May 9, 2005

Re: Applications for Consent to Transfer of Control filed by SBC Communications Inc. and AT&T Corp. and Verizon Communications Inc. and MCI, Inc.;
WC Dockets 05-65 and 05-75

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Dear Chairman Martin:

This letter is submitted in connection with the proposed merger of SBC Communications, Inc. and AT&T Corp and Verizon Communications Inc. and MCI, Inc. Applications are pending before the Commission pursuant to Sections 214 and the 310(d) of the Communications Act and Section 2 of the Cable Landing License Act seeking the Commission's approval to transfer control of the authorizations and licenses held by AT&T Corp. to SBC Communications Inc. and by MCI Inc. to Verizon Communications Inc.[1]

When the Commission acts on the pending SBC/AT&T and Verizon/MCI applications (or, for that matter, applications filed in connection with other proposed communications industry mergers), it will be acting in the context of a rapidly changing, dynamic industry environment---one much different than any previous Commission confronting merger applications has faced. The difference, of course, is that, largely due to the onslaught of technological advances and the continued movement towards a less burdensome regulatory environment, the communications marketplace is rapidly becoming ever more competitive. And old service distinctions and geographical boundaries are becoming ever more rapidly irrelevant for purposes of assessing the claimed market power of market participants. Thus, in today's marketplace environment in which digital services increasingly are becoming more ubiquitous, claims that one participant or another exercises market power in the "long distance" or "local" market, or in the "voice" or "data" or "video" market, should be viewed with considerable skepticism. Similarly, claims that wireless services are not "substitutable" for wireline services, or that potential new-technology competitors like independent VoIP, broadband powerline, or WI-MAX providers, are not

[1] Public Notices, DA 05-656, March 11, 2005, and DA 05-762, March 24, 2005.

relevant to assessing the market power of existing leading market participants also should be viewed with considerable skepticism by those government authorities charged with considering the competitive effects proposed mergers.

While it appears based on the information available that the proposed SBC/AT&T merger will not have adverse impacts on competition in today's dynamic marketplace, I am writing principally to urge, especially as the new era marked by your chairmanship begins, that the Commission adopt two process-related merger review reforms. The agency should: (1) defer to the expertise of the antitrust authorities to address any claimed competitive concerns; (2) refrain from imposing conditions on approval of the merger applications that are not directly related to compliance with statutory or rule requirements.

Although the FCC is authorized to review telecom mergers under the Clayton Act to determine if they will substantially lessen competition, it never invokes this authority. Instead, it prefers to use its authority under Sections 214 and 310 to determine whether license transfers are in "the public interest." Under the public interest standard, in the past the Commission has claimed it considers: (1) whether the merger would violate any provision of the Communications Act or other statutes; (2) whether it would violate any FCC rule; (3) whether it would substantially frustrate or impair implementation of the Communications Act or other statutes; and (4) whether the merger promises to yield affirmative public interest benefits. Of course, if the merger is inconsistent with the Communications Act or other statutory provisions or the agency's rules, then the FCC should not approve it until the inconsistencies are satisfactorily remedied. But it is in treating the last consideration—the public interest determination—that the Commission has gone astray.

Having in mind the agency's responsibilities under the existing provisions of the Communications Act, the Commission could adopt these process reforms in an exercise of regulatory self-restraint. If it does, it will increase the efficiency of governmental processes and reduce burdens and costs that otherwise are incurred by the private sector and by the government itself without corresponding benefit. And it will promote confidence in the integrity of the Commission's exercise of its regulatory authority.

1. The Commission Should Largely Defer to the DOJ's Expertise Regarding Competition Concerns

In practice, the chief—but not exclusive—focus of the FCC's merger review effort typically has been its analysis of the competitive effects of the

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proposed transaction. Such competitive analysis is not unimportant, of course. But it is one that the Department of Justice and the Federal Trade Commission are charged with performing under the antitrust laws. In the past, the FCC has attempted to differentiate its role by claiming that it must "be convinced that (the merger) will enhance competition" while DOJ (or the FTC) focus on whether the proposed merger "will substantially lessen competition." In reality, all three agencies examine essentially the same market information and perform a similar analysis. The difference between deciding whether a merger will substantially lessen competition or fail to enhance competition is related more to semantics than anything else.

To reduce the burden on merging companies and eliminate duplication of government resources, the FCC should largely defer to the Justice Department's (or FTC's) analysis of the competitive impact of a merger. A February 2000 report of the International Competition Policy Advisory Committee highlighted the burdensome and unnecessarily wasteful additional costs imposed by duplicative competitive reviews undertaken by the antitrust authorities and the FCC. It concluded that the antitrust agencies have the staff and expertise to perform this competitive review function quite competently, and that the sectoral regulatory agencies, including the FCC, should defer to the antitrust agencies' expertise to address competitive concerns.[2] There is no reason why, in an exercise of regulatory self-restraint, the FCC cannot decide in advance to defer to DOJ's primary expertise regarding the competitive impact of the SBC/AT&T proposal.

2. The Commission Should Not Impose "Voluntary" Conditions Unrelated to Compliance with Existing Statutory or Regulatory Requirements

In an exercise of regulatory self-restraint, the second process-related reform that the Commission should implement with respect to the SBC/AT&T and other merger proposals relates to its past practice of extracting so-called "voluntary" proffered conditions as part of the process of considering pending applications. The nub of the problem here is rooted in the fact that the FCC's merger review process takes place under the Communications Act's indeterminate public interest standard. This facilitates "regulation by condition" by an agency so inclined—a type of regulation that is almost always inequitable and overreaching, and which, most importantly, leads to the public perception that the Commission is abusing the authority delegated to it by Congress.

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[2] See Chapter 3, Report to the Department of Justice of the International Competition Policy Advisory Committee, February 28, 2000.

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As but one example of the way the Commission has abused its authority in this regard, consider SBC's own prior experience when it merged with Ameritech. After months of waiting for agency approval, the companies eventually "volunteered" to abide by 30 regulatory conditions (not counting subparts with many more "sub-conditions"), filling more than 60 pages.[3] Most of these conditions--such as requiring the merged company to substantially restructure, provide huge discounts for competitors' use of its network, and roll out advanced services to low-income households—went far beyond any existing requirements of the Communications Act or the FCC's rules. Assuming for the sake of argument that requirements such as those embodied by the "volunteered" conditions made sense as a matter of policy, such issues should be considered in a generic rule-making proceeding. There was no evidence that SBC's or Ameritech's practices related to the conditions imposed by the Commission differed from those of other similarly-situated carriers or that the merger proposal uniquely raised concerns purportedly addressed by the "volunteered" conditions.

At the time, then-Commissioner Michael Powell emphasized that "the Commission extracted these conditions during protracted negotiations with the staff under the cloud that the merger would be rejected absent sufficient conditions." He succinctly stated: "I do not subscribe to . . . the idea that a regulated entity can 'voluntarily' offer and commit to broad-ranging legal obligations and penalties. There is never anything voluntary about the regulatory relationship."[4] His then-fellow commissioner, Harold Furchtgott-Roth summed up this way: "What emerged (from the merger review process) was a set of conditions proposed by SBC that only those willing to contort the English language could call 'voluntary.'"[5]

The Commission should no longer engage in a process that requires a distortion of the English language, and which is unseemly to boot. After the SBC/Ameritech merger proposal had been pending at the FCC for more than fourteen months, then-Rep. W.J. "Billy" Tauzin, chairman of the House telecommunications subcommittee at the time, charged that the FCC's process leaves the merging companies vulnerable to "shakedowns that would raise the hair on the back of your head." Whether or not it is hyperbolic to describe the process as a "shakedown" or as "hair-raising", the extraction of conditions unrelated to competitive concerns or to compliance with existing clearly-defined regulatory mandates is certainly indecorous and unbecoming. If the Commission wishes to impose new regulatory requirements, it should

[3] See News Release, "FCC Approves SBC-Ameritech Merger Subject to Competition-Enhancing Conditions, October 6, 1999.
[4] Id. (Statement of Commissioner Michael Powell).
[5] Id. (Statement of Commissioner Harold Furtchgott-Roth).

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propose such requirements on an industry-wide basis in a proceeding such to public view and comment.

Therefore, the Commission should decide now that in acting on the SBC/AT&T and Verizon/MCI transfer applications it only will impose conditions that are necessary to ensure that the applicants are in compliance with existing statutory requirements and FCC rules.

If consumers are to realize the full benefits of today's technologically dynamic and competitive communications marketplace, it is important that merger proposals be considered by the appropriate governmental authorities in a fair, timely, and efficient manner. No one benefits—least of all the American consumer and taxpayer—from the wasteful expenditure of private and public sector resources that can be more productively employed in other endeavors. As your chairmanship begins, the Commission can make

an important contribution to sound public policy, consistent with promoting enduring rule of law values, by implementing the process-related reforms proposed herein.

Thank you very much for your consideration of these views.

Sincerely,

Randolph J. May

Senior Fellow
and Director of Communications Policy
Studies

cc: Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Jonathan Adelstein

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