this merger must be examined in the context of the proposed SBC/AT&T merger**.[53]

VI. THE BENEFITS THAT VERIZON AND MCI ASSERT THE MERGER WILL PRODUCE ARE NOT MERGER-SPECIFIC, NOT LIKELY AND NOT CREDIBLE.

In the *SBC/Ameritech Order*, the Commission examined whether the benefits of the merger outweighed the harms.[54] The first concern was "whether the merged entity is likely to pursue business strategies resulting in demonstrable and verifiable benefits to consumers that could not be pursued but for the merger."[55] The Commission also held that "[p]ublic interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger, are sufficiently likely and verifiable, and are not deemed the result of anti-competitive reductions in output or increases in price."[56]

The Commission also held in the *SBC/Ameritech Order* that "merger-specific benefits may also include beneficial conditions either proffered by the Applicants, by other parties, or

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[53] The Sprint/Nextel merger and the accompanying spin-off of Sprint's local operations are also factors to be considered.

[54] *SBC/Ameritech Order*, ¶ 257.

[55] *Id*., ¶ 255.

[56] *Id*., citing *1992 Horizontal Merger Guidelines* at 30.

imposed by the Commission."[57] **The Applicants here have proposed no conditions that add "redeeming public interest benefits."**[58]

The "benefits" claimed by the Applicants include nothing more than generalities about the "combination of Verizon's and MCI's complementary assets and expertise,"[59] and "enhanced investment and innovation."[60] Verizon and MCI assert that

> this transaction will have no … adverse effects on competition. Any concerns about lost competition are insubstantial both by themselves, and weighed against the pro-competitive benefits of the transaction.[61]

As shown in Section VI. above, the merger will have substantial adverse effects on competition. And the "pro-competitive benefits of the transaction" are illusory. It should be clear that most of the benefits posited by the Joint Applicants come as a result of the merged company's increased dominance of markets.

It should be clear that "benefits" such as the consolidation of networks[62] come directly from the merger of competitors. These "efficiencies" would be maximized, of course, if all networks in the Nation were combined in a single firm. The combination of functions would, as discussed above, give the combined firm far more incentive and opportunity to take advantage of their resulting increased market dominance.

Finally, the Application touts the benefits from merger-related savings. Those savings

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[57] *Id*., ¶ 255.

[58] *Id.*

[59] PI Statement at 10. These benefits are pretty much the same as those claimed by SBC/AT&T. See SBC/AT&T Application at ii.

[60] PI Statement at 15; see SBC/AT&T Application at iv.

[61] PI statement at 18; see SBC/AT&T Application at v.

[62] PI Statement at 3, 10-11; see SBC/AT&T Application at 39-43.

are alleged, in total, to have a net present value of $7 billion.[63] That may seem like a lot of money. However, put into perspective against Verizon's 2004 revenues of $71.3 billion[64] and MCI's 2004 revenues of $20.7 billion,[65] the *total* of future savings represent only 7.6% of 2004 revenues.

It should also be pointed out that there is little evidence that consumers actually benefited from the savings from the Bell Atlantic/GTE merger, despite Verizon's claimed "flawless track record in achieving these efficiencies in prior acquisitions."[66] This was, of course, in the context of the lack of a condition that required such sharing.

VII. THE PUBLIC INTEREST HARMS THAT WOULD RESULT FROM THIS MERGER ARE SO SUBSTANTIAL THAT A MULTITUDE OF CONDITIONS WOULD BE REQUIRED TO MAKE IT IN THE PUBLIC INTEREST.

A. The context of commitments

When reviewing the SBC/Ameritech merger, the Commission engaged in a careful deliberative process. The Commission took an initial round of comments.[67] The Commission held a series of three public forums.[68] Staff requested specific information from the applicants.[69]

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[63] PI Statement at 15.

[64] See http://investor.vzmultimedia.com/financial/annual/2004/feature01.html .

[65] See http://library.corporate-ir.net/library/17/176/176011/items/146000/2004_10k.pdf .

[66] PI Statement at 14.

[67] *SBC/Ameritech Order*, ¶ 39.

[68] *Id*.

[69] *Id*., ¶ 41.

The Commission's chairman communicated serious concerns to the applicants.[70] The applicants met with Commission Staff.[71] Another public forum was held.[72]

Then SBC and Ameritech supplemented their application with "an integrated package of conditions."[73] The Commission requested public comment on the conditions.[74] The applicants further clarified their commitments.[75]

Given the potential harms and speculative benefits of that merger, only after all that -- including the iterations of the numerous commitments -- was the Commission able to approve the SBC/Ameritech merger and the Bell Atlantic/GTE merger.[76] A listing of the conditions ordered in SBC/Ameritech and in Bell Atlantic/GTE is found in Attachment C.

The proposed Verizon/MCI merger at issue here has greater potential for harm, and fewer real benefits. Therefore, in order to make this merger in the public interest, the Commission must adopt more numerous and more enforceable conditions.

B. Federal conditions should be a floor, not a ceiling.

In the *SBC/Ameritech Order*, the Commission adopted a condition that allowed states to impose their own conditions on the merger.[77] Such state-imposed conditions, based on the

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[70] *Id*., ¶ 42.

[71] *Id*., ¶ 43.

[72] *Id*., ¶ 44.

[73] *Id*., ¶ 45.

[74] *Id*.

[75] *Id*.

[76] *Id*., ¶ 2. The process in Bell Atlantic/GTE was similar. *BA/GTE Order*, ¶ 17-19.

[77] SBC/Ameritech Condition XXX, BA/GTE Condition XXV (see Attachment C); see, e.g., *SBC/Ameritech Order*, ¶ 34 (Ohio conditions).

specific environment -- competitive and otherwise -- in each state, also reflect the specific requirements of state laws. In the context of the Verizon/MCI merger, with its greater possible public interest harms, the Commission should be even more deferential to the decisions of individual states.

C. The conditions should remain in place for five years and survive changes in law.

In general, the conditions imposed on the SBC/Ameritech merger were allowed to sunset 36 months after the merger closing date.[78] Since the "sun went down" on the conditions, darkness has fallen on the environment the conditions were designed to protect and benefit, as described above and in *Confronting Consolidation*. Despite the rapid changes occurring in telecommunications, the sheer mass of this merger requires that the conditions imposed upon it have more endurance. The general term for these conditions should, therefore, be five years rather than three.

Endurance would also come with a condition that would require the conditions to persist in the face of changes in federal law.[79] We are facing likely massive changes in federal law, given all of the talk of rewriting the 1996 Act. Verizon, MCI, the rest of the industry and the public in general would likely benefit from the certainty of knowing that the conditions will persist despite legislative vicissitudes.

D. The conditions

The conditions that the Commission should adopt for the Verizon/MCI merger fall into four broad categories: 1) conditions to encourage and enable the at-this-point badly damaged

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[78] SBC/Ameritech Condition XXIX; see also BA/GTE Condition XXIV (see Attachment C).

[79] Unless, of course, the statutory change specifically forbade the substance of the condition.

prospects for competition for residential and small business customers; 2) conditions aimed at limiting the harm to competition and consumers from the merger; 3) conditions to ensure that residential and small business customers benefit from the merger; and 4) conditions to realign the regulatory regime to recognize the new market conditions arising from the merger.[80] NASUCA's current proposals -- not intended to be exhaustive at this point -- are set forth here.

1. Conditions to promote competition

The sheer dominance of the merged company will have many anti-competitive effects. These effects will only exacerbate the recent harms to competition caused by the D.C. Circuit's and the Commission's interpretations of the impairment standard in 47 U.S.C. § 251(c), interpretations that had nothing to do with the "fair and ordinary" meaning of the term found relevant by the Supreme Court.

The harm is most directly evident in the removal of local switching as a facility ILECs must make available to CLECs. Unbundled local switching ("ULS") is the key element -- along with the unbundled loop and transport -- that makes up the unbundled network element platform ("UNE-P"), which has been the basis for the majority of residential competition to date.[81] Another key element for residential competition for broadband-based services is the high frequency portion of the loop ("HFPL") though which competitors can provide broadband without having to provide basic service. The availability of these UNEs at TELRIC-based prices is crucial to further progress on residential and small business competition.

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[80] The conditions are proposed here for the Verizon/MCI merger. As *Confronting Consolidation* makes clear, similar conditions will have to be imposed for an SBC/AT&T merger. Indeed, the list here is virtually identical to the list of conditions proposed by NASUCA for the SBC/AT&T merger.

[81] *Confronting Consolidation* at 19-20.

A condition of this merger should be that Verizon makes the UNE-P and the HFPL available to competitors at TELRIC rates.[82] Verizon should also be required to ensure that its networks are accessible for VoIP service, especially with regard to the interface with 9-1-1 service.

That condition will stimulate competition within the Verizon territory. But as the Commission recognized in the SBC/Ameritech and Bell Atlantic/GTE mergers, there was also a need for conditions addressing competition outside the incumbent's territory.[83]

In the SBC/Ameritech merger, the Commission found that the condition

> will ensure that residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC. This condition effectively requires SBC and Ameritech to redeem their promise that their merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier. We also anticipate that this condition will stimulate competitive entry into the SBC/Ameritech region by the affected incumbent LECs.[84]

As explained elsewhere in these Comments and in *Confronting Consolidation*, the proposed merger of Verizon and MCI causes a greater concern and public interest harm than did either the SBC/Ameritech or the Bell Atlantic/GTE merger. It cannot be overemphasized or said too often that the proposed merger of Verizon and MCI involves *actual* competitors in the mass market not merely *potential* market participants.

It is obvious that neither the Bell Atlantic/GTE nor the SBC/Ameritech out-of-territory competitive entry condition was successful in forcing Verizon or SBC to be an active enduring

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[82] Even if one assumes that the D.C. Circuit was correct in *USTA I* and *II* that Sec. 251(c) does not compel unbundling of ULS or the HFPL -- which it was not -- the Commission may yet impose such conditions on mergers.

[83] SBC/Ameritech Condition XXI, BA/GTE Condition XVI (see Attachment C).

[84] *SBC/Ameritech Order*, ¶ 398.

CLEC in these markets. Nor has the retaliatory competitive entry into Verizon or SBC territory that the Commission hoped for actually occurred. Surely, however, with the additional force of MCI behind it, Verizon will be able to handle sustained entry into other ILECs' markets, specifically the SBC, BellSouth and Qwest markets.[85]

The merged company should be required to repeat the Bell Atlantic/GTE local competition strategy on today's terms.

A standard anti-trust and regulatory response to anti-competitive combinations like this one is to open duplicative facilities to competition. **As a condition of merger, Verizon and MCI should be required to divest themselves of duplicative long-distance and Internet backbone capacity.**

2. Conditions to limit harm to competition and consumers

There is no reason to believe that the management of a newly-merged Verizon/MCI will have the same -- let alone a greater -- commitment to service quality and network reliability than existed in each company prior to the merger. It is of concern that a service quality may in fact decline as a result of the merger. That was precisely the case with the SBC/Ameritech merger. There is no reason to believe that a decision will be made in favor of the highest rather than the lowest common denominator of service quality practices by the merged Verizon/MCI. The Commission must adopt conditions to ensure retail service quality.

One of the significant regulatory events of the last few years was the adoption of the

[85] If a corporation the size of the combined Verizon/MCI cannot make a go of it in these other markets -- markets likely subject to the anti-unbundling directives of the D.C. Circuit -- that will demonstrate conclusively that there is impairment in those markets.

California Consumer Bill of Rights ("CBOR").[86] This even-handed set of consumer protections applied to a broad spectrum of telecommunications providers; to use regulatory clichés, to a great extent the CBOR as originally adopted "leveled the playing field" and provided "regulatory parity" among providers in California. It is exceeding unfortunate for the consumers of California that the California Public Utilities Commission reversed course and suspended the effectiveness of the rules.[87]

Despite this, the CBOR as originally adopted remains a rational and reasonable set of protections for telecommunications consumers. It deserves to be more widespread. It is appropriate as a means to protect the customers of a merged Verizon/MCI against management's cost-cutting moves.

As a condition of the approval of the Verizon/MCI merger, the merged firm should be subject to the terms of the originally-adopted CBOR, for all of its operations -- wireline, wireless and broadband. If the regulatory commission or other body within a state is unable to enforce such a condition, the Commission should retain enforcement jurisdiction.

In the Bell Atlantic/GTE merger, the Commission adopted service quality requirements for *wholesale* service.[88] Without such requirements, the competition-enhancing condition discussed above will likely see numerous problems.

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[86] Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities, Rulemaking 00-02-004, Order adopted May 27, 2004. See http://www.dca.ca.gov/r_r/telecommunications_rights.htm and http://www.cpuc.ca.gov/PUBLISHED/NEWS_RELEASE/36910.htm .

[87] See "Telecom bill of rights suspended – for now" at http://www.consumerwatchdog.org/utilities/nw/nw004862.php3**,** Jeffrey Silva, RCR Wireless News, January 31, 2005; "Regulatory shift worries state consumer advocates" at http://www.thedesertsun.com/apps/pbcs.dll/article?Date=20050129&Category=NEWS10&ArtNo=501290321&SectionCat=topics&Template=printart**,** Terence Chea and Jennifer Coleman, Associated Press, January 29, 2005.

[88] BA/GTE Condition V (see Attachment C).

Wholesale service quality conditions of the Bell Atlantic/GTE merger should be reinvigorated as a condition of the Verizon/MCI merger.

The RBOCs (including Verizon) have been involved in efforts to restrict municipalities and other governmental entities from investing in broadband networks that will be made available to consumers.[89] A combined Verizon/MCI will have even more incentive and ability to participate in these anti-competitive efforts. **As a condition of their merger, the Applicants should be required to commit not to participate in such efforts.**

3. Conditions to ensure consumer benefits

In the SBC/Ameritech Order, the Commission adopted a condition that required that xDSL service be "fairly deployed" in urban (upper and lower income areas) and rural wire centers.[90] That policy should be followed and expanded on here.

The Commission should require as a condition of approval of this merger that the combined company provide broadband capabilities ubiquitously throughout the Verizon territory within five years.

Further, despite the promises of increased efficiencies flowing from the Bell Atlantic/GTE merger, it does not appear that the benefits of those efficiencies have flowed through to consumers. **Flowing the benefits of merger synergies and cost-savings back to consumers should be a condition for the merger. Further, Verizon should be required to show that the merger produced the projected amount of savings per year.**

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[89] "Wi-Fi plan to face static," The Business Journal (Minneapolis/St. Paul), April 25, 2005 at http://twincities.bizjournals.com/twincities/stories/2005/04/25/story1.html?t=printable; "Verizon CEO sounds off on Wi-Fi, customer gripes," San Francisco Chronicle, April 16, 2005 at http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/04/16/BUGJ1C9R091.DTL&type=business; "Is Low-Cost Wi-Fi Un-American?", In These Times, April 18, 2005 at http://www.inthesetimes.com/site/main/article/2071/.

[90] *SBC/Ameritech Order*, ¶ 376.

One other condition of the Bell Atlantic/GTE merger was the adoption throughout the resulting Verizon territory of Lifeline plans that provided benefits comparable to the Lifeline plan adopted as part of alternative regulation in Ohio.[91] **That Lifeline condition should be revived for this merger.**

4. Conditions to realign the regulatory regime

As explained in detail in *Confronting Consolidation*, the impact of this merger on the competitive landscape would be such that resinstatement of many regulations to control market dominance must be considered. This would include

- de novo reviews of deregulation/detariffing/flexible pricing of "competitive" services;
- restoration of incentive regulation safeguards such as productivity offset factors and earnings sharing/capping;
- reinitialization of rates at "authorized" rates of return;
- imputation of earnings that benefit from joint BOC/affiliate activities (e.g., local/long distance).

5. Enforcement

The Commission determined that it would "utilize every available enforcement mechanism" to ensure that the benefits of the SBC/Ameritech merger conditions were realized.[92] The Commission will have to make that determination again.

Verizon's track record on the conditions dictated in the Bell Atlantic/GTE merger is not encouraging.[93] Therefore, the Commission must adopt specific and effective enforcement mechanisms here. The enforcement mechanisms must be substantial enough that Verizon will

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[91] SBC/Ameritech Condition XXIII, BA/GTE Condition XVIII (see Attachment C).

[92] *SBC/Ameritech Order*, ¶ 360.

[93] See Attachment B.

not make the calculation that it is cheaper -- or more desirable -- to pay the fine than to comply with the condition. In the SBC/Ameritech merger, the Commission hinted that enforcement would include, "if necessary, revocation of the merged firms section 214 authority."[94] The Commission must make clear here that such a penalty is a real possibility, in order to give the merged company a real disincentive to not complying with the conditions.

NASUCA looks forward to reviewing the comments of other stakeholders for conditions that might be added to -- or might, perhaps, substitute for -- the conditions outlined here.

VIII. CONCLUSION

In the *SBC/Ameritech Order*, the Commission noted the reasons for the breakup of AT&T, which the merger that led to the creation of Verizon -- like the SBC mergers -- reversed in part:

> To put it simply, the Bell System was broken up because of two firmly held beliefs. One belief was that competition, rather than regulation, could best decide who would sell what telecommunications services at what prices to whom. The other belief was that the principal obstacles to realizing that competitive ideal were the incentive and ability of dominant local exchange carriers, who typically controlled virtually all local services within their regions, to wield exclusionary power against their rivals.[95]

The merger of Verizon and MCI will harm competition. And the combined Verizon/MCI will be able to raise substantial obstacles to other competitors by wielding their dominant market power in much of the Nation.

This merger will combine the largest and the fourth largest firms in terms of total

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[94] *SBC/Ameritech Order*, ¶ 360.

revenues.[96] Yet this merger must be reviewed in context with the proposed SBC/AT&T merger, which will combine the second and third largest firms.[97] The combinations will leave the next-largest firm with less than one-fourth the revenues of the smallest of the two industry giants. *Confronting Consolidation* is precisely the Commission's problem here.

For the reasons set forth here, the public interest harms of this merger far outweigh the speculative benefits alleged for the merger. As currently structured, the merger should not be approved. If the Commission adopts substantial enforceable conditions such as those outlined here, the public interest harms will be sufficiently limited and the public interest benefits will be adequately increased so as to make approval of this merger proper under the law.

Respectfully submitted,

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[95] *Id.*, ¶ 14.

[96] FCC Statistics of Common Carriers, 2003-2004, Tables 1.1 and 1.2.

[97] *Id.*

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