

**FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re: the

**APPLICATIONS OF)
MCI, INC., TRANSFEROR and)
VERIZON COMMUNICATIONS, INC.,)
TRANSFEREE: APPLICATION FOR)
FOR TRANSFER OF CONTROL)**

**WC DKT. NO. 05-75
DA 05-762**

COMMENTS OF THE INDEPENDENT ALLIANCE

DATED: May 9, 2005

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COMMENTS OF THE INDEPENDENT ALLIANCE
WC Docket No. 05-75, DA 05-762

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Summary

The Independent Alliance, a group of rural independent telephone companies, submits that the Commission should attach meaningful conditions to any approval of a Verizon/MCI merger in order to ensure access to tandems, transport facilities, and Internet backbone facilities by rural telephone companies. The merger of a BOC and a large interexchange carrier contemplates the creation of a formidable vertically integrated entity that has the means and opportunity to restrict access to key facilities. In addition, the Independent Alliance submits that the Commission must consider the Verizon/MCI merger in light of the proposed SBC/AT&T merger, since the approval of the two mergers would cause a rapid and far-reaching transformation of the telecommunications marketplace.

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COMMENTS OF THE INDEPENDENT ALLIANCE

TO THE COMMISSION:

The Independent Alliance, a group of rural independent telephone companies,¹ submits herein its comments on the proposed merger of MCI, Inc. (“MCI”) and Verizon Communications, Inc. (“Verizon”). The Independent Alliance urges the Commission to include in its consideration of the proposed merger an analysis to determine whether such a merger would foster the goals of the Communications Act of 1934, as amended (the “Act”), specifically, to “promote competition” and to “encourage the rapid deployment of telecommunications technologies,” *see* 47 USC § 153. The Independent Alliance submits that meaningful conditions to a Verizon/MCI merger, similar to those proposed by the Independent Alliance with regard to the AT&T/SBC merger,² are necessary in order to ensure these goals are met. The Independent

^{1/} The member companies are set forth in Attachment 1.

^{2/} *See, Application of AT&T Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to the Transfer of Control: Comments of the Independent Alliance*, WC Docket No. 05-65 (electronic filing Apr. 25, 2005).

Alliance also urges the Commission to consider in its analysis the combined impact of the instant proposed merger and the proposed AT&T/SBC merger on the telecommunications market. The two proposals portend the possibility of a swift and radical transformation of the telecommunications marketplace.

I. INTRODUCTION

The members of the Independent Alliance are small and mid-size rural telecommunications carriers, associations representing these companies, and consortia of these companies that provide switch and transport services . These companies were founded originally in order to provide telephone service in areas that were not served by the local service affiliates of American Telephone & Telegraph, predecessor entity to AT&T. These independent companies were and are today an integral component in the provision of universal service across America. The Independent Alliance urges the Commission to take action so as to ensure that rural telephone customers continue to enjoy, at a minimum, the same quality, level, pricing, and “rapid deployment of telecommunications technologies” in a post-merger environment as they do today. The Commission should ensure that a marketplace dominated by a merged Verizon/MCI leads to improved, rather than diminished, opportunities.

II. THE PROPOSED MERGER CONTEMPLATES THE INTRODUCTION OF A FORMIDABLE VERTICALLY INTEGRATED ENTITY TO THE MARKET.

The proposed merger of Verizon and MCI constitutes vertical integration of the Nation’s largest Bell Operating Company (“BOC”) and a major interexchange (“IXC”) provider, implicating issues of market and facilities dominance. The proposed Verizon/MCI merger does not simply raise the specter of whether the industry will see a return to the era of a massive consolidated telephone company, similar to that which existed before the break-up of AT&T. Rather, the proposed merger implicates concerns related to the future of telecommunications,

including rural independent access to not only tandem and transport facilities, but to important underlying Internet backbone facilities, as well.

Historically, the general interest of rural and independent telephone companies *vis-a-vis* AT&T local affiliates and Long Lines was to connect rural customers to the nationwide switched network in order to enable rural communities to reach, and be reached by, the world. The provision of basic dial-tone was the overriding concern. Current technological, regulatory, and market conditions, however, demand a new analysis when confronting the possibility of a major vertically integrated entity that controls essential transport and backbone facilities. Verizon is the Nation's largest BOC, with a wireline service footprint spanning 28 states, the District of Columbia, and Puerto Rico; MCI controls UUNET, the largest Internet backbone facility in the United States. The merged entity would control access to a staggering proportion of telecommunications facilities that simply cannot be replicated with any margin of economic efficiency by other carriers.

A. The Proposed Merger Could Harm Access to Tandems and Transport Facilities.

Independent Alliance members and similarly situated carriers have endeavored to bring more than universal basic dial-tone service to their communities. Many rural independent carriers offer interstate toll services and broadband connectivity. These interstate and broadband services often rely upon access to BOC tandems and the transport facilities of large IXC carriers like MCI. The proposed merger of Verizon and MCI, two very large companies that control tandem and transport facilities, raises questions as to how smaller carriers might obtain fair access to facilities that are controlled by a single vertically integrated entity. Natural market forces and economic theory warn that the smaller party is at a competitive disadvantage. The Independent Alliance urges the Commission to ensure that this does not occur, since the “smaller

entity” in telecommunications is not only the independent carrier, but its rural customers, too. The size and market power of a combined firm like a merged Verizon/MCI invites the opportunity for broad and effective discrimination that reaches local, long-distance and Internet backbone facilities. Appropriate merger conditions are necessary in order to ensure that neither purposeful conduct nor unchecked market power allow for discrimination against smaller entities, and their consumers, that rely upon the transport and facilities of the larger carriers.

The Commission and the parties to the merger are familiar with these issues. In the early 1900s, AT&T, predecessor entity to Verizon, built its network empire in part by refusing to interconnect with smaller independent providers until the smaller carrier capitulated and “sold out” to AT&T. The practice was halted by what came to be known as the “Kingsbury Commitment:” AT&T agreed to stop muscling the smaller carriers, and the Federal government permitted AT&T to continue as a regulated monopoly.³ In fact, the Commission recently decided a case in which a smaller party encountered discriminatory treatment when seeking access to the facilities of a larger entity. In *AT&T Corp. v. BellSouth Telecommunications*, AT&T complained to the Commission about BellSouth pricing plans for special access services that had the effect of favoring BellSouth’s retail interexchange services affiliate, BellSouth Long Distance, over other carriers. See *AT&T Corp. v. BellSouth Telecommunications, Inc.: Memorandum Opinion and Order, File No. EB-04-MD-010, FCC 04-278 (rel. Dec. 9, 2004)*. The pricing plan offered larger discounts to smaller volume users – at first blush, perhaps, the practice could be perceived as favoring “underdog” entities. The plan, as BellSouth explained, offered relatively low-volume customers “larger discounts than would be available under a plan whose discounts were more closely proportional to volume.” *Id.* at para. 18. But, the BellSouth

³ / See, i.e., Steve Coll, *The Deal of the Century: The Break-Up of AT&T*, Atheneum, New York (1986), at 58.

plan actually favored its own low-volume usage affiliate, and disfavored larger non-affiliated entities such as AT&T. The Commission found that this was a violation of applicable provisions of the Act because it discriminated against entities that were not affiliated with BellSouth.

Similar concerns attend the proposed Verizon/MCI merger: MCI will gain access to Verizon's tandem facilities without the need to enter into a commercial sub-tending arrangement, and Verizon will gain access to MCI's transport facilities. Both the local and long-distance service divisions of the new entity will have natural incentives to favor their respective corporate affiliate over an "outside" carrier. Smaller independent and rural companies, by contrast, that rely upon both the local and long-distance facilities of the newly merged entity will face decreased, if not negligible, leverage and bargaining power. Whereas in the past some degree of Verizon's market power may have been neutralized by MCI's market strength, and Verizon may have wielded similar power when negotiating with MCI, the combination of those companies would eliminate, to the detriment of smaller carriers, any check or balance to their respective power in their markets.

The combined transport facilities and access services of Verizon and MCI would simply have no peer in the geographic regions in which they operate. Verizon and MCI control some, if not all, of the only facilities that carry and switch traffic for rural customers of a smaller carrier when that traffic is destined to terminate beyond the network borders of the rural carrier. If MCI is absorbed into Verizon, there will no longer be a large IXC presence to challenge the BOC in negotiations; small and independent carriers will be left with little leverage to achieve fair pricing. The Independent Alliance submits that these general principles are evidenced by real-world experience.

B. The Proposed Merger Also Threatens the Market for Interconnection to the Internet.

The mergers between BOCs and nationwide IXC's that own Tier I Internet Service Providers ("ISPs") represent unprecedented consolidation and vertical integration in the Internet marketplace. Efficient interconnection arrangements between ISPs are the lifeblood of a robust public Internet because market forces compel services to be sold competitively. After consolidation, small, independent ISPs will be in the unenviable position of having to purchase Internet protocol ("IP") backbone capacity from giant firms who are also direct competitors of these small ISPs.

Market power is already a problem in the Internet interconnection market. In the past, nationwide ISPs commonly exchanged each other's traffic without payment of settlement charges. Known as "peering," these arrangements have since largely been replaced by commercial agreements in which compensation flows from the smaller ISPs to the large Tier I ISPs, but not *vice versa*. The smaller ISPs rely on the Tier 1 providers in order to link their customers, often residents of rural and non-metropolitan areas of America, to the Internet backbone. The commercial agreements are almost always covered by stringent non-disclosure agreements ("NDAs") resulting in a dearth of publicly available information concerning settlement terms. These confidential agreements afford those with market power the opportunity to discriminate against different customers. The merger of Tier I IP backbone providers, such as MCI, with BOCs, such as Verizon, which themselves already control large, regional ISPs, will increasingly enable the backbone providers to abuse and manipulate interconnection negotiations. The ISPs will be able to either extract monopoly rents or bias favorably their position as competitors in contested markets.

The Commission has examined the ISP backbone and interconnection market in the context of prior mergers. It has long recognized its role in ensuring widespread nondiscriminatory access to the Internet backbone. In its order approving the merger between MCI and WorldCom, for example, the Commission noted, “We seek not to regulate the Internet, but rather to ensure that Internet services, which rely on telecommunications transmission capacity, remain competitive, accessible, and devoid of entry barriers.”⁴ Protecting access to the Internet backbone is a well-respected FCC function. Imposing the reasonable backbone access conditions suggested by the Independent Alliance would be fully consistent with prior Commission precedent, and would be a measure far short of the complete divestiture of Internet backbone assets that it ordered in the MCI/WorldCom merger.⁵

As large companies merge, market power and dominance increase, and access to their facilities by smaller entities can be limited by the natural tendencies of large providers. This phenomenon was evidenced when AT&T, a market force with which to be reckoned, found itself “under the thumb” of BellSouth when the latter favored its own long distance affiliate. The Independent Alliance urges the Commission to recognize the threats imposed by large vertically integrated firms, and to take such action as necessary to ensure that potential damage to rural carriers and their customers by a merged Verizon/MCI is pre-empted by applying conditions to any merger approval.

^{4/} *In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd. 18,025, ¶ 142 (1998).

^{5/} *Id.* at ¶ 227.

C. The Verizon/MCI Merger Must Be Considered In Light of the Proposed AT&T/SBC Merger.

The Independent Alliance submits that the proposed Verizon/MCI merger must be considered in light of the proposed AT&T/SBC merger. Concurrent mergers of Verizon/MCI and AT&T/SBC would create colossal vertically integrated companies, the combination of which would result in a radically reformulated telecommunications landscape. An analysis of a Verizon/MCI merger, accordingly, must include examination of the issues presented by the Independent Alliance in a possible environment that could threaten rural independent telephone companies with more drastically reduced leverage in negotiations with IP backbone providers than previously considered. Dual approved mergers would result in the consolidation of major BOC providers with major Internet backbone providers, reducing the opportunities for rural independents to negotiate Internet backbone access with entities unaffiliated with BOC interests. The Independent Alliance urges that the Commission should not examine the proposed mergers in separate vacuums.⁶

III. RECOMMENDATIONS

The Independent Alliance submits the following recommendations for conditions to a Verizon/MCI merger:

1. Access to Facilities - Tandems: Rural independent companies rely upon tandem facilities to bring incoming telecommunications traffic to their customers, and to deliver outgoing telecommunications traffic to the world. Any merger between Verizon and MCI must be conditioned to ensure that the combined companies do not (a) deflect inter-exchange traffic from

^{6/} See, *i.e.*, Comments of American Antitrust Institute, at 7, WC Docket No. 05-65 (Apr. 25, 2005) (AT&T/SBC proceeding), *citing* *FTC v. Cardinal Health, Inc., et al.*, 12 F.Supp. 2d. 34 (US Dist. DC 1998) and supporting the proposition that a regulatory authority can consolidate multiple transactions into a single proceeding to consider the cumulative weight of multiple mergers. The Independent Alliance is not requesting consolidation, *per se*, but is urging that consideration of each merger proposal consider the other pending proposal and their combined effect on the market.

rural independent tandems to Verizon tandems, or (b) impose inordinate and excessive commercial obligations upon rural companies seeking or continuing access to Verizon facilities.

(a) Most Favored Nation: The Independent Alliance submits that “Most Favored Nation” (“MFN”) conditions be attached to any merger approval. This would ensure that the smallest of carriers is able to enjoy the favorable terms that a larger carrier, including an affiliate of the underlying service provider, receives. Small carriers and their customers should not be subject to diminished service quality or unreasonable rates. Verizon, in fact, was the subject of such merger conditions when it was created by the merger of its predecessor entities. *See, i.e., In re: Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License: Memorandum Opinion and Order, CC Dkt. No. 98-184, FCC 00-221 (rel. Jun. 16, 2000), at Appendix D.*

(b) Tandem Selection: The Independent Alliance urges the Commission to condition a Verizon/MCI merger on a requirement that rural and independent telephone companies can without question select the tandem for traffic that terminates on their network. This is intended to preempt any opportunity for Verizon to direct a subsidiary or affiliate MCI to route all MCI traffic through a Verizon tandem when the terminating rural carrier has elected to utilize its own tandem or the tandem of another provider to connect its network to the world.

2. Access to Facilities – Internet Backbone: The Independent Alliance urges that the FCC ensure fair and open access to underlying Internet telecommunications facilities which have their origin in public funds. Fair and open access to the Internet backbone should not be confused with so-called “regulation” of the Internet. Merger conditions that ensure fair and open access

are not at odds with proponents of non-regulated retail Internet services.⁷ The Independent Alliance agrees that free market forces are strong drivers toward innovation and development. The market, however, dare not confuse the two factors that have contributed to the success of the Internet: (1) non-proprietary, unimpeded access to IP transmission network infrastructure, which is neutral with respect to applications and content; and (2) unrestricted development and implementation of Internet applications at the retail level. While Internet *applications* may continue to be unfettered by regulation, *interconnection* through common carriers to the Internet backbone is imperative to maintain the open, unobstructed access to transmission network infrastructure, especially considering the increased market concentration that would result from a Verizon/MCI merger. Accordingly, the Independent Alliance recommends that the Commission impose “Most Favored Nation” conditions on agreements governing access to the Internet backbone. The Independent Alliance also recommends adoption of the following safeguards as a condition of mergers between BOCs with Tier I ISPs or Internet backbone providers:

(a) Affiliates of merged IXC and BOCs offering access to the ISP backbone should be subject to interconnection obligations and non-discrimination requirements similar to those that are applicable to LEC interconnection obligations.

(b) Non-disclosure agreements with any party regarding the use of facilities of a merged Verizon/MCI should be deemed illegal.

(c) Newly-merged Tier I ISPs providing Internet backbone access, such as Verizon/MCI, should be required to file Statements of Generally Available Terms (“SGATs”) for price and quality of service of interconnection. This requirement would be similar to what was required of the BOCs in providing interconnection on the telephone network.

⁷ See, e.g., MCI-Worldcom Merger Order, *supra*.

IV. CONCLUSION

The Independent Alliance urges the Commission to ensure that all carriers have access to transport and access facilities on fair and non-discriminatory terms, and that incentives for larger vertically integrated firms to discriminate be preempted by Commission action in accordance with the recommendations set forth above.

Respectfully submitted,

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