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

In the Matter of	**)**	
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Applications of Verizon Communications, Inc.	**)**	**WC Docket 05-75**
and MCI, Inc. For Consent To	**)**	
Transfer Control of Section 214 and 308 Licenses	**)**	
and Authorizations	**)**	

COMPTEL/ALTS PETITION TO DENY

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CompTel/ALTS, pursuant to Section 309(d) of the Communications Act, 47 U.S.C. § 309(d), hereby petitions the Commission to deny the above captioned applications of Verizon Communications, Inc. ("Verizon") and MCI, Inc. ("MCI") for transfer of control of MCI's licenses and authorizations to Verizon. Verizon and MCI have not provided anywhere near the full extent of the information the Commission needs to properly analyze the competitive impact of the proposed merger. Without this information, the Commission cannot possibly undertake its statutory obligation to determine whether any competitive benefits of the merger outweigh the competitive harms that are sure to result from the marriage of two of the nation's largest telecommunications carriers. The information that is available to the Commission demonstrates that the merger will not promote competition and, therefore, will not serve the public interest, convenience or necessity. For these reasons, the CompTel/ALTS urges the Commission to deny the applications.

CompTel/ALTS was formed in March 2005 by the merger of CompTel/ASCENT and the Association for Local Telecommunications Services (ALTS). With more than 300 members, CompTel/ALTS is the leading industry association representing competitive facilities-based telecommunications service providers, emerging VoIP providers, integrated communications companies, and their supplier partners. CompTel/ALTS members compete directly with Verizon and MCI in providing voice, data and video services in the U.S. and around the world. CompTel/ALTS members also purchase essential inputs -- unbundled network elements ("UNEs"), special access facilities and backbone capacity -- from Verizon and MCI in order to serve their end users. CompTel/ALTS, acting on behalf of its members who are customers and competitors of both Verizon and MCI, is a party in interest with standing to oppose this merger pursuant to Section 309(d).

INTRODUCTION

Woodrow Wilson once declared, "[i]f monopoly persists, monopoly will always sit at the helm of the government . . . . "[1] Verizon, today, sits at the helm of government. Its General Counsel threatens the FCC if the Commission exercises independence – with the help of a United States Senator, no less![2] It goes without saying that Verizon wields inordinate power over its customers—governments included. No one in the DC Government, for example, would be at all surprised to learn that the regulatory function of the government has been usurped by Verizon. For purposes of analyzing the potential effects of this merger, it is instructive to look at a contemporaneous drama starring Verizon and its large government customer the District of Columbia.

[1] Woodrow Wilson, The New Freedom: A Call For the Emancipation of the Generous Energies of a People. Prentice-Hall: Englewood Cliffs, NJ (1918) at 286.

[2] http://www.wirelessweek.com/index.asp?layout=document&doc_id=134272&verticalID=34&vertical=Business+and+Finance&industry=

Verizon is in the midst of a billing dispute with the DC Government. In order to extract the DC Government's agreement to a resolution of the dispute, Verizon threatened to disconnect all of the telephone and data services provided to the DC Government when its three year custom contract expired on April 30, 2005. What got Verizon so angry? Could it have been that Verizon was concerned that the D.C. Government's installation of a fiber optic telecommunications network that would make the government less dependent on Verizon would also cost Verizon an important source of leverage in forcing an acceptable settlement to the dispute? Unfortunately, for D.C., MCI is its partner in the private telecommunications network and approval of this merger will keep the D.C. Government and all other customers of MCI dependent on Verizon.

The District of Columbia's Deputy Chief Technology Officer asserted in a sworn statement that if Verizon followed through on its threat to disconnect all telecommunications and data services, the result would be "immediate, severe and potentially life-threatening effects on virtually all functions of the [government] and the nearly 600,000 residents " of our nation's capital. Verizon did not back down until the D.C. Government filed suit on April 29,[3] which apparently prompted Verizon to agree to provide service for an additional 18 days to give the government an opportunity to transition its contract services to tariffed services or make alternative arrangements. Whatever the merits of the billing dispute, Verizon's threat to disconnect service was unconscionable. The fact that Verizon is able to put government communications systems at risk as a bargaining chip in a billing dispute demonstrates that it already has

[3] *District of Columbia v. Verizon Washington, D.C., Inc.*, Distict of Columbia Court of Appeals, Case No. 05-OA-21.

far too much market power. Allowing Verizon to substantially increase its market power through the acquisition of a major competitor cannot possibly be in the public interest.

As this example illustrates, the Bells are still classic monopolies, controlling the bottleneck “last mile” links to virtually every customer. At the same time, the FCC has actually *abolished* regulation of these monopolies, eliminating in almost every case any efficient means by which competitors can reach potential customers.

- The Commission has eliminated access of competitors at cost-based rates to the Bell’s last mile, bottleneck local loop platform (known as “UNE-P”), the only efficient way that competitors can provide a competing local service to most analog consumers.
- The Commission has eliminated access of competitors at cost-based rates to the Bell’s last mile, bottleneck local loops to provide DSL services along side the Bell’s telephone service (known as “line sharing”), driving competing DSL companies from the market.
- The Commission substantially eliminated access of competitors at cost-based rates to the Bells’ high capacity digital loops and transport throughout much of the territories served by competitors.
- The Commission eliminated rate regulation of the Bell’s bottleneck last mile, local loops when they are leased by competitors to connect customers to national and global networks (known as “special access”).

In each case the FCC has relied upon a *perception* of competition, or worse—the promise of future competition—that does not match *reality*. Cable television networks are only now becoming alternatives for some customers for limited local telephone service and broadband, but they are not now an alternative for most customers. Many cable systems do not offer telephone service, and, in most instances, cable systems do not even pass consumers in business districts. Even where cable systems are an alternative, they are virtually the *only* alternative, because the ILEC bottlenecks, and the FCC's failure to adequately regulate them, makes any more extensive, additional competition impossible. Cellular service may some day become a substitute for the ILEC's telephone services for some consumers, but it is not today; in any event, cellular is another business largely controlled by the Bells. Other technologies and services, like Wi-Max and broadband over power lines are today just ideas; they are not an available alternative to the ILEC last mile bottleneck.

Ignoring mountains of evidence provided by private equity investors, the Commission has also relied on the Bells' cynical "speculation" that competitors, denied fair access to ILEC bottleneck facilities, will resort instead to construction of their own parallel facilities. That has not happened because the basic premise of the earliest fiber investments—that the government was committed to rigorously enforcing the Act, and requiring cost-based access to facilities that cannot be efficiently replicated—has been repeatedly, and profoundly, abandoned by the Commission.

The Commission has also acquiesced in the position of the Bells that they will not introduce advanced services in competition with cable TV companies unless they are relieved of competitive pressure from companies that require cost-based access to ILEC last mile facilities to succeed. Ironically, in the zeal to align the public interest with the monopolists' "incentives," no regard was given to one of the most basic principles of economics—that market power must be constrained, because of the monopolist's incentive to *restrict output*, and thereby distort resource allocation. Adam Smith, as early as 1776, observed, "[t]he monopolists, by keeping the market constantly understocked, by never fully supplying the effectual demand, sell their commodities much above the natural price . . . ."[4] Reducing competition has never caused the Bells to innovate. Consumers deserve better than "faith-based approaches to advanced services."[5]

To a public told by the media every day about the astounding advances in telecommunications technology and the "intense competition" that technology has promoted, it may seem strange to learn, as the industry already knows, that the monopolies of the last century continue in place today to the detriment of consumers. In that sense, the only good that can be said of these proposed mergers is that they will reveal at long last that fact, fully and forthrightly, and the failure of existing regulatory approaches to adequately address it. The public will finally understand that the "intense competition" is in fact a battle of businesses small and large to survive against the monopolies and the undue advantages the incumbents have attained by regulation that has ignored the existence of the monopolies.

The proposed merger should be denied, because it will harm consumers in a myriad of ways. *First*, the merger would harm consumers by completely eliminating MCI as a competitive provider of local connectivity for local, national and global services in the extensive Verizon region. In this way, the merger's anticompetitive effects will be felt throughout the complement of markets served by MCI and Verizon, because today all competitors—and their customers—benefit from MCI's presence in the wholesale market. CompTel/ALTS believes that it is not unreasonable to expect significant price

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[4] Adam Smith, The Wealth of Nations, 1776. Vol. I, Bk. I, Ch. 7.

[5] Copps Dissent.

increases for key wholesale inputs. These price increases will translate into even more significant price increases for most retail customer classes throughout the Verizon ILEC region, as retail markets themselves become more concentrated both directly as a result of the merger, and from the inevitable exit of competitors resulting from these wholesale price increases.

Accordingly, the merged Verizon/MCI will have the ability and irresistible incentive to price squeeze competitors who must turn to Verizon for local connectivity. The merged firm will also have the ability and incentive to engage in non-price discrimination strategies, such as delaying, or degrading, provisioning of these essential inputs to competitors. The SBC/AT&T and the Verizon/MCI mergers will inevitably foster a classic duopoly in which each merged firm will provide local connectivity to the other in region at reduced rates denied to all other competitors. If the mergers were permitted, the incentive to engage in price squeezes and provisioning delays will necessarily be extended to all other services requiring special access and other types of local connectivity, including enterprise services and Internet backbone services.

Second, in a very direct way, consumers in the residential and large enterprise markets will be harmed by the loss of MCI's competitive presence. It is as misleading as it is shameful that Verizon, having used its political muscle to eliminate MCI's ability to compete for residential customers, claims that it is the government's regulatory policies—and not this merger—which will result in MCI's exit from the residential market. This argument avoids the point that many competitive carriers, both circuit-switch based and packet-switch based, were working on wholesale offerings to serve those mass market customers currently served by UNE-P based carriers. Since AT&T

and MCI had the largest base of UNE-P customers, their customers would have been the natural market for these competitive wholesale offers. However, with these customers now destined to return to SBC or Verizon, it is doubtful that this wholesale market will develop at the same pace at which it would have, if it even develops at all.

For many of the same reasons, the competitive fiber-based carriers that are currently in the market will lose the benefit, and potential benefit, of providing service to MCI. On the other hand, SBC’s ability to foreclose further competitive fiber-based entry will be strengthened as the result of controlling even more excess fiber capacity.

Large enterprise customers, too, will see a competitive choice completely eliminated from the market. The large enterprise customers in Verizon’s ILEC region have seen a competitive benefit in the past few years as Verizon has entered a very concentrated market. As noted previously, for these customers (like the D.C. Government), as well as the large wholesale customers, it is reasonable to expect significant price increases as a result of this merger.

Third, the proposed merger would also harm consumers by reducing significantly competition for Internet Backbone Services by permitting Verizon to favor MCI, and SBC to favor AT&T. These carriers will have uniquely high (and asymmetric with respect to their former peers) post-merger volumes of traffic, due to their extensive DSL originated traffic, their enormous future FTTH traffic, and their wireless traffic (which will grow exponentially as Verizon Wireless and SBC (Cingular) aggressively market 3G capabilities to their customers). The asymmetric traffic possessed by either Verizon or SBC alone, or Verizon and SBC together will certainly create the ability for one or two firms to engage in non-efficiency based strategic conduct targeted at their smaller rivals (and customers of their smaller rivals), such as categorically refusing to peer on a non-discriminatory basis with competitors, thereby ultimately tipping the market to the merged companies. Furthermore, the merged firms, with their combined traffic, may have even more incentives to discriminate against rival Internet backbones and a greater ability to do so by virtue of not only controlling more Internet traffic, especially as all traffic—wireline and wireless—becomes more packetized, but also by virtue of now being critical input suppliers (for local connectivity) as well as large competitors in the Internet backbone market.

The Commission's ongoing reluctance to address its failed predictive judgment in the Special Access Pricing Flexibility decision will further complicate the Commission's review of this merger Application. The Commission's virtual (in-everything-but-name only) deregulation of the Bells in 1999 is an inseparable backdrop to this proceeding. The Applicants cannot use their tired "collateral attack" arguments to deflect scrutiny of their market power in the special access market in this proceeding, because accretion of that market power, which is today completely unconstrained by regulation, must be the primary focus of the Commission's inquiry. From the way the Bells use volume commitments and non-cost-based termination penalties to distort the natural geographic market, to the way they can use control over price, quality, and performance to delay, degrade, and devalue access to large customers by competing carriers and Internet backbone providers, the issue of how the Commission will attempt to resolve the problem of past and future monopoly is undeniably the focus of this Application.

Fourth, the merger effectively represents Verizon's acquisition of one of its most effective regulators of wholesale services. The pro-competitive provisions of the

Telecommunications Act were never expected to implement themselves. Congress deliberately adopted a structure whereby the creative tensions between the RBOCs and their largest expected customers – MCI and AT&T included – would engage in bilateral arbitrations to establish reasonable wholesale offerings. When the Act was passed, this structure was reasonable – the resources available to competitors and to the incumbernts were generally in balance. The proposed mergers, however, will produce a resource imbalance between entrants and incumbents that is so severe that the effectiveness of this regime is destined to fail.

Finally, if the Commission determines that the Application does not enhance the public interest, which it does not, the Commission should simply deny the Application. It would be a mistake, and simply another exercise in futility, for the Commission to attempt to mitigate the many public interest harms created by this merger through toothless merger conditions. Verizon, today, is completely incapable of operating within the Commission's regulatory structure, and the Commission is, today, completely incapable of effectively regulating Verizon. Enhancing Verizon's market power through approval of this merger could not possibly serve the public interest especially now that Verizon has shown that it will put government communications systems at risk as a bargaining chip in a billing dispute.

We are now finally at the cross-roads. It is now time for the FCC to decide, how it will address for consumers, *the problem of the monopolies*. The present merger application, if approved, will be the logical—and regrettable—conclusion to several years of regulatory capture, and law enforcement failure-- regulatory *capitulation*. However, this outcome need not be inevitable. It is not too late for the Commission to embrace competition by denying the merger applications, and developing a commitment to enforcing those few pro-competition regulations to help the Commission constrain the Bells' market power. To paraphrase Milton Friedman: "It is up to the [regulator] to promote the public interest by fostering competition across the board and to recognize that being pro-free enterprise may sometimes require that we be anti-existing business."

I. THE PRESENT MERGER IS INEXTRICABLY RELATED TO THE COMMISSION'S *SPECIAL ACCESS NPRM*

In its *Special Access NPRM*[6], the FCC asks significant questions about the nature of the special access market in each price-cap LEC's market region. The Commission asks questions regarding the extent of the Bells' market power, their ability to exercise that market power to raise prices to wholesale and retail customers, and their ability to use contract arrangements to exclude entry by smaller, efficient competitors. The Commission also asks what the appropriate geographic market is for special access services. All of these questions must be answered by the Commission as it analyzes the present merger Application. Verizon's ability to exclude competitors, and raise special access input prices to retail, wholesale, and Internet backbone customers post-merger is one of the most significant, if not *the* most significant, concern raised by the proposed merger. Thus, Verizon's market power in the special access market is a *central,* not collateral (as the Applicants contend), issue in this merger.[7]

While the issue of Verizon's market power in the special access market is a critical issue, which is discussed throughout this Petition, *infra*, the preliminary question

[6] *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, (released January 31, 2005) ("*Special Access NPRM*").

[7] See, *e.g.*, Public Interest Statement, p. 33, n. 33.

of how to define a relevant geographic market for special access is a critical issue that the Commission must confront from the outset of its analysis. The FCC notes that it has previously found an MSA to be a relevant geographic market for special access services.[8] The Commission also notes, however, that AT&T contends that the proper geographic market is much smaller than an MSA, because "competition is concentrated in a small number of areas within MSAs and that, therefore, the MSA is too large to be the relevant geographic market." [9] MCI also contends that, "[t]he special access market is actually composed of many separate geographic markets in which the ILECs are dominant."[10]

Others, including CompTel/ALTS, believe that because the FCC has completely failed to regulate the BOCs. Once the BOCs are granted pricing flexibility, they have been free to demand huge, region-wide term and volume commitments for special access services.[11] Accordingly, the Bells have been able to raise the minimum geographic scale of entry that might effectively discipline the BOCs' prices to include the *entire Bell region*. Verizon's Vice-Chairman and President Larry Babbio explained this exclusionary strategy on an investors' call: "*Our goal is to encourage carriers to use our networks, rather than build their own*" because special access services to other "*carriers*

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8 *Special Access NPRM.* at ¶ 87.

9 *Id.* at ¶ 88, *citing* AT&T Reply, Reply Declaration of Lee L. Selwyn at ¶¶ 16-21.

10 Reply Comments of WorldCom, Declaration of Michael Pelcovits, RM-10593, at 8. (Dr. Pelcovits further explains that "[a]lthough competition has developed along *some routes*, the BOCs still retain significant market power in large pockets of the market.") *Id.* (emphasis added)

11 See, *e.g.*, T. Randolph Beard, George S. Ford, and Lawrence J. Spiwak, "Quantity-Discount Contracts as a Barrier to Entry," Phoenix Center Policy Paper No. 20, November 2004. Available at http://www.phoenix-center.org/pcpp/PCPP20Final.doc

generate about $5.5 billion of high margin business for us."[12] In the AT&T Petition for Rulemaking, MCI explained how Verizon achieves this "goal":

> [d]iscounts on the monopoly portion of a customer's demand are conditioned on choices for the competitive sensitive portion of demand. *CLEC[s] cannot compete for a portion of the customer's business, because it would have to give an enormous discount to offset the higher cost incurred by the customer, which must surrender the [ ] discount*.[13]

Thus, the Commission must properly define the appropriate geographic market as the entire Bell region, unless or until the FCC decides to limit the Bells', including Verizon's, ability to demand exclusionary terms in exchange for volume discounts. However, because the issue of whether the Bells can demand exclusionary volume commitments, and thus determine for themselves the customer's perception of the relevant geographic market, is a question that necessarily must be addressed in the *Special Access NPRM*, the Commission cannot conduct its analysis of this merger until that question is answered.

II. THE PROPOSED MERGER WOULD HARM CONSUMERS BY ELIMINATING DIRECT COMPETITION OR POTENTIAL COMPETITION BETWEEN VERIZON AND MCI

A. The Proposed Merger Would Harm Consumers By Eliminating MCI As A Direct Competitor of Verizon In The Provision Of Local Connectivity

Verizon controls a virtual monopoly over local connectivity in 13 states and the District of Columbia and in sizable operating areas in an additional 16 states. One of Verizon's largest competitors in the provision of local connectivity is MCI, the company

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[12] Thomson Street Events, Final Transcript, Q3 2004 Earnings Conference Call (28 October 2004) at 11 (emphasis added).

[13] Comments of WorldCom, Inc., FCC Docket No. RM-10593 at n. 13 (emphasis added).

it would acquire in the merger. The proposed merger will result in the loss of even this limited direct competition with Verizon. Consumers will be hurt because the loss of one of Verizon's largest competitors for local connectivity will increase costs in wholesale and retail markets.

While the Applicants acknowledge MCI's strength and scope as a wholesale carrier (Public Interest Statement, pp. 31-34, Lew/Lataile and Powell/Owens Declarations, generally), the Applicants seem to contend that the relevant geographic markets are those wire centers in which the Applicants can point to some overlap with numerous other competitive carriers, and that the product market is vaguely "fiber facilities." No explanation is given as to why wire centers, or "contiguous wire centers," should be considered relevant geographic markets. Nor is any explanation given as to why anyone who has deployed any local fiber is in the same league, in terms of providing a viable access substitute to Verizon, as MCI—which has local, long-haul, and Internet backbone facilities, in addition to benefiting from significant special access discounts from Verizon, which can be combined with MCI's type 1 facilities to create a more ubiquitous, more valuable, competitive access service.

Indeed, as CompTel/ALTS explains in the preceding section (and in its Petition to Deny the SBC/AT&T merger), Verizon's exclusionary pricing practices have distorted the relevant geographic market, which may naturally be a route, but, for purposes of this analysis, should be considered the entire Verizon region. It is a well-recognized convention to alter geographic market definition depending on the pricing power of the “hypothetical” (but not so hypothetical in this instance) monopolist.[14] Similarly, with respect to product market definition, it is misleading, to say the least, for the Applicants to suggest that MCI is nothing more than a collection of fiber assets, and that multiple smaller providers with much smaller networks can be considered in the aggregate (no matter how small their collective share of the access market) to be on the same par with Verizon and MCI.

It must be noted that MCI is an effective competitor because of its significant local fiber mileage for two reasons. The first is the fact that MCI uses its fiber to provide many wholesale and retail services to its own customers. The second reason is that MCI, by virtue of its significant fiber resources and its massive amount of retail and non-MCI wholesale circuits, is able to obtain lower prices from the ILECs because it can credibly threaten to groom circuits off the ILEC network and onto its own fiber. This combination of MCI-controlled traffic and circuits, as well as enormous fiber resources allows MCI to benefit from discounts that smaller carriers simply cannot obtain. However, it should also be understood that while MCI’s unique position allows it to be shielded from the *full* exercise of Verizon’s market power (relative to smaller competitors), MCI by no means constrains Verizon’s ability to exercise market power in the same way that a competitive market, or even effective regulation, could. Nonetheless, because of MCI’s ability to get superior discounts on special access, discounts which are passed along to its wholesale customers, the circuits MCI obtains from Verizon must be considered to be part of the MCI network when considering the extent to which competing facilities and services will be lost as a result of this merger.

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[14] See, *e.g.*, US Department of Justice Horizontal Merger Guidelines, § 1.22 (recognizing that geographic market definition must be analyzed differently in the presence of price discrimination). Exclusionary pricing of the type engaged in by Verizon is simply another variety of price discrimination.

Depending on how the FCC ultimately decides to rule on the exclusionary vertical contracts that Verizon imposes on its wholesale special access customers (and, thus, on the issue of geographic market definition), CompTel/ALTS believes market concentration could increase significantly as the result of this merger. On the one hand, if the Commission decides to continue to allow Verizon to engage in its pattern of requiring wholesale customers to submit to anticompetitive, exclusionary terms in exchange for discounts, then the relevant geographic market is the entire Verizon ILEC region. AT&T and MCI, by virtue of their ability to obtain larger special access discounts as well as their extensive local fiber networks, are the only competitors who can provide—through a combination of "type 1" and resold "type 2" circuits—special access services to wholesale customers throughout the Verizon ILEC region. Thus, competitive alternatives will diminish from 3 to 2 (assuming, perhaps unrealistically, that Verizon and SBC are unable to reach a "detente" and SBC allows AT&T to continue to wholesale to competitors).[15]

On the other hand, if the Commission in the *Special Access NPRM* decides to constrain Verizon's ability to engage in anticompetitive vertical restraints in the special access market, then MCI's perception of the geographic market for special access is correct—the relevant market is likely route-specific. In this event, also, MCI will, for most relevant geographic markets, be Verizon's most significant special access competitor—especially given AT&T's almost certain diminution in the market that will result from SBC's less-than-aggressive posture toward out-of-region markets. Furthermore, due to Verizon's anticompetitive practices, MCI has never as a practical

[15] In any event, Verizon is likely to give SBC/AT&T significant concessions, possibly based on factors other than reasonable volume discounts, that will significantly skew the competitive landscape.

matter been able to compete on a fair, “head-to-head” basis so even these market shares will understate MCI’s likely future impact on a market where purchasers are not “punished” for diverting circuits to more efficient competitors. Moreover, since MCI’s capacity will come off the market and, in the hands of Verizon, become excess capacity (a barrier to subsequent facilities-based entry),[16] this may be the most accurate way to measure the anticompetitive effects of this merger. In this event, MCI’s exit from the market will clearly reduce alternatives for most carrier customers, and in a very significant way.

The reduction in competition for wholesale customers created by this acquisition will allow the post-merger Verizon to exercise market power against the remaining wholesale carrier customers, and increase special access prices significantly. This is because even if there are firms with significant fiber facilities remaining in the market, it is unlikely that these firms, even in the aggregate, have the *traffic* to effectively exert *any* discipline on the merged firm. In other words, the special access discount structures that are available today will not be available post-merger because this acquisition, along with the SBC/AT&T merger, will eliminate the dynamic that makes today’s discount schedules possible.

Therefore, because MCI and its wholesale customers are getting the benefit of MCI’s substantial fiber investment, wholesale customers will lose the substantial benefits of this investment if this Application is approved. Moreover, it is also clear that, because of the enormous size advantage of the merged firm’s long distance company, even separate affiliate requirements will not cure the anticompetitive effects of this merger.

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[16] See U.S. Department of Justice and Federal Trade Commission’s Horizontal Merger Guidelines [“the Guidelines”], Section 3.3.

Finally, the post-merger firm's enhanced incentives and ability to profitably raise input prices will also create the incentives to engage in other exclusionary practices in every downstream market affected by the input price increases, including, *inter alia*, the retail enterprise market, the domestic and global long-distance market, and the Internet backbone market.

Competition in the provision of local connectivity will also suffer as a direct result of the merger because switch-based competitive carriers, including packet switch-based competitors like Covad Communications, will lose the opportunity to provide wholesale services as UNE-P replacements to MCI, as well as AT&T. Both MCI and AT&T entered into deals to transition their UNE-P customer base to a circuit switch-based CLEC competitor, McLeod Communications.[17] Moreover, Covad Communications also announced plans to make available to UNE-P based competitors an IP-based service that would be a comparable service to ILEC-provided UNE-P.[18] Clearly, the loss of the largest potential customers for these services creates a disincentive for competitive carriers to develop wholesale substitutes for those few firms who might be intrepid enough to continue to compete for local mass-market customers. Thus, the elimination of MCI as a potential customer virtually guarantees that the remaining MCI mass-market local customers will have no choice but to revert back to a monopoly provider of local and long-distance services.

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[17] McLeodUSA Press Release, "*AT&T and McLeodUSA Reach Agreement To Provide Customer Choice and Jointly Propose Rules for Continued Competition in Residential and Business Local Phone Service*." July 6, 2004. See also, "*McLeodUSA enters Multi-Year Agreement with MCI to provide Local Service on the McLeodUSA Network.*" December 16, 2004.

[18] Covad Press Release, "*Covad to Conduct Trials of Next-Generation DSLAM Technology Supporting New Competitive Choices for Local and Long Distance Service"* January 13, 2005. "Line-powered voice access will offer an alternative to competitive local exchange carriers (CLECs) to transition lines off the Bell's UNE-P voice service platform and onto Covad's nationwide UNE-L network."

Finally, the Applicants note that 80% of Verizon's revenues from local high-capacity access facilities are obtained from other carriers, and 75% of MCI's local private line revenues come from other carriers.[19] These numbers confirm SBC's observation that, "the largest special access customers are carriers, like AT&T and WorldCom."[20] The loss of either, or both, of these large sources of demand could be devastating for the few remaining competitive providers of fiber-based transport services. The potential effects of this merger on competitive local transport providers due to outright foreclosure of competitive demand—especially within the Verizion ILEC region—are obvious. The exclusionary effect of Verizon's special access contracts on competitive fiber-based transport providers, as well as the potential barrier to entry created by Verizon acquiring excess capacity in the form of all of MCI's fiber facilities are factors that the Department of Justice considers to make subsequent entry—in response to an exercise of market power by the post-merger firm—less likely.

> Factors that reduce the sales opportunities available to entrants include: . . . (b) the exclusion of an entrant from a portion of the market over the long term because of vertical integration or forward contracting by incumbents, and (c) any anticipated sales expansion by incumbents in reaction to entry, either generalized or targeted at customers approached by the entrant, *that utilizes prior irreversible investments in excess production capacity*.[21]

Thus, the Commission should obtain information about the enhanced potential for vertical foreclosure of competitive wholesalers. MCI has previously observed, that the types of exclusionary pricing, and contracting, practices described above, are effective

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[19] Public Interest Statement, p. 20, n. 14.

[20] Opposition of SBC, RM No. 10593 at 29.

[21] Guidelines at Section 3.3 (emphasis added).

"where they tie up sufficient volume to prevent smaller competitors from reaching minimum viable scale."[22]

Clearly, the Commission must also gather more evidence from Verizon and MCI on the potential for competitive harm to both wholesale and retail consumers likely to result from this merger. The Commission should request from Verizon/MCI the additional information described in the CompTel/ALTS Petition to Deny filed in WC Docket No. 05-65.

B. The Proposed Merger Would Harm Consumers By Eliminating Verizon As A Significant New Competitor Of MCI In The Provision of In-Region National And Global Enterprise Services

The Applicants have explained that one of MCI's major areas of expertise lies in serving large, complex enterprise customers. The Applicants also note that Verizon has entered this product market as well—at least in its ILEC region. (See, e.g., Public Interest Statement, p. 23) The Applicants seem confused as to the shares they should assign themselves, based on conflicting estimates from outside parties, but the point they are clear on is that they are competitors for large, in-region, retail enterprise customers. The Commission could, of course, dispel the Applicants' confusion over which outside analyst to believe by compelling the Applicants to produce their own sales data on large contracts, which, in combination with the same information from SBC and AT&T, would provide the most accurate view of the market.

Nonetheless, we do know that in 2000, at the time of the WorldCom/Sprint proposed merger, the Department of Justice noted that, while the BOCs could be considered prospective entrants in this market, the BOCs could not be included in the market at that time since they lacked the ability to provide inter-LATA services, which

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[22] WorldCom Reply Comments, RM-10593, Pelcovits Declaration, p. 7.

are a critical portion of this market. However, Verizon and SBC are in the market today. Thus, it is likely that large enterprise customers will see a substantial reduction in competition by virtue of the loss of competition between Verizon and MCI for predominantly in-region services. Indeed, assuming the information identified by the Department in the WorldCom/Sprint complaint is still largely accurate, the concentration of this market will dramatically increase by over 800 points from a pre-merger HHI of 2500 (25%*25%*4) to a post-merger HHI of more than 3300 (33%*33%*3=3327). Enterprise consumers will also be harmed by the loss of Verizon as a potentially substantial competitor for national and global enterprise services.

Even this startling increase in in-region concentration may understate the true reduction in competition caused by the merger of one of the leading network-based providers of large enterprise services with the dominant incumbent LEC. This is because, post-merger, the merged firm will be in an ideal position to "manage" the now-more-concentrated retail market, being able to monitor the success of its rivals (as a dominant key-input supplier, Verizon will know the identity of every contract winner with certainty), being a leader with retail price increases, and signaling (through input price increases) to rivals who take more than their "fair share" of retail contracts that the rival may want to bid less aggressively the next time around. Such anti-competitive behavior by the merged entity is also inevitable in the national and global enterprise market, to the detriment of those consumers.

The Applicants have provided no useful information on which the Commission could currently analyze the effects of this merger on the market for in-region large enterprise customers. The often-confusing and conflicting information provided by the

Applicants begs the simple question, "who is providing service in this market today, and how are they providing service?" The Commission should, therefore, require Verizon and MCI to produce the data requested in its April 18th Information Request addressed to SBC and AT&T, as well as the additional information suggested by CompTel/ALTS in its Petition to Deny the SBC/AT&T merger.

III. THE MERGED VERIZON/MCI WOULD HAVE BOTH THE ABILITY AND THE INCENTIVE TO HARM OTHER SERVICE PROVIDERS THROUGH PRICE SQUEEZES AND RAISING RIVALS' COSTS.

Verizon already has the *ability* to discriminate against competing service providers, given its virtual monopoly over special access and the FCC's failure to regulate that critical input. The merger would give Verizon an even more powerful *incentive* to discriminate, given its instant transformation into a dominant enterprise service provider. The merged company will have the ability to severely harm consumers by raising wholesale prices for essential local facilities to service providers attempting to compete with Verizon/MCI for enterprise customers. As explained in CompTel/ALTS' Petition to Deny the SBC/AT&T merger application, it is reasonable to expect that post-merger Verizon will likely be able to raise rates to its wholesale rivals by at least 10% or more.[23] Verizon will also have the ability and incentive to provision the essential facilities in a manner that favors its own commercial interests. Consequently, enterprise customers will face higher prices, as Verizon/MCI raises its bids to reflect the higher input price increases it can charge its rivals. Consequently, the post-merger Verizon will be better situated to ensure that customers will receive poorer service if they do business

[23] CompTel/ALTS Petition to Deny, WC Docket No. 05-65, at 17-19.

with a competitor; and, in the longer run, that customers will have fewer choices as competitors are driven from the market.

Verizon/MCI will have the ability and incentive to handicap, and ultimately destroy competitors by placing them in a classic price squeeze. Even if Verizon/MCI charged all competitive enterprise market service providers identical special access rates, it would still have a significant advantage over its competitors in the enterprise sector, because the "real" price affiliate MCI would pay to Verizon for essential local access inputs would be the substantially lower forward-looking economic cost of such facilities. As a result, Verizon/ MCI could offer retail prices much lower than its competitors and still be able to maintain a profitable offering. The published special access rate payment made by MCI, as the downstream affiliate of post-merger Verizon, would move from one Verizon pocket to another. Enterprise customers will pay higher prices as a result.

The Commission, itself, has long recognized the potential for exactly this type of behavior by a vertically integrated Bell company:

> Absent appropriate regulation, an incumbent LEC and its interexchange affiliate could potentially implement a price squeeze once the incumbent LEC began offering in-region, interexchange toll services. . . . The incumbent LEC could do this by raising the price of interstate access services to all interexchange carriers, which would cause competing in-region carriers to either raise their retail rates to maintain their profit margins or to attempt to maintain their market share by not raising their prices to reflect the increase in access charges, thereby reducing their profit margins. If the competing in-region, interexchange providers raised their prices to recover the increased access charges, the incumbent LEC's interexchange affiliate could seek to expand its market share by not matching the price increase. The incumbent LEC affiliate could also set its in-region, interexchange prices at or below its access prices. Its competitors would then be faced with the choice of lowering their retail rates for interexchange services, thereby reducing their profit margins, or maintaining their retail rates at the higher price and risk losing market share.[24]

[24] *Access Reform Order*, 12 FCC Rcd. 15982, ¶ 277 (1997)

The "absent appropriate regulation" trigger occurs upon approval of this Application, because currently the Commission exercises no regulatory discipline over prices, or exclusionary terms, set by Verizon. The facilities of MCI and AT&T, their retail presence, and their ability to aggressively prosecute violations by Verizon—acting as the only security patrol in a neighborhood where no police are present—were the only factors that had even limited effect in constraining Verizon's market power. Further, in the absence of any—much less meaningful—special access performance measures, the post-merger Verizon will, by providing higher quality to service to MCI, more prompt installation of new circuits, and more effective maintenance and repair of existing service be able to give itself benefits that would be very difficult to monitor, but that could seriously harm rival enterprise service providers' ability to compete effectively.

In order to prevent the post-merger firm from acting on its enhanced ability and incentive to harm competitors and their customers through price squeezes, the Commission would have to engage in a level of regulatory vigilance that, quite frankly, the laws and procedures that the Commission must abide do not allow for—nor do the current state of the Commission's regulations. At a minimum, and among other things, it would be essential that pricing of such local connectivity over which Verizon has market power, including *all* special access links between a Verizon installation and a customer, must be at forward-looking economic cost. The current regulatory trend has prices for monopoly inputs—in the form of both UNEs and special access—moving in the opposite direction.

Verizon's ability to discriminate in favor of its own affiliate might have been controlled by the requirements of Section 272 of the Communications Act, which imposes a separate subsidiary requirement and strict rules regarding public disclosure, non-discrimination and arm's length dealing in transactions between an RBOC's ILEC operating companies and affiliated long-distance entities. However, Section 272 "sunsets" automatically within 3 years after an RBOC has received long-distance authority in each state under Section 271, unless the FCC acts to continue the application of those requirements – and the FCC has thus far refused to do so. Because a merger would give Verizon every incentive to use its market power over local facilities to competitors' disadvantage, and ultimately destroy its competitors, the FCC must deny the Application.

IV. THE MERGER MAY REDUCE COMPETITION IN THE INTERNET BACKBONE MARKET

A. The Basic Concern With Dominance in the Internet Backbone Market

The theory of anticompetitive harm from Internet backbone mergers was first developed by three economists, Jacques Cremer, Patrick Rey, and Jean Tirole, who were retained by GTE to aid in its opposition to the WorldCom/MCI merger in 1998.[25] Relying on game theory, Cremer *et al.* described the competitive interaction between Internet backbone providers (IBPs) in a market characterized by significant network effects or externalities and the conditions that could lead to the domination of the Internet backbone by a single firm.

A customer of an IBP (*e.g.*, an ISP, a content provider, or a business requiring direct access to the Internet) pays the IBP for access to customer sites across the Internet,

[25] The three economists were with the Institute of Industrial Economy in Toulouse, France. The paper they submitted on behalf of GTE is Cremer, et al., "The degradation of quality and the domination of the Internet." This model was later published as "Connectivity in The Commercial Internet," *Journal of Industrial Economics*, v. 48, n.4, pp. 433-472, December 2000.

including customer sites not directly connected to the IBP's own network. In order to meet the demands of its customers for broad Internet access, the IBP must reach interconnection agreements with other IBPs. These are essentially bilateral bargaining agreements where the relative size of each IBP's customer base plays the key role in the bargaining. Relatively larger IBPs (in terms of customer base size) can extract fees from smaller IBPs for access to the larger IBP's customer base. From the perspective of the smaller IBP, the payment of the fee is preferable to the denial of access to the large IBP's more desirable customer base. From the perspective of the larger IBP, it recognizes that its more desirable customer base will allow it to extract fees from smaller IBPs.[26] If two IBP's are of roughly equal size, they will recognize that neither possesses a bargaining advantage and they will decide to interconnect on a settlements-free basis. In the Internet backbone market, this bargaining outcome is referred to as peering.

Cremer *et al*. discuss strategies that a dominant firm can employ to enhance its dominance, including pricing and interconnection degradation strategies. These strategies will work, they argue, because their effect will be to further increase the size of the customer base of the dominant firm and reduce the size of the customer bases of other IBPs. In the absence of dominance, competition among IBPs should yield competitive fees, because an IBP has incentives to increase their number of customers for two reasons: first, customers are a direct source of revenues (through fee payments) and second, a larger customer base increases its bargaining power versus its peers. But if an

[26] More generally, this can be restated in terms of the total losses each party would suffer: the threat to deny interconnection is credible if one's losses are smaller. In practice, smaller IBPs often pay transit fees to the very largest IBPs, called Tier 1 IBPs, to provide interconnection to all of the networks connected to the large IBP's network.

IBP can achieve dominance, it will gain the ability to impose supracompetitive fees and ultimately harm consumers.

DOJ has opposed at least three Internet backbone mergers, WorldCom/MCI in 1998, WorldCom/Sprint in 2000, and WorldCom/Intermedia in 2000. DOJ stopped the WorldCom/Sprint merger and won partial divestitures in the other two cases. DOJ's theory of antitrust harm in these three cases is similar to the theory contained in the Cremer, *et al*. paper as can be seen from the following paragraphs in its WorldCom/Sprint complaint.

> 33. The proposed merger threatens to destroy the competitive environment that has created a vibrant, innovative Internet by forming an entity that is larger than all other IBPs combined, and thereby has an overwhelmingly disproportionate size advantage over any other IBP.
>
> 34. The proposed transaction would produce anticompetitive harm in at least two ways. First, it would substantially lessen competition by eliminating Sprint, the second-largest IBP in an already concentrated market, as a competitive constraint on the Internet backbone market. The elimination of this constraint will provide the combined entity with the incentive and ability to charge higher prices and provide lower quality of service for customers.
>
> 35. Second, the combined entity ("UUNET/Sprint") will have the incentive and ability to impair the ability of its rivals to compete by, among other things, raising its rivals' costs and/or degrading the quality of its interconnections to its rivals. As a result of the merger, UUNET/Sprint's rivals will become increasingly dependent upon being connected to the combined entity, and the combined entity will exploit that advantage. Such behavior will likely enhance the market power of the combined firm, and ultimately facilitate a "tipping" of the Internet backbone market that will result in a monopoly.

The theory of anticompetitive harm developed by Cremer *et al*. and utilized by DOJ applies with equal force to the Veruzon/MCI and SBC /AT&T mergers.

B. The Present Merger Presents Classic Internet Backbone "De-Peering" and Dominance Concerns

Verizon is the largest wireline provider of local, long distance, voice, and data services in the country. Verizon also controls one of the nation's largest wireless carriers. MCI owns and operates the "world's most connected Internet backbone"[27], accessing "2,800 cities and 4,500 points of presence, and covers 98,000 route miles, connecting more than 140 countries." (Public Interest Statement at 12) Moreover, "MCI's core strength is its global Internet backbone, which . . . will be able to provide next-generation VoIP and other IP-based services worldwide tomorrow." (*Id*. at 17)

Verizon/MCI and SBC/AT&T possess two decisive advantages that will enable them to significantly increase the customer bases of their respective IBP downstream affiliates at the expense of their IBP competitors. First, with their bottleneck monopoly control over special access to businesses requiring dedicated, non-switched connections to the Internet, the RBOCs will have the incentive and ability to discriminate in price and quality against the IBP competitors of the RBOC's respective downstream affiliates. The types of businesses requiring dedicated access to the Internet include ISPs, content providers and other businesses seeking dedicated Internet connectivity.

Second, each post-merger mega-Bell will have the incentive and ability to route the Internet traffic of its large customer base of residential users and small businesses to their respective downstream affiliates. Verizon has ambitious plans to increase sales of high bandwidth services to commercial and institutional customers, and to deploy optical

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[27] MCI, Inc. Form 10-K for the year ending December 31, 2004 at 4. http://www.sec.gov/Archives/edgar/data/723527/000119312505052451.d10K.html

fiber to the home throughout its region to provide residential customers with high speed bandwidth to connect to the Internet, and to provide video services. (Public Interest Statement, at 15-18)   Verizon also notes that "the companies see opportunities for marrying Verizon's wireless and local broadband capabilities with MCI's IP-backbone . . . capabilities." (*Id*. at 16) In recent Congressional testimony, Ivan Seidenberg, the chairman and CEO of Verizon, " pointed out that, with Verizon as a partner, MCI can continue to be a strong competitor to AT&T, which today is the largest provider of services to the largest business and government customers. Verizon plans to invest some $3 billion in MCI's Internet backbone, network and other systems."[28] So it seems clear that the merged firm will, almost from day one, have more traffic on its backbone than either firm had previously.

Moreover, a historical analysis, or an analysis that misleadingly focuses on Verizon's share of a "national" market, will dramatically understate Verizon's current and likely future levels of Internet backbone traffic, which has been growing dramatically since Verizon has been operating in the interexchange market over the past few years.

Table 1 below shows the date on which Verizon received FCC Section 271 approval in each state. By January 1, 2002, Verizon had received Section 271 approvals in states representing 57.2% of the population of its in-region territory and by January 1, 2003 it had received approvals in states representing 88.3% of the population of its in-region territory. It is not surprising that Verizon and SBC had relatively lows share of Internet backbone revenues in 2002 and 2003 since they had not received a significant

[28] PRN Newswire, March 15, 2005.

proportion of their Section 271 approvals before June 2002 in Verizon's case or before the fall of 2003 in SBC's case.

Table 1. Date on Which Verizon Received FCC Section 271 Approval Ranked by Date of Approval

Verizon State	Date of FCC 271 Approval	2000 Population	Share of State Total	Cumulative Share of State Total
New York	December 23, 1999	18,976,457	28.9%	28.9%
Massachusetts	April 16, 2001	6,349,097	9.7%	38.5%
Pennsylvania	September 19, 2001	12,281,054	18.7%	57.2%
Rhode Island	February 24, 2002	1,048,319	1.6%	58.8%
Vermont	April 17, 2002	608,827	0.9%	59.7%
Maine	June 19, 2002	1,274,923	1.9%	61.7%
New Jersey	June 24, 2002	8,414,350	12.8%	74.5%
Delaware	September 25, 2002	783,600	1.2%	75.7%
New Hampshire	September 25, 2002	1,235,786	1.9%	77.6%
Virginia	October 30, 2002	7,078,515	10.8%	88.3%
District of Columbia	March 19, 2003	572,059	0.9%	89.2%
Maryland	March 19, 2003	5,296,486	8.1%	97.2%
West Virginia	March 19, 2003	1,808,344	2.8%	100.0%
Total VZ Population		65,727,817		

Sources: http://www.census.gov/popest/states/NST-ann-est.html
FCC Sect. 271 Application Home Page

The merging parties have submitted economists' declarations to the FCC that present very similar analyses of the competitive implications of the Internet backbone mergers. These are the Schwartz Declaration on behalf of SBC/AT&T and the Kende Declaration on behalf of Verizon/MCI. Both Declarations present data that are purported to show that SBC and Verizon are insignificant Internet backbone providers. The two declarations adopt a very static approach in analyzing the impact of the two mergers on the provision of Internet backbone services. Their analyses do not capture the dynamic entry into the Internet backbone market of arguably the two most powerful telecommunications companies in the world. Indeed, what is significant about the table below—based on information from the Declaration of Dr. Marius Schwartz, in the SBC/AT&T Application—is that Verizon, before even gaining all of its 271 approvals, was able to become the fourth largest backbone in the country so quickly. The Applicants analyses understate the potential for the merged firm to quickly acquire enough traffic to be able to "de-peer" with other Tier 1 backbones and discriminate against smaller rivals.

Table 2. Revenue Gain (Loss) 2002-2003 by Internet Backbone Providers for Internet Backbone Related Functions ($Million) (Ranked by Revenue Gain)

	2002 Revenues	2003 Revenues	Revenue Gain (Loss) 2002-2003	Percentage Revenue Gain (Loss) 2002-2003
SBC	313	396	84	26.7%
AT&T	1,063	1,134	71	6.7%
BellSouth	343	400	58	16.8%
Verizon	350	403	53	15.0%
C&W	64	73	9	14.1%
Savvis	153	107	(46)	(30.2%)
Qwest	227	170	(57)	(25.2%)
Sprint	664	600	(64)	(9.6%)
XO	180	99	(81)	(44.9%)
MCI	931	699	(232)	(24.9%)
Level 3/Genuity	525	283	(242)	(46.0%)

Source: Declaration of Marius Schwartz, Table 3 and Appendix 3. See text above and accompanying footnotes for more details about the sources and methodology

Note: Level 3 and Genuity revenues for 2002 combined to make a valid two-year comparison. Level 3 acquired Genuity in early 2003.

V. THE APPLICANTS HAVE FAILED TO SATISFY THE PUBLIC INTEREST REQUIREMENT

As discussed above, Verizon and MCI have failed to come forward with even the minimum relevant and probative information that the Commission needs to assess the potential anticompetitive effects of the merger. Moreover, the information that is currently available to the Commission compels a finding that grant of the transfer applications would not promote competition and therefore would not serve the public interest, convenience and necessity.

A. The Proposed Merger Would Permit Verizon To Acquire One Of Its Principal Wholesale Services Regulators

The 1996 Telecommunications Act did not intend to culminate in the effective reemergence of the pre-divestiture Bell System with two mega-RBOCs, vertically integrated and dominating regional markets. The failures that led to this proposed acquisition are many, but it is the additional failures *caused* by the proposed merger that are of concern here. In addition to doing violence to the intended goal of the Act (a competitive local and long distance market), the proposed acquisition of MCI by Verizon violates a fundamental assumption underlying the Act itself – that is, that a reasonable resource balance would exist between entrant and incumbent so that the creative tensions of negotiation and arbitration could produce just and reasonable wholesale arrangements.

As the Supreme Court noted, the Telecommunications Act was intended "to reorganize markets by rendering … monopolies vulnerable to interlopers," with provisions "designed to give aspiring competitors every possible incentive to enter local retail telephone markets."[29] Significantly, the Telecom Act did more than attempt to

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[29] *Verizon*, 535 U.S. 467 (2002).

reorganize local markets, it also effected a subtle shift in the regulatory role of government. For all practical purposes, the Act *privatized* responsibility for the regulation of the RBOCs' wholesale services relying on their competitive customers to arbitrate and enforce their rights.[30] Consequently, the proposed merger represents not only a consolidation and expansion of Verizon's market power, it also represents its acquisition of one of its principal regulators for wholesale services, MCI.

Prior to passage of the Telecommunications Act, regulation focused on retail pricing and was largely conducted at the state level. The principal resources used to police RBOC behavior were publicly-funded: state commission staffs, Offices of Public Counsel, and other state-level consumer utility advocate organizations.[31] As regulation moved from traditional rate-base/rate-of-return approaches to more flexible forms of price regulation, these public resources continued to monitor earnings, service quality and other issues important to retail regulation.

The Telecommunications Act, however, shifted the focus of regulation from the *retail* level (where competition was intended to take root), to a system of regulation intended to create a *wholesale* level beneath it.[32] The wholesale tools adopted by Congress were comprehensive – resale of the incumbent's services,[33] access to network

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[30] By this comment we do not intend to trivialize the important efforts of this Commission and its counterparts in the States. We recognize that each has committed substantial resources to *evaluating* the respective claims of the RBOCs and their entrant-competitors.

[31] In some states, intervenor funding was available to assure that state regulation would be balanced and not distorted by the incumbent utilities' resource advantage.

[32] The Supreme Court recognized this very focus in *Verizon*, describing the Act as having been "…designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbent's property." (emphasis added).

[33] *See* §251(c)(4).

elements at cost based rates,[34] and, for RBOCs wanting to offer long distance services in-region, the added insurance of the competitive checklist.[35]

In addition to its shifting of regulatory emphasis from the retail to wholesale levels, however, the Act also shifted the principal responsibility for regulatory effort from the public sector to the private sector. In the wholesale scheme created by the Act, the principle activities of wholesale regulation – i.e., the creation of open cost models, the development of performance penalty plans, the litigation needed to establish and enforce access rights, as well as the monitoring of wholesale offerings – are substantively born by competitors. To be sure, the states and this Commission must adjudicate the disputes raised by these activities, but the creative tension so central to the Act's implementation depends upon the private resources committed to the regulatory process by competitive entrants.

When Congress decided to rely on the creative tensions between the incumbent RBOC and its "requesting carrier" competitors, it did so because the landscape in 1996 embodied a reasonable resource balance between monopoly and competitive sectors, as shown below.

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[34] *See* §251(c)(3).

[35] *See* §271.

The Incumbent-Competitor Resource Balance at Act Passage[36]
($ millions)

Incumbent LEC Sector		Competitive Sector[37]	
Company	**Revenues**	**Company**	**Revenues**
GTE	$19,957	AT&T	$79,609
BellSouth	$17,886	MCI	$15,265
Bell Atlantic	$13,430	WorldCom	$3,639
Ameritech	$13,427		
NYNEX	$13,407		
SBC	$12,670		
US West	$9,284		
Pacific Telesis	$9,042		
Total	$109,103	Total	$98,699

As the table shows, when Congress was crafting the Telecommunications Act, resources were roughly balanced between the monopoly and competitive sectors. The largest expected local entrants were established interexchange carriers,[38] well financed and (at least presumably) positioned to become effective local competitors.[39] The second largest carrier was MCI. The regulatory model adopted by Congress, with its heavy reliance on bilateral negotiation and arbitration, reflected the relative resource balance that existed at the time.

What Congress could not have anticipated, however, was the extent to which the incumbents would successfully frustrate its fundamental objective of achieving a competitive local market. *Twice* promising that prior consolidations would create the

36 Source: 1995 10K Reports.

37 In addition to these large competitors, there were a handful of much smaller entrants with comparatively modest revenues and numbers of employees.

38 A third interexchange carrier (Sprint) was also an incumbent LEC and has not been included in the above table as either a member of the competitive or monopoly sectors of the industry.

39 It is useful to note that the total revenues of the interexchange carriers is partially inflated by revenues recovered in retail toll rates that ultimately are paid to incumbent local exchange carriers as access payments.

necessary scale to compete out-of-region,[40] two super-RBOCs – Verizon and SBC, who together currently control more than 63% of the country's access lines and more than 50% of the wireless lines[41] -- have emerged to dominate the monopoly sector. Coupled with a strategy of perpetual litigation intended to erode their wholesale obligations, the RBOCs have succeeded in tilting the resource balance against the competitive sector.

The Incumbent-Competitor Resource Balance – Pre-Merger[42]
($ millions)

Incumbent LEC Sector		**Competitive Sector[43]**	
Company	**Revenues**	**Company**	**Revenues**
Verizon	$71,283	AT&T	$30,537
SBC[44]	$52,308	MCI	$20,690
BellSouth	$20,300	Level 3	$3,712
Qwest	$13,809	XO	$1,300
		McLeod	$716
		Broadwing	$672
		Time Warner	$653
		ITC^DeltaCom	$583
		Talk America	$471
		Covad	$429
		US LEC	$356
		Trinsic	$251
		Eschelon	$158
		PacWest	$124
Total	$157,700	Total	$60,653

40 Both Verizon (when it acquired GTE) and SBC (when it acquired Ameritech) claimed that these mergers would provide them the scale they needed for out-of-region entry.

41 *Trends in Telephone Service May 2004*, Industry Analysis and Technology Division, Wireline Competition Bureau at Table 7.1; *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993*, WT Docket 04-111, Ninth Report, FCC 04-216 (released September 28, 2004.

42 Source: 2004 10K Reports.

43 Listing includes competitive carriers that have reached sufficient size to (at least, at one time) attract public capital.

44 SBC revenues include 60% of Cingular's revenues for 2004.

As the table above demonstrates, one consequence of the RBOC consolidation that has already occurred is the ever-tilting resource imbalance favoring the incumbent. The resource imbalance that exists today (as shown in the table above), however, is more manageable than the imbalance that will result from the acquisition of MCI by Verizon (and the acquisition of AT&T by SBC). MCI and AT&T are responsible for approximately 85% of the revenues of the competitive sector.

If Verizon is permitted to acquire MCI (and AT&T is acquired by SBC), the resource balance so critical to the Act's successful operation will be crippled. In practical terms, the RBOCs are poised to acquire their regulators – rendering the Act's reliance on privately-funded arbitrations, cost-proceedings and performance monitoring irrelevant.

The Incumbent-Competitor Resource Imbalance – Post-Merger
($ millions)

Incumbent LEC Sector		**Competitive Sector**	
Company	**Revenues**	**Company**	**Revenues**
Verizon	$71,283	Level 3	$3,712
SBC	$52,308	XO	$1,300
Qwest	$13,809	McLeod	$716
BellSouth	$20,300	Broadwing	$672
		Time Warner	$653
AT&T[45]	$30,537	ITC DeltaCom	$583
MCI	$20,690	Talk America	$471
		Covad	$429
		US LEC	$356
		Trinsic	$251
		Eschelon	$158
		PacWest	$124
Total	$208,927	Total	$9,426

[45] Including MCI and AT&T on the "Incumbent LEC" side of the ledger admittedly overstates revenues (by the amount of access charges that will become merely internal transfer payments) and employees (since substantial layoffs are expected). Adjusting for such factors, however, would not materially effect the discussion or conclusion that the proposed transactions are not in the public interest.

As the above table demonstrates, the fundamental predicate to the Act – that privately funded entrants can effectively police the wholesale services of the incumbent – will be violated by the proposed mergers. The Act's reliance on a creative tension between incumbent and entrant (with the requisite arbitration by state utility commissions) will be irreparably harmed. With the simple strategy of attrition through litigation – a strategy that the RBOCs have perfected -- basic competitor rights will continue to erode. The only antidote for the elimination of the major private enforcers would be for the regulators to engage in more intrusive regulatory intervention to promote competition and ensure quality service at reasonable prices for consumers. Such intervention would be contrary to the deregulatory goals of the Act.[46]

B. Recreating The Bell System Will Not Promote Competition

In reviewing merger applications, the Commission has repeatedly stressed that the Communications Act requires it to actively promote the development of competition in telecommunications markets, not merely to prevent the lessening of competition, which is the province of the antitrust laws. *See e.g., In re Applications of Ameritech Corp., and SBC Communications, Inc., For Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, FCC 99-279 (released October 8, 1999) ("*SBC/Ameritech Order*") at ¶63. In terms of achieving the statutory goal of promoting competition, a marriage between the nation's largest incumbent local

[46] In resolving the public interest issue, the Commission must consider whether the transaction would substantially frustrate the Commission's ability to implement or enforce the Communications Act. *Bell Atlantic/GTE Order* at ¶ 22.

exchange carrier [47] and the nation's second largest long distance/competitive local exchange carrier does not pass the red-face test.

Like its sister Bell Company SBC, Verizon has pursued an acquisition strategy in response to the pro-competitive, ILEC monopoly-dismantling provisions of the 1996 Act. Shortly after the passage of the Telecommunications Act in February 1996, Verizon (then known as BellAtlantic) acquired its Bell Company neighbor to the north, NYNEX Corporation. *In the Applications of NYNEX Corporation and BellAtlantic Corporation For Consent To Transfer Control of NYNEX Corporation And Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, FCC 97-286 (released August 14, 1997) ("*NYNEX/Bell Atlantic Order*"). Less than one year later, BellAtlantic announced its intention to acquire GTE, the nation's largest independent ILEC. *In re Application of GTE Corporation and Bell Atlantic Corporation For Consent to Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application To Transfer Control of a Submarine Cable Landing License*, CC Docket 98-0184, Memorandum Opinion and Order, FCC 00-221, at ¶¶ 6, 13 (released June 16, 2000) ("*BellAtlantic/GTE Order").* Six months after the GTE acquisition was approved, Verizon acquired One Point Communications, a CLEC providing local and long distance telephone services, video services and high-speed Internet access services to apartment and condominium residents. *In the Matter of the Joint Applications of One Point Communications Corporation and Verizon Communications For Authority Pursuant to Section 214 of the Communications Act, As Amended, To Transfer Control of Authorizations to Provide Domestic Interstate and International Telecommunications*

[47] *Trends in Telephone Service May 2004*, Industry Analysis and Technology Division, Wireline Competition Bureau at Table 7.3.

Services As A Non-Dominant Carrier, CC Docket No. 00-170, Memorandum Opinion and Order, DA 00-2783 (released December 8, 2000). Already the country's second largest wireless carrier and the most profitable in terms of operating income,[48] Verizon currently has three applications pending to acquire additional PCS licenses to further expand its wireless holdings. *In re Applications of Qwest Wireless and CellCo Partnership d/b/a Verizon Wireless For Consent To the Assignment of Sixty-two Broadband PCS* Licenses, WT Docket No. 04-264, PN DA 04-2254 (released July 22, 2004);[49] *In re Applications of Verizon and Nextwave For Consent To Transfer Control of Broadband PCS Licenses to Verizon,* WT Docket No. 04-434, PN DA 04-3873 (released December 10, 2004); *In re Applications of UrbanCom-North Carolina, Inc., Suncom Wireless, Inc. and CellCo Partnership d/b/a Verizon Wireless For Consent To the Transfer of Control of Broadband PCS Licenses*, WT Docket 05-169, PN DA-1042 (released April 8, 2005). With the acquisition of MCI, Verizon will have eliminated the competitor whose tenacity in fighting AT&T's monopoly control of the nation's telecommunications markets contributed to the break up of AT&T and the birth of Verizon and its fellow Regional Bell Operating Companies.[50]

Although the goal of the AT&T divestiture was to open the long distance markets to competition and the goal of the Telecommunications Act of 1996 was to open the local telecommunications markets to competition, Verizon, through its proposed acquisition of

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[48] See Verizon's Annual Report for the year ending December 31, 2004 at 12. http://www.sec.gov/archives/edgar/data/732712/000119312505049044/d10k.htm.

[49] Although the Commission's website indicates that this application is still pending, Verizon stated in its 2004 Annual Report that the transaction closed on March 4. 2005. *Id.* at 16.

[50] The Commission should not forget that it was the Bell System's discrimination against interexchange carriers, such as MCI, that led to the divestiture of AT&T and the creation of Verizon and the other Baby Bell companies. *BellAtlantic/GTE Order* at ¶ 195.

MCI, and SBC, through its proposed acquisition of AT&T, will restore to Bell Operating Company control the vast networks of the two largest local and long distance competitors. As a result of the two proposed mergers, the smaller surviving competitors will be beholden to the Bell Operating Companies not only for access to the local bottleneck but also for access to long distance capacity and the Internet backbone capacity necessary to provide advanced services. Now that the Commission has authorized all of the RBOCs to provide in-region long distance service,[51] allowing the two largest RBOCs to pick off their two largest competitors will seriously jeopardize fulfillment of the goal of the Telecommunications Act of 1996 – bringing the benefits of competition to the American public.

In proposing a transaction that will unite the largest ILEC with one of its largest competitors, Verizon and MCI bear an extremely heavy burden to prove that the merger will serve the public interest. *Bell Atlantic/GTE Order* at ¶ 171 ("The Commission warned in the *Bell Atlantic/NYNEX Order* and reiterated in the *SBC/Ameritech Order*, that 'future applicants bear an additional burden in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity.'")

Before making the requisite public interest finding, the Commission must be "convinced that [the merger] will *enhance* competition." *NYNEX/Bell Atlantic Order* at ¶ 2 (emphasis added); *Bell Atlantic/GTE Order* at ¶ 23. A merger will not be "pro-competitive if the harms to competition – i.e., enhancing market power, slowing the decline of market power, or impairing [the] Commission's ability properly to establish

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[51] Verizon reports that 47% of its wireline residential customers subscribe to Verizon long distance service. See Verizon's Annual Report for the year ending December 31, 2004. http://www.sec.gov/archives/edgar/data/732712/000119312505049044/d10k.htm

and enforce those rules necessary to establish and maintain the competition that will be a prerequisite to deregulation – are [not] outweighed by the benefits that enhance competition." *BellAtlantic/NYNEX Order* at ¶ 2. As discussed above, the paucity of information that Verizon and MCI have presented in their Application precludes a finding that there are competitive benefits to this merger, much less benefits that outweigh the competitive harms caused by the loss of one of Verizon's largest and strongest rivals. For this reason, the Commission must deny the merger application.

To demonstrate that the merger will enhance, rather than impair, competition, Verizon and MCI bear the burden of showing that the proposed merger would not eliminate potentially significant sources of the competition that the Communications Act sought to create. *Bell Atlantic/NYNEX* Order at 3. The Applicants cannot carry this burden of proof. At the time the Commission approved the Bell Atlantic/GTE merger five years ago, it concluded that the merger was likely to result in a significant public interest harm by eliminating GTE as "among the most significant *potential* participants in the mass market for local exchange and exchange access services in Bell Atlantic's operating areas." *Bell Atlantic/GTE Order* at ¶ 100 (emphasis added). The harm to the public interest that will be caused by the merger of Verizon and MCI is far worse because MCI in not merely a *potential* entrant into Verizon's operating areas, but a significant existing competitor. *Id.* at ¶118 (MCI is "among the most significant participants in the mass market for local exchange and exchange access services.") As of December 31, 2004, MCI reported that it had 7 million mass market customers for its long distance service, 3 million of which also subscribed to its local service.[52] Under these

[52] MCI, Inc. Annual Report for the year ending December 31, 2004 at 10. http://www.sec.gov/Archives/edgar/data/723527/000119325050524 51/d10k.htm.

circumstances, the Commission must conclude that the merger of Verizon and one of the most significant competitors in its region harms the public interest by "frustrating the Communications Act's objective of fostering greater competition in the market for these services." *Bell Atlantic/GTE Order* at ¶122.

Pursuant to Section 214(a) of the Act, the Commission cannot approve the merger unless it makes an affirmative finding that the present or future public convenience and necessity *requires* or *will require* Verizon to operate MCI's telecommunications lines and that neither the present nor future public convenience or necessity will be adversely affected by the discontinuance of service from MCI. *Bell Atlantic/GTE Order* at ¶ 21. The Commission cannot make such a finding. If the elimination of a potential entrant into Verizon's markets would harm the public interest as the Commission found in the *Bell Atlantic/GTE Order*, the public interest cannot possibly *require* Verizon to acquire MCI's customers and lines and the public interest will surely be adversely affected by the by the removal of MCI as a competitor in Verizon's territory.[53]

In analyzing the potential impacts of mergers among major carriers in the past, the Commission has correctly recognized that incumbent LECs, such as Verizon, have the incentive and ability to discriminate against competitors in the provision of local services, interexchange services and advanced services and that such incentives and ability will increase as a result of the merger. Giving an ILEC the tools to enhance its ability to discriminate harms the public interest by adversely affecting not only the ability of competitive carriers to remain viable alternatives in the market, but also by forcing

[53] The Commission's finding in the *Bell Atlantic/NYNEX Order* that the merger would strengthen the incumbent's market power against erosion from competition by removing one of the most significant market participants is even more true here. *Id.* at ¶45.

consumers to pay more for retail services, with reduced quality and choice of services and providers. *Bell Atlantic/GTE Order* at ¶¶ 173-176.

The Commission expressed serious concern about the likelihood that the Bell Atlantic/GTE merger would increase harmful discrimination particularly against competitive providers of local exchange services to small business and residential customers. The Commission acknowledged that Verizon had the incentive to discriminate against its retail rivals in order to preserve its customer base and win back the customers its competitors were sure to lose due to the discrimination. The Commission traced Verizon's ability to discriminate against its CLEC rivals to its monopoly control over the key inputs, such as interconnection and network elements, that CLECs need to provide service to their end users. *Bell Atlantic/GTE Order* at ¶¶173 - 176.

Today, Verizon continues to maintain the ability to discriminate, especially against CLECs that serve the small business and residential retail markets, through control over essential inputs. Verizon also continues to maintain the incentive to discriminate in an effort to regain the millions of mass market customers it has lost to MCI, AT&T and other CLECs offering service using unbundled network elements. [54]

Verizon's ability and incentive to discriminate has been greatly enhanced by the Commission's decision in the Triennial Review to deny CLECs the right to access the

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[54] Verizon attributes the decline in its local services revenues to regulatory pricing rules for UNEs which it claims "put downward pressure on revenues by shifting the mix of access lines from retail to wholesale." See Verizon's Annual Report for the year ending December 31, 2004. http://www.sec.gov/archives/edgar/data/732712/000119312505049044/d10k.htm This statement underscores the accuracy of the Commission's prior determination that discriminatory interconnection policies will be profitable for Verizon insofar as gains in the provision of retail services will exceed whatever revenues Verizon forgoes from wholesale interconnection with rivals. *Bell Atlantic/GTE Order* at ¶201.

TELRIC-priced UNEs they need to serve end users.[55] Verizon and the other RBOCs are fighting to protect from public disclosure any negotiations or agreements for wholesale offerings to replace network elements and combinations of network elements no longer required to be unbundled.[56] By insisting that CLECs sign non-disclosure agreements before initiating negotiations for de-listed network elements, Verizon is attempting to ensure that any such offerings or agreements will not be subject to regulatory scrutiny, thereby eliminating the possibility that it will be called to task for discriminating against its CLEC competitors. Neither this Commission nor state regulators will be able to effectively police or prevent unjust and unreasonable discrimination under these conditions. Shrouding agreements for key inputs used by competitors in secrecy will encourage Verizon to discriminate because it is unlikely that any such discrimination will be detected or appropriate enforcement action taken.

C. The Commission Must Consider The Possible Adverse Effects The Merger May Have On National Security Issues

In reviewing this merger, the Commission must be extremely sensitive to the very real public interest harm and threat to the national security that will result from Verizon's acquisition of one of its largest competitors in the local, long distance and data markets. As an incumbent carrier in 29 states and the District of Columbia, Verizon

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55 *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket 04-313, CC Docket 03-338, Order on Remand, FCC 04-290 (released February 4, 2005) (finding that CLECs are not impaired without access to UNE dark fiber and switching and severely limiting UNE access to high capacity loops and transport).

56 *See* Comments of Verizon filed in *In the Matter of SBC Communications, Inc. Emergency Petition For Declaratory Ruling, Preemption and For Standstill Order to Preserve the Viability of Commercial Negotiations*, WC Docket No. 04-172 and *In the Matter of Bell South Corporation's Petition For Forbearance Under §160(c) From Enforcement of Section 252 With Respect To Non-251 Agreements*, WC Docket No. 04-313.

provides vital communications services to federal, state and municipal government agencies, including fire and police departments. Verizon's recent behavior in threatening to disconnect the District of Columbia's voice and data services because of a five year old unresolved billing dispute demonstrates that the public interest, not to mention national security interests, would be harmed if Verizon is permitted to significantly increase its market power by eliminating MCI as a competitor.

Verizon is, and has been for many years, the District of Columbia Government's local exchange carrier. As Verizon acknowledged in the Applicants' Public Interest Statement, "[t]he typical large enterprise or institutional customer often expects its provider to tailor its offerings to the customer's unique demands, which often requires customization of network functions and systems."[57] In May 2002, the D.C. Government signed such a custom contract with Verizon for a three year term, pursuant to which Verizon provided voice lines and data circuits to "all executive and some independent agencies and most of the 33,000 employees" of the government at discounted rates.[58] Verizon's services support virtually all of the operations of the D.C. Government, "including, among countless others, public safety and fire and police services, traffic management systems, tax and other revenue collections, electronic payroll distributions for [government] employees, and numerous health and human services furnished to

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[57] Public Interest Statement at 6.

[58] *Petition of the District of Columbia For Oversight of Transition To Tariffed Telecommunications Services*, DC Public Service Commission Formal Case No. 1038, Petition of the District of Columbia Government For An Expedited Hearing and Order Requiring Verizon Washington, D.C., Inc. to Continue Service, Affidavit of Peter R. Roy (filed April 27, 2005).

senior citizens, people insured with the [government's] health alliances, needy children, disabled persons and others."[59]

Over the past few months, a drama has been unfolding regarding the District's attempt to renew the Verizon contract, which expired on April 30, 2005, and Verizon's refusal to renew the contract or extend it beyond its expiration date due to a billing dispute. By letter dated April 7, 2005, Verizon informed the D.C. Government that it would discontinue providing telephone service on the expiration date unless the government was able to obtain service under the federal WITS 2001 contract or submitted a "request, acceptable to Verizon, to provide the services under the rates, terms and conditions of Verizon's applicable tariffs".[60] When the District of Columbia realized that it would not be able to implement a WITS 2001 service arrangement before the contract expiration date, it submitted a tariff application to Verizon requesting that Verizon provide exactly the same services under tariff that it was currently providing under the custom contract. On April 25, 2005, Verizon rejected the tariff application on the grounds that it did not contain sufficient detail with respect to the services requested "translated into tariff-based categories." [61] Moreover, Verizon informed the District that even if an acceptable tariff application was presented, it would discontinue services furnished under the custom contract that are not specifically described in applicable tariffs.[62]

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59 *Id.*

60 *Id.*, Attachment 3, April 7, 2005 letter from Harry A. Coleman, II, Senior Vice President – Sales, Verizon to Peter Roy, Deputy Chief Technology Office for the District of Columbia.

61 *Id.*, Affidavit of Peter R. Roy

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62 *Id.*, at ¶ 11. Verizon also argued in a pleading filed with the District of Columbia Court of Appeals that the District of Columbia Public Service Commission "does not have jurisdiction to compel

The District of Columbia's Deputy Chief Technology Officer summarized just some of the adverse consequences that would befall the District of Columbia government and its ability to serve its citizens if Verizon disconnected the service on May 1 as follows:[63]

> the [government] would lose its key methods of communication, voice telephone and email, as well as data circuits that support numerous [government] services. The result would be immediate, severe, and potentially life-threatening effects on virtually all functions of the [government] and the nearly 600,000 residents of the city. For example:
>
> The city (including citizens, visitors, District employees and the federal government) would face dramatically increased risk in the event of any public emergency (including September 11-type attack), because the [government] would lack the communications and traffic management systems that are vital to all emergency response.
>
> In addition, government personnel and the public would face immediate increased risk because of the following impacts:
>
> - District public safety agencies would be incapable of communicating with each other or civilian agencies that support them (e.g., the federal and [D.C.] Departments of Transportation).
> - Public safety (fire, police and Emergency Management Agency (EMA)) voice radio systems would be interrupted.
> - The high-speed wireless system used by the District public safety agencies, as well as federal agencies including the Secret Service, Capitol Police and Park Police, and regional partners, would be interrupted.
> - Public safety messaging systems that rely on communication through the Internet would be disconnected.

Verizon to provide services that are not regulated at all, that are regulated by the FCC or that are not 'public utility services'" and that "[t]he contract between Verizon and the District government includes such services. . . ." Verizon Washington, D.C., Inc.'s Expedited Response to Petition For Writ Pursuant to the All Writs Act, filed April 29, 2005 in *District of Columbia v. Verizon Washington, D.C., Inc.*, Distict of Columbia Court of Appeals, Case No. 05-OA-21.

[63] *Id.*, Affidavit of Peter R. Roy at ¶¶ 27-33.

> - District agencies could not call “9-1-1” to summon emergency help. . . .
>
> The [D.C. government] would also suffer interruption of vital national security services and lines, for example:
>
> - Priority Restoration for 911 Lines – Telecommunications Service Priority
> - NSEP Mayoral Hotlines
> - Hotline to the White House
> - Hotline to the Secret Service
> - Hotline to the National Guard
> - Hotline to the Governors of Virginia, Maryland and other Council of Government jurisdictions
> - Hotline to the Federal Emergency Management Agency . . . .

Verizon’s threat to disconnect all telecommunications and data services continued until the D.C. Government filed suit on April 29,[64] which apparently prompted Verizon to agree to provide service for an additional 18 days to give the government an opportunity to transition its contract services to tariffed services or make alternative arrangements. The fact that Verizon would be able to cripple the nation’s capital and its ability to respond to emergency situations over a *billing dispute* demonstrates conclusively that Verizon has far too much market power already. What is especially pernicious about Verizon’s conduct is its willingness to use its market power to endanger the safety and lives of the 600,000 residents of the District of Columbia in an attempt to force the government to resolve a billing dispute to its liking. Whatever the merits of the billing dispute, Verizon’s threat to disconnect service and thereby jeopardize national and municipal security was reckless and unconscionable. Enhancing Verizon’s market power through approval of this merger could not possibly serve the public interest especially

[64] *District of Columbia v. Verizon Washington, D.C., Inc.*, Distict of Columbia Court of Appeals, Case No. 05-OA-21.

now that Verizon has shown that it will put government communications systems at risk as a bargaining chip in a billing dispute.

The D.C. Government is in the process of constructing a fiber optic telecommunications network designed in part to make the government less dependent on Verizon.[65] Ironically, MCI is the District of Columbia's "partner in [its] private telecommunications network."[66] If the Commission approves the merger between Verizon and MCI, the D.C. Government will remain dependent on Verizon for its telecommunications needs and will continue to suffer the adverse consequences brought about by the exercise of Verizon's market power. This fact cannot be reconciled with the Applicant's representation that the merger "will benefit government customers and promote national security."[67] Nor can it be reconciled with the Applicants' argument that that the characteristics of the large enterprise market "are such that the combination will have no negative effects on competition for these customers."[68] Although the Applicants contend that large enterprise customers can obtain competitive prices through requests for proposals from carriers,[69] Verizon has demonstrated that it can and will refuse to negotiate competitive prices with even its largest enterprise customers[70] and force them to

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65 "DC-NET Fiber Optic Voice/Data System Provides Data Connectivity to Government Agencies," http://octo.dc.gov/octo/cwp/view,a,1304,q,624403,octoNav,|32780|.asp.

66 Affidavit of Peter R. Roy at ¶ 24.

67 Public Interest Statement at 3.

68 Public Interest Statement at 26.

69 *Id.*

70 Verizon describes large enterprise customers as those that spend at least $100,000 annually on communications services. Bruno/Murphy Declaration at ¶ 5. The District of Columbia government spends more than twenty times that amount monthly. According to Verizon, the District government buys *$1 million in services from Verizon every 10 business days*. *See Petition of the District of Columbia For Oversight of Transition To Tariffed Telecommunications Services,* DC Public Service Commission Formal

purchase tariffed services. This very real life example of Verizon's use of its market power to hold hostage one of its largest enterprise customers, and our nation's capital no less, does not bode well for smaller retail, wholesale and enterprise customers.

While Verizon's conduct in its dispute with the D.C. Government is shocking enough, the Commission must also look at the bigger picture. A very difficult lesson learned from the September 11th attacks is that our telecommunications systems are not invulnerable and that bringing down even one ILEC central communications node can have a devastating impact. The destruction of Verizon's facilities at 60 Hudson in Lower Manhattan not only eliminated communication links to much of the financial community, but also the links needed by the rescue workers to communicate with one another. Verizon's efforts to restore service were in large part facilitated by the redundant facilities, both wireline and fixed wireless, made available to Verizon and rescue personnel by CompTel/ALTS members.[71]

The redundant facilities put in place and operated by competitive carriers are vital to the security of our nation's communications systems and are a critical national resource. In evaluating the public interest, the Commission must consider the toll this merger may take on the continuing viability of CLECs and the concomitant continuing availability of redundant facilities to keep our nation connected. Before determining whether this merger will serve the public interest, convenience and necessity, the Commission at the very least should and must assess the impact the elimination of MCI

Case No. 1038, Verizon Washington, D.C., Inc.'s Motion To Dismiss The Petition of the District of Columbia Government at 15.

[71] *See* ALTS Letter to Chairman Michael Powell dated September 28, 2001; CompTel Letter to President George W. Bush dated October 3, 2001; George W. Bush Letter to CompTel dated October 5, 2001.

as a competitor and Verizon's retirement of MCI's "duplicative facilities" will have on the security of the nation's telecommunications systems. In addition, the Commission should and must assess the impact the increased concentration of market power in the hands of Verizon will have on the ability of the ever dwindling number of CLECs to remain viable competitors in the market.

VI. CHARACTER QUALIFICATIONS

Section 310(d) of the Act provides that transfer applications, such as those filed by Verizon and MCI, will be treated as though the transferee applied under Section 308 of the Act. Section 308 provides that before granting an application, the Commission must make an affirmative determination that the applicant possesses the requisite character qualifications to be a Commission licensee. As the Commission noted recently, the central focus of its "review of an applicant's character qualifications is conduct that bears on the proclivity of an applicant to deal truthfully *with the Commission* and to comply with *our* rules and orders." *Cingular/AT&T Order* at ¶47 (emphasis in the original). All violations of the Act, the Commission's rules and/or policies are "predictive of an applicant's future truthfulness and reliability and, thus, have a bearing on an applicant's character qualifications." *Id.*

Verizon has a well documented history of violating the pro-competitive provisions of the Act and Commission rules. CompTel/ALTS submits that Verizon's past derelictions are predictive of its future behavior as a licensee and are disqualifying under Section 310 of the Act.

A. Verizon's History of Misconduct

Section 214 authorizes the Commission to impose conditions on the grant of licenses if necessary to protect the public interest. The public harms that will be caused by the Verizon/MCI merger, however, cannot be rectified through the imposition of conditions. Although the Commission imposed conditions when it approved the Bell Atlantic/GTE merger, Verizon failed to comply with them and with other pro-competitive provisions of the Act and Commission's rules, demonstrating that even at its current size, it is virtually unregulatable. The Commission should not again be lulled into a false sense of security by presuming that it can remedy competitive harms with conditions that have no teeth. The public interest demands far more.

Due to the significant competitive harms threatened by the merger of Bell Atlantic and GTE, the Commission made very clear that it would not have approved the merger absent stringent and enforceable conditions:

> [A]bsent conditions, the merger of Bell Atlantic and GTE will harm consumers of telecommunications systems by (a) denying them the benefits of future probable competition between the merging firms; (b) undermining the ability of regulators and competitors to implement the pro-competitive, deregulatory framework for local telecommunications that was adopted by Congress in the 1996 Act; and (c) increasing the merged entity's incentives and abilities to discriminate against entrants into the local markets of the merging firms. Moreover, we also find that asserted public interest benefits of the proposed merger will not outweigh the public interest harms.

Bell Atlantic/GTE Order at ¶ 3. Thus, the merger conditions were an integral part of the Commission's agreement to allow Verizon to "continue the trend of coalescing large incumbent LECs, and reversing the breakup of the Bell System." *Id.* at 195. Of course, bringing MCI under Verizon's control will constitute another giant leap in recreating the pre-divestiture Bell System and will also (1) deny consumers the benefits of competition between Verizon and MCI; (2) undermine the ability of regulators and competitors to implement the pro-competitive, deregulatory goals of the 1996 Act; and increase the merged entity's incentives and abilities to discriminate against the remaining competitors.

Since the Bell Atlantic/GTE merger was approved, the Commission has investigated Verizon for engaging in conduct that violates several different merger conditions as well as provisions of the Act and Commission rules designed to protect CLECs against discrimination. Unfortunately, the only punishment the Commission has imposed for these violations has been the assessment of non-material financial forfeitures and, in some cases, the extraction of a promise from Verizon to try to do better. As a result, Verizon has been able to avoid dutiful compliance with the pro-competition provisions of the Act and the conditions designed to counter the anticompetitive effects of the merger, choosing instead apparently to absorb the financial forfeitures as a cost of doing business if and when the Commission held it accountable for its misconduct.

For the Commission's convenience, CompTel/ALTS summarizes below a sampling of the Commission's enforcement Orders addressing Verizon's violation of various merger conditions, provisions of the statute and Commission rules:

- In an Order released March 9, 2000, the Commission adopted a Consent Decree to terminate an investigation into Verizon's violation of Section 271 and the conditions of its New York Section 271 authority. The investigation was prompted by Verizon's loss and mishandling of UNE orders submitted electronically by CLECs. *In the Matter of Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* File No. EB-00-IH-0085, Order, FCC 00-92 (released March 9, 2000). Shortly after Verizon secured 271 authority for New York in December 1999, its performance in providing order acknowledgments and confirmation, rejection and order completion notices for UNE-Platform local service orders deteriorated significantly. Pursuant to the terms of the Consent Decree, Verizon agreed to make a "voluntary payment" of $3 million to the U.S. Treasury and to implement an additional performance measuring system requiring the submission of weekly reports to the Commission.

- In an Order released August 1, 2000, the Commission adopted a Consent Decree terminating an investigation into GTE's violations of Section 251(c)(6) of the Act and Section 51.323(k) of the Commission's rules due to its failure to offer cageless physical collocation. *In the Matter of GTE Service Corporation*, File No. EB-00-IH-0113, Order, FCC 00-281 (released August 1, 2000). Pursuant to the Consent Decree, GTE agreed to make "a voluntary contribution" to the U.S. Treasury in the amount of $2.7 million.
- In an Order released October 17, 2000, the Enforcement Bureau adopted a Consent Decree terminating an investigation into Verizon's violations of Section 64.1120(a)(1)(ii) of the Commission's rules by failing to keep records of third party verifications ("TPVs") for tens of thousands of customer PIC changes to Verizon's long distance service. *In the Matter of Verizon Communications*, File No. EB-00-TC-053, Order, DA 00-2341 (released October 17, 2000). Pursuant to the Consent Decree, Verizon agreed to make a "voluntary contribution" in the amount of $250,000 to the U.S. Treasury and to implement training procedures

and oversight mechanisms for its employees and TPV contractors to ensure compliance with the Commission's PIC change rules.

- In an Order released September 14, 2001, the Commission adopted a Consent Decree terminating an investigation into Verizon's violations of Section 51.321(h) of the Commission's rules by failing to timely post notice of central offices where collocation space was exhausted. *In the Matter of Verizon Communications, Inc.*, File No. EB-01-IH-0236, Order, DA 01-2079 (released September 14, 2001). Pursuant to the Consent Decree, Verizon agreed to make a "voluntary contribution" of $77,000 to the U.S. Treasury .
- In an Order released February 28, 2002, the Commission found that Verizon had violated Section 201(b) of the Act and a Bell Atlantic/GTE merger condition by refusing to allow Global NAPS to opt into certain provisions of an interconnection agreement. *Global NAPS, Inc. v. Verizon Communications, Inc., et al.*, File No. EB-01-MD-010, Memorandum Opinion and Order, FCC 02-59 (released February 28, 2002).
- In an Order released August 20, 2002, the Enforcement Bureau adopted a Consent Decree terminating an investigation into Verizon's compliance with certain Bell Atlantic/GTE merger conditions designed to protect against discrimination against CLECs in the provision of services. *In the Matter of Verizon Communications, Inc.*, File No. EB-01-IH-0519, Order, DA 02-2017 (released August 20, 2002). The investigation focused on Verizon's failure to submit to the independent auditor data for certain Carrier-to-Carrier performance measurements and special access performance measurements as well as inaccuracies in the performance data

that Verizon did submit over an 18 month period. The Commission also investigated Verizon's failure to disclose to the auditors a complete set of the agreements between Verizon and Genuity, the separate corporation formed to hold substantially all of GTE's nationwide data business, as required by the merger conditions. Verizon agreed to make a "voluntary contribution" in the amount of $260,000 to the U.S. Treasury and to implement a Compliance Plan which, among other things, required Verizon to establish one or more Vice Presidential steering committees to review the accuracy of performance and service quality data required under the Carrier-to Carrier Performance Plan, and implement measures to ensure that data required to be reported pursuant to the merger conditions was properly retained and submitted.

- In an Order released March 4, 2003, the Commission adopted a Consent Decree to terminate an investigation into Verizon's marketing and provisioning of interLATA service in states where it had not received Section 271 authority. *In the Matter of Verizon Telephone Companies*, File No. EB-02-IH-0568, Order, FCC03-41 (released March 4, 2003). Pursuant to the Consent Decree, Verizon agreed to make a "voluntary contribution" of $5.7 million to the U.S. Treasury.
- In an Order released April 23, 2003, the Commission found that Verizon had violated the reasonableness standard of Section 251(c)(2)(D) of the Act and Section 31.305 of the Commission's rules by refusing to interconnect with a CLEC on just and reasonable terms. *In the Matter of Core Communications, Inc. v. Verizon Maryland, Inc.*, File No. EB-01-MD-007, Memorandum Opinion and Order, FCC 03-96 (released April 23, 2003).

- In an Order released July 27, 2004, the Commission adopted a Consent Decree to terminate an investigation into Verizon's and its long distance affiliates' violations of the structural, transactional and nondiscrimination safeguards of Section 272 of the Act and Sections 32.27 and 53.203 of the Commission's Rules. *In the Matter of Verizon Telephone Companies, Inc.*, File No. EB-03-IH-0245, Order, FCC 04-180 (released July 27, 2004). Pursuant to the Consent Decree, Verizon agreed, *inter alia,* to make a "voluntary contribution" to the U.S. Treasury in the amount of $300,000 and to advise all employees dealing with contracts involving Verizon's 272 long distance affiliate of the requirements of the Commission's rules.

B. The Past Is Prologue

CompTel/ALTS is aware of the Commission's observation that matters resolved by Consent Decree are not considered adjudicated misconduct for purposes of assessing an applicant's character qualifications. *Cingular/AT&T Order* at ¶53. CompTel/ALTS is confident that the Commission did not mean by this observation that an applicant or licensee is free to willfully and repeatedly violate the Act and the Commission rules with impunity, so long as it enters a Consent Decree before an actual finding of liability and makes a "voluntary contribution" to the U.S. Treasury. A blanket refusal to consider conduct leading up to a Consent Decree as reflecting on an applicant's fitness to hold a Commission license would constitute an abnegation of the Commission's statutory duty under Section 308 of the Act to make an affirmative determination that an applicant possesses the requisite character qualifications before awarding a license.

The sheer size of and concentration of market power in the telecommunications behemoth that will be created by the merger of Verizon and MCI compels the Commission to take into consideration Verizon's past propensity to violate the Act and the Commission's rules as predictive of its future behavior. This is especially so because Verizon's violations have been focused on avoiding the pro-competitive provisions of the Act and the conditions imposed to offset the anticompetitive effects of its merger with GTE, and have harmed its competitors. Allowing Verizon to accrue even more market power and acquire one of its largest competitors through the merger with MCI will surely lead to more anticompetitive behavior against the smaller surviving CLECs. CompTel/ALTS submits that the Commission must conclude that Verizon's past propensity to violate the Act is predictive of its future behavior and that Verizon is not qualified to be the transferee of MCI's licenses, lines and authorizations.

CONCLUSION

For the foregoing reasons, CompTel/ALTS urges the Commission to deny the Verizon/MCI merger.

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Respectfully submitted,

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