Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Application for Consent to Transfer Control	)	
Filed By Verizon Communications Inc. and	)	WC Docket No. 05-75
MCI, Inc.	)	

COMMENTS OF
ACN COMMUNICATIONS SERVICES, INC.
ATX COMMUNICATIONS, INC.
BIDDEFORD INTERNET CORPORATION D/B/A GREAT WORKS INTERNET
BRIDGECOM INTERNATIONAL, INC.
BROADVIEW NETWORKS, INC.
BULLSEYE TELECOM, INC.
CAVALIER TELEPHONE MID-ATLANTIC, LLC
CIMCO COMMUNICATIONS, INC.
CTC COMMUNICATIONS CORP.
GILLETTE GLOBAL NETWORK, INC. D/B/A EUREKA NETWORKS
GRANITE TELECOMMUNICATIONS, LLC
LIGHTSHIP COMMUNICATIONS, LLC
LIGHTWAVE COMMUNICATIONS, LLC
LIGHTYEAR NETWORK SOLUTIONS, LLC
MPOWER COMMUNICATIONS CORP.
PAC-WEST TELECOMM, INC.
RCN TELECOM SERVICES INC.
USLEC CORP.
U.S. TELEPACIFIC CORP. D/B/A TELEPACIFIC COMMUNICATIONS

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Communications Corp., RCN Telecom Services Inc., US LEC Corp., U.S. TelePacific Corp. D/B/A TelePacific Communications (collectively "Commenters") submit these comments in this proceeding concerning the proposed acquisition of MCI, Inc. ("MCI") by Verizon Communications Inc. ("Verizon") (collectively "Applicants"). This proposed merger raises very similar, if not identical in every respect, concerns to those raised in connection with the proposed SBC/AT&T merger, especially considering that the Commission must consider the impacts of the proposed mergers together.[1] For the reasons discussed herein, the Commission may not conclude that grant of the Application as filed would serve the public interest. The Commission should impose significant conditions on any approval of the proposed merger.

I. INTRODUCTION AND SUMMARY

As with the application for approval of the SBC/AT&T merger, the above-captioned Application fails to provide sufficient information to permit a meaningful evaluation. The Application and supporting declarations fail to provide, among other things, market share and market definitions for the services provided by the Applicants. The Application apparently reflects a strategy of withholding important information and attempting to win approval based on essentially unsupported and unverifiable assertions of future possible benefits while ignoring the obvious, concrete harms that would be caused by the proposed merger.

As it did for the SBC/AT&T application, the Commission should direct the Applicants to provide supplemental information. Commenters provide suggested questions in the attached Appendix that the Commission Staff should propound to the Applicants. Answers to these questions could provide an adequate basis for evaluation of the proposed merger. If Applicants, as is likely, provide unresponsive answers, the Commission should dismiss the Application.

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[1] *See* Comments of ACN Communications Services, *et. al*, WC Docket No. 05-75 (filed April 25, 2005).

This merger – which essentially reconstitutes the old Bell System monopoly in almost 40 percent of the United States – will deal a significant blow to the development of telecommunications competition and is clearly not in the public interest. Consequently, Qwest, one of the four remaining RBOCs, recently filed comments with the California PUC stating that "it is difficult to see how [the SBC/AT&T and Verizon/MCI] transactions ever could be found to be in the public interest."[2]

To obtain approval of these transfers of control, Verizon and MCI must show that their merger would serve the public interest by *enhancing* competition. As discussed in detail in these comments, this proposed transaction would accomplish precisely the opposite. First, and most obviously, the merger between the largest provider of local exchange services in its region, Verizon, which controls a monopoly share of this market, with one of its largest competitors, constitutes a competitive injury *per se* that should preclude this Application as a matter of law. Verizon will only increase its monopoly share in these markets upon consummation of the merger, when it should rightly be required to compete to regain customers or for new customers. Verizon and MCI contend that each is somehow subject today to vigorous competition from a multitude of fledgling entrants – entrants that have only a fraction of each Applicant's current size, and have none of the advantages of Verizon's incumbent status. In fact, however, as Applicants are well aware, the chief obstacles to local competition include not only lack of access to capital, but the determination of incumbent LECs, such as Verizon, to do everything in their power to defeat competitive entry and to make essential network elements unavailable and

[2] Protest of Qwest Communications Corp., *In the Matter of the Joint Application of SBC Communications, Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California*, Application 05-02-027 (Cal. PUC), filed April 14, 2005, at 4.

otherwise to thwart implementation of the Act. The merger will exacerbate these fundamental obstacles to meaningful competitive entry.

Second, after the merger, Verizon will immediately become one of the largest providers of interexchange services in the world and will have the incentive and ability to exclude other competitors in all product markets within its footprint by engaging in various forms of discrimination. This is so for two related reasons, one of which results from the prospective merger of SBC and AT&T. There are only a few national providers of facilities-based long distance service, including MCI and AT&T - the nation's largest facilities-based long distance service provider. Yet, these facilities-based providers are critical, since the "unaffiliated" competitors (CLECs, service integrators, wireless providers, VoIP providers, cable providers, etc.) of the newly merged company will remain fundamentally dependent, as they are today, on a vibrantly competitive market for long-distance services as a vital input into the bundled service offers they make to end-user subscribers. The combined purchases of long distance service at wholesale by Verizon and SBC, which is simultaneously seeking the Commission's approval to purchase AT&T, over 5 billion minutes per month, are, however, of such magnitude that withdrawing those purchases from independent facilities-based providers of long-distance service could threaten the continued viability of those unaffiliated providers. Moreover, Verizon's control over the interexchange facilities themselves, gives it the ability and incentive to discriminate against third-parties who currently use MCI's interexchange facilities to compete against Verizon, and subjects those competitors to untenable price squeezes.

Third, the merger would further make maintenance of the *status quo,* in which no RBOC competes with another, except for the largest enterprise customers, even more likely. Indeed, this Application concedes as much and does not even attempt to maintain the prior disingenuous claim that underlaid the previous RBOC-RBOC mergers that such combinations were necessary to promote out-of-region competition. Nine years of experience in which no RBOC has made any serious attempt to compete out-of-region must make even Verizon ashamed to repeat that claim here.

In contrast to these inescapable and undeniable public harms that will result from the merger, Applicants' claims of countervailing public interest benefits are either contrived, trivial, or both, and mimic the claims of benefit made by Verizon to support its 271 long distance applications – claims that in retrospect we now know to be false. Applicants have failed to offer probative *evidence* (as opposed to rhetoric) to show that the merger will create a more "robust" international competitor or will benefit customers through increased research, development and innovation. Applicants' discussion of these issues reveals that they will literally say anything to gain approval. And even if the merger did, somehow, promote these "benefits," the harm that will result far outweighs them.

II. LEGAL STANDARD FOR MERGER REVIEW

In reviewing the Merger, the FCC must conduct a public interest analysis pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended ("the Act") to determine whether Verizon and MCI have demonstrated that the public interest would be served by the transfer of control of MCI's many licenses to Verizon.[3]

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[3] 47 U.S.C. §§ 214(a), 303(r), 310(d). *See GTE Corporation, Transferor, and Bell Atlantic Corporation., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 at ¶ 20 (2000) ("*GTE/Bell Atlantic Order*"). Also, because MCI is seeking authority to transfer control of its submarine cable landing licenses to Verizon, the application must be reviewed under the Cable Landing License Act. 47 U.S.C. §§ 34-39.

Pursuant to sections 214 and 310 of the Act, the FCC must weigh the potential public interest harms resulting from the Merger against the potential public interest benefits "to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessity."[4] The burden of proof is upon Applicants to demonstrate through a preponderance of the evidence that the Merger serves the public interest.[5] The Commission examines four overriding factors "(1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes; and (4) whether the merger promises to yield affirmative public interest benefits."[6] Finally, the FCC's analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the Merger under traditional antitrust principles.[7]

Applicants have failed to meet their burden of proof that the Merger is in the public interest. In fact, the Merger as proposed, without conditions, would have significant anticompetitive effects that would frustrate the FCC's attempts to implement Congress' objectives expressed through the Telecommunications Act of 1996 ("1996 Act") to ensure a competitive U.S. local and long distance telecommunications market.

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4 *See Intelsat, Ltd., Transferor, and Zeus Holdings Limited, Transferee*, IB Docket No. 04-366, DA 04-4034, at ¶ 15 (rel. Dec. 22, 2004) (*"Intelsat Order"*).

5 *GTE/Bell Atlantic Order,* 15 FCC Rcd 14032 at ¶ 22.

6 *Id.*

7 *Id.* at ¶ 23.

III. MCI'S PREVIOUS ADVOCACY DEMONSTRATES THE APPLICATION'S TOTAL LACK OF MERIT

As with the twin proposed merger of SBC and AT&T, Verizon is proposing to acquire one of its principal and most articulate opponents on regulatory issues. Until now, MCI has forcefully opposed all of the BOC mergers as well as all of the principal arguments that Applicants now urge in support of the instant merger.

For example, MCI has conceded that "[b]ecause the BOCs continue to enjoy market power in the local market, they possess the ability to extend that market power into the interLATA market, unless subject to appropriate safeguards."[8] It has further acknowledged that "the BOCs' continued high local market share is directly relevant to an assessment of the BOCs' market power in the interLATA market,"[9] which acknowledgement necessitates the most careful consideration of the proposed Verizon and SBC acquisitions of the two largest long distance networks.

MCI has remarked that "[i]t is difficult to imagine any reasonably enforceable behavioral conditions that, individually or in combination, would be sufficient to make the [Bell Atlantic/GTE merger] affirmatively pro-competitive."[10] MCI aptly pointed out that "[t]he risks to local competition have increased further, now that the BOCs have received long-distance

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8 Comments of WorldCom, Inc. d/b/a MCI, FCC WC Docket No. 02-112, CC Docket No. 00-175, at page 16 (June 30, 2003).

9 *Id.* at page 5. MCI stated that "In every state in which the BOCs have obtained interLATA authority, they have gained market share at an unprecedented rate. Verizon, for example, claims to have achieved a 30 percent share of the market in New York barely two years after receiving interLATA authority." *Id.* at 2.

10 Comments of MCI WorldCom, Inc., *GTE Corporation, Transferor, and Bell Atlantic Corporation., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, FCC CC Docket No. 98-184, at 60-1 (Nov. 23, 1998).

authority in 42 states. The granting of section 271 applications eliminates the 'carrot' that led the BOCs to agree to...a variety of other commitments."[11]

With respect to huge consolidating BOC mega mergers, MCI has stated that "[t]he effect, if not the intent, of the [BOC mega mergers] would be to raise the barriers to local competition within [Applicants'] regions by consolidating their monopolies."[12] Indeed, approving the pending mergers "would be tantamount to carving most of the United States into two huge regions each controlled by a single monopolist."[13]

In light of MCI's previous advocacy, the Commission should give little, if any, weight, to the Applicants' arguments in support of their proposed merger, as MCI's prior statements not only refute and invalidate them but also impeach MCI's current position. Rather, consistent with MCI's previous advocacy[14] the Commission should conclude that this merger poses significant public interest harms.

IV. ALLEGED COMPETITION DOES NOT JUSTIFY THE PROPOSED MERGER

Contrary to Applicants' contention, the Commission may not ignore the serious anticompetitive aspects of the proposed merger based on vague assertions of the existence of competitive markets. It is manifestly incorrect that the markets in which the merged company will provide service will be sufficiently competitive after the merger. Applicants' arguments to the contrary are vague, conclusory, internally contradictory, and unsupported by any compelling

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11 Comments of WorldCom, Inc. d/b/a MCI, FCC WC Docket No. 02-112, CC Docket No. 00-175, at 15 (June 30, 2003).

12 Comments of MCI WorldCom, Inc., *GTE Corporation, Transferor, and Bell Atlantic Corporation., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, FCC CC Docket No. 98-184, at iv (Nov. 23, 1998).

13 *Id.* at 30-31.

14 *GTE/Bell Atlantic Order*, ¶ 246; *SBC/Ameritech Order*, ¶ 348.

evidence. The fact that the Applicants did not provide market share data reveals that they have no real argument that competition would not be harmed by the proposed merger.

As an initial matter, Applicants claim that there is no actual competitive overlap between the companies because they have "complementary core competencies."[15] But, given the undisputed fact that Verizon and MCI each provide local and long-distance service to millions of mass market and business customers, in many cases in the same states and cities (and sometimes even the same customers), the claim, obviously, has no connection to reality. Indeed, MCI is one of Verizon's biggest competitor in most relevant markets. But Applicants claim that this competition between them is irrelevant for two reasons: first, Applicants claim that they are not among a small number of "most significant market participants" for any relevant subgroup of customers.[16] This contention is unsupported and begs the essential question raised by this merger. Due to failure to provide adequate supporting information, the Applicants do not identify how many customers in each relevant product market MCI actually serves in Verizon's region, nor how many national customers Verizon serves.

Second, the fact that Verizon is "rarely, if ever, a competing bidder" for large enterprise customers,[17] if true, is dispositive of nothing unless Verizon is also claiming that absent the merger it will not compete for such customers. Indeed, given that Verizon only had region-wide Section 271 authority for just over 24 months when the merger was announced, it would be surprising if Verizon already had a large share of this market, where customers enter into long-term contracts that in many cases have not yet expired, or have only recently expired, and often

[15] Public Interest Statement at 22. Applicants also claim that "this transaction will have no countervailing adverse affects on competition." Public Interest Statement at 18.

[16] Public Interest Statement at 18-19.

[17] Public Interest Statement at 25.

take many months to put out to bid and negotiate. Thus, many, if not most, of these customers have not yet been free to turn their business over to Verizon and negotiate and implement a new contract with Verizon by the time that it decided to merge with MCI, or even today. Also, rather than showing an *inability* to compete nation-wide, Verizon's lack of a national footprint shows only that it has never attempted to do so. Noticeably absent from the Application is any evidence that Verizon has attempted, but failed, to compete out-of-region. Given its relatively recent in-region long distance authority, even that evidence—if it existed—should be afforded little weight. Absent meaningful evidence that Verizon has tried and failed to compete in this market, the Commission must dismiss as without merit Verizon's claims regarding the competitive disadvantages it faces without an MCI alliance.

Verizon also asserts that the millions of mass-market customers that MCI serves are irrelevant for the purpose of analyzing competition because MCI's mass-market business is in a "continuing and irreversible decline."[18] But the Applicants' attempt to divert the Commission's attention away from the very large elephant looming over this proceeding is legally unsustainable -- post-merger, MCI's millions of customers will automatically become Verizon customers, without Verizon having to fight for them in the competitive marketplace, and Verizon's market share – already (presumably) well above monopoly levels – will become even larger. While the Commission could ignore MCI's customer base if MCI were a failing enterprise,[19] MCI is not failing by any means, either in the consumer market or the business

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18 Public Interest Statement at 35.

19 *See Citizen Publishing Co. v. United States*, 394 U.S. 131, 136-39 (1969) (authorizing anticompetitive mergers in violation of the antitrust laws under the "failing company" defense only if: (1) the firm being acquired faces a "grave probability of business failure" (i.e., bankruptcy) and (2) there is no less anticompetitive means of avoiding the failure, such as merger with some other firm.

market. In a recent SEC filing, MCI reported $2.12 billion in revenue for the fourth quarter of 2004 in the mass market and $1.21 billion in revenue for the enterprise market.[20] This is hardly the financial report of a failing company. And even if MCI were to have to pay an additional $7 per month to serve each of its UNE-P customers with a commercial substitute, the increased expense would presumably leave operating profits in the consumer market. In addition, while MCI may have made a decision, which it could change at any time, not to seek new mass market customers, it did not abandon its existing customer base. Nor is there any showing that MCI could not have turned these customers into a profitable customer base using a wholesale local service purchased from CLECs. Thus, the Commission may not ratify this merger, based on the Applicant's unsupported assertions that the proposed merger will enhance competition, as further discussed below.

A. Intramodal Competition Cannot Avert the Competitive Harm from the Merger

Implicitly recognizing, as they must, that Verizon's acquisition of MCI could adversely diminish competition, Applicants argue that the Commission need not worry about those consequences because other wireline providers remain in the market. Specifically, Applicants cite the presence of other CLECs, IXCs, cable providers, and other ILECs as providing competitive options once MCI exits the market.[21] Most ludicrously, Applicants claim that business customers are sophisticated users of telecom services who, through their business savvy, will be able to negotiate good deals despite the ever decreasing number of competitive

[20] MCI, Inc., Form 8-K, Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (filed February 25, 2005). Net operating income in the enterprise market was $200 million. MCI did not provide similar information on the mass market alone but stated that the net operating income for the U.S. sales and service sector was $194 million.

[21] *See* Public Interest Statement at 22, 28, 30-31, 36.

alternatives.[22] The invalidity of these claims is underscored by the fact that Applicants make them at the same time as ILECs have begun to increase retail pricing to small and medium business customers as competition recedes in many local markets.

As with similar claims by SBC and AT&T, these claims are all obvious make-weights. While the undersigned competitors, among others, remain in the market, they have nowhere near the market presence to avert the competitive harms posed by this merger as described elsewhere in these comments, which is primarily attributable to the fact that competitors are dependent on Verizon for access to bottleneck facilities. As the Commission is aware, and as explained at greater length below, the competitive foothold in the mass market remains tenuous.

Verizon's power in the business market remains unchallenged, and a principal defect with Verizon's claims regarding competition in the business markets is that it fails to acknowledge, as noted above, that the carriers who Verizon contends constitute "the competition" rely on Verizon for provision of the last mile facilities necessary to provide service.[23] Indeed, the Commission explicitly found in the *Triennial Review Remand Order* ("TRRO") that ILECs, including Verizon, retain market power in all relevant business markets, concluding that, "the barriers to entry impeding competitive deployment of loops are substantial."[24] The Commission found that CLECs "face substantial operational barriers to

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22 Public Interest Statement at 26.

23 Opposition of MCI, Inc., *Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common Carriage Requirements*, WC Docket 04-405, at 10-11 (filed Dec. 20, 2004).

24 *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Order on Remand, FCC 04-290, ¶ 153 ("*TRO Remand Order*")

constructing their own facilities;"[25] that Competitors still face "steep economic barriers" to the deployment of last mile facilities;[26] and that these barriers "typically make duplication of such facilities uneconomic."[27] It is natural then that competitors have only built their own last mile facilities to a small percentage of business customers.[28] Facilities based CLECs, such as Time Warner Telecom and Focal, still rely on ILEC-provided loop facilities at 75% of their customer locations.[29] Even MCI has acknowledged that it relies on ILEC loops, and CLEC loops where they are available (rarely), to serve customers.[30] As Chairman Powell explained, in rejecting ILEC claims that competitors did not need access to unbundled last mile broadband facilities, "the record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances."[31]

If the merger were allowed to proceed, MCI would no longer need to purchase these access services from Verizon. Thus, MCI's "costs" of access would no longer be a genuine external cost of doing business because its access payments would be no more than transfers within the Verizon corporate enterprise. The merged company would then be able to provision

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[25] *Id.* ¶ 151.

[26] *See TRO* ¶ 199.

[27] *TRO Remand Order* Separate Statement of Commissioner Kathleen Abernathy.

[28] *See* WC Docket 04-405, Time Warner Telecom *et al* Comments at 9 *citing* RBOC 2004 UNE Report, WC Docket 04-313, filed Oct. 4, 2004 at p. I-2.

[29] *See* WC Docket 04-405, Time Warner Telecom *et al* Comments at 10.

[30] WorldCom, Inc. Comments, *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, FCC RM No. 10593, at 9 (Dec. 2, 2002). *See also*, WorldCom, Inc. Reply Comments at 13 (Jan. 23, 2003).

[31] Separate Statement of Chairman Powell, *Triennial Review Remand Order Press Release.*

access facilities to itself without regard to the access prices still faced by its competitors. And, as discussed elsewhere in these comments, those competitors would remain dependent on ILEC facilities that, in turn, would facilitate Verizon's ability to engage in various forms of price and non-price discrimination against them.

In view of this reality, the merged firm will have new incentives and opportunities to engage in anticompetitive conduct by taking steps to reduce the competition it faces in these and other markets. These new opportunities arise not only from the increased horizontal concentration that the merger results in but from the newly acquired ability of the merged firm to favor its own operations by enabling them to avoid exorbitant access prices. The merger will thus result in an uneven playing field for *all* services that now require some form of Verizon-provided last-mile access. As a result, other (non-access) markets, including markets for voice services within the Verizon region, will face substantially lessened competition if the merger is consummated as proposed.

Accordingly, there is no basis to conclude that intramodal competition justifies the proposed merger.

B. Intermodal Competition – To The Extent It Exists – Does Not Eliminate The Competitive Harm Posed By This Merger

The intermodal alternatives cited by Verizon are likewise not grounds for approving the merger, as there is no reliable evidence that any "of these technologies and service categories has yet posed anything like a significant competitive antidote to the incumbents' market power."[32] Notably, the Commission found in the *TRRO*, "the record does not indicate that other intermodal

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[32] *See Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services)* Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12618 ¶ 164 (1997) ("*LMDS Order*").

options, such as fixed wireless and satellite, offer significant competition in the enterprise loop market."[33]

As the Commission is painfully aware, predictions of expansive broadband competition from the electric power industry and wireless broadband technology have been plentiful over the last decade and beyond. These predictions have, however, yet to come true. The Commission has predicted competition from electric utility communications services for years while no viable competition has taken root.[34] The Commission has also explored the promise of advanced fiber deployments for decades, and despite the promise, it has yet to bring any broad benefit to consumers.[35]

Verizon's claims regarding the impact of cable broadband competition in the business market also lack evidentiary support. As the Commission has recently observed, "cable modem service is primarily residential service."[36] In many markets, cable networks only pass – let alone serve – just a quarter of business customers.[37] Fewer than 1% of cable modem subscribers are

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33 *Id.* ¶ 193 n. 508.

34 *1995 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, ¶ 120 (1995) (Commission observed that electric utilities that have incurred substantial costs to deploy networks that reach nearly every household in the country could compete with cable companies).

35 *See e.g.*, Robert Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change*, Office of Policy and Plans Working Paper No. 24, ¶¶ 21, 24 (1988).

36 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report to Congress, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at p. 14 (rel. Sep. 9, 2004) ("*Fourth Advanced Services Report*").

37 Ex parte letter of Jonathan Banks, BellSouth, to Marlene H. Dortch, FCC, *Unbundled Access to Network Elements,* WC Docket 04-313, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket 01-338 at p. 5 (filed Nov. 8, 2004).

medium or large businesses or government entities.[38] The *TRRO* confirms that cable modem service is unsuited, and therefore not a substitute, for ILEC services for a number of reasons, including that it is asymmetrical, relatively low bandwidth, and lacks sufficient reliability and security.[39] Indeed, the Commission expressly found that the RBOCs provided "little evidence that cable companies are a significant presence in the enterprise loop market."[40] Rather, to the extent that cable companies provide service to business customers, it is in the mass market to "small and medium business ... that are near the residential network."[41] Simply put, there is no evidence that cable operators provide a serious alternative to serve the large business customer niche that is currently so well served by MCI.

Moreover, to the extent that cable does provide a competitive alternative, it does not do so to the extent necessary to justify the proposed anticompetitive merger. The Commission has previously found that competition sufficient to diminish the need for regulation will not exist where the market is primarily allocated between two dominant firms.[42] Courts have recognized that a duopoly in the market is the equivalent of a monopoly because, "firms in a concentrated market ... in effect share monopoly power by recognizing their shared economic interests and their interdependence with respect to price and output decisions."[43] A "durable duopoly affords

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38 *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau (December 2003), Table 1 and Table 3.

39 *Id.*

40 *Id.*

41 *Id.*

42 *See Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee,* CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, 17 FCC Rcd 20559, 20684 ¶¶ 103-105 (2002) ("*EchoStar Merger Order*").

43 *Brooke Group v. Brown & Williamson*, 509 US 209, 227 (1993).

both the opportunity and incentive for both firms to coordinate to increase prices."[44] Thus, at a minimum, even to the limited extent that Verizon shares its service monopoly with cable, it retains market power and the incentive to abuse that power. Moreover, there are numerous areas throughout Verizon's service territory where cable does not compete with Verizon at all. Many mass-market consumers lack access to cable modem service.[45]

VoIP is also not a significant competitor as the Applicants maintain. In the first place, similar to issues faced by providers seeking to compete with Verizon in the business market segment, VoIP requires customer access be provided by local network operators – and in the vast majority of its exchanges that will be Verizon, or a CLEC using last mile facilities from Verizon. To use VoIP, a customer needs to obtain broadband Internet access, which may not be available for all businesses, except from wireline carriers, such as Verizon. Although Applicants cite analysts who view VoIP products as direct competitive threats to the ILECs, the declaration of their economists do not go so far,[46] and for good reason. VoIP has only been deployed in the mass-market for a couple of years at this point, and there are questions about its scalability (*i.e.*, can it serve tens of millions of users) and service quality and reliability. Even leaving aside the problems that VoIP providers have had with 911 and call reliability, long-run future gradual substitution of VoIP for wireline local voice services—assuming that it occurs--does *not* put VoIP in a relevant antitrust market at this time with all wireline services. The fact that VoIP applications may some day replace traditional wireline voice services is, thus, irrelevant, as these potential trends have nothing to do with market definition analysis. Rather, the test is whether

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44 *FTC v. Heinz*, 246 F.3d 708, 725 (D.C. Cir. 2001).

45 *See* AT&T Comments, WC Docket 04-405 at 41.

46 Declaration of Gustavo E. Bamberger, Dennis W. Carlton, and Allan L. Shampine, ¶ 27. (Mar. 9, 2005).

VoIP providers other than Verizon offer an economic substitute for Verizon's traditional wireline telecom services,[47] and Applicants (very typically) have not provided any evidence of price-related substitution of VoIP for any service, so it is impossible to reach the conclusion that VoIP is in the same market with wireline. But even if customers do migrate to VoIP, it is clear that Verizon will be a beneficiary of that trend, as Verizon has its own VoIP service, VoiceWing. Thus, even if VoIP is in the same market as wireline, it is unlikely that Verizon's market share would be significantly smaller in a wireline/VoIP market than it is in a solely wireline market. And again, most of the VoIP players in the space will be beholden to Verizon for last mile access to the end user customer using the VoIP application over those facilities.

Moreover, Verizon continues to aggressively use tactics to stymie existing VoIP competition such as asserting such traffic is subject to access charges and filing lawsuits against carriers that terminate VoIP traffic, in addition to not cooperating in providing 911 access to VoIP carriers.

In addition, in order to transition VoIP service, customers must continue to rely on broadband Internet access that relies on traditional providers and cable providers because market conditions today unequivocally show that there is currently no viable large-scale competitor to DSL or cable modem broadband services.[48] Simply because a market is evolving rapidly does not mean that new entrants are successfully entering the market and providing competitive services. In the face of facts that current entrants have not been able to establish a foothold in the market, the Commission should decline Verizon's invitation to speculate that the future of BPL,

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[47] *See, e.g., Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* 17 FCC Rcd 23246, ¶ 41 (2002).

[48] WC Docket 04-405, Joint CLEC Comments at 18.

WiMax and other nascent technologies will succeed where others have failed.[49] Indeed, it may not do so, as the Commission is required to examine *current* market conditions and the incumbents' *current* market power.[50] Verizon's claims regarding the "potential" competition from satellite, BPL, and other technologies have already been dispositively rejected by this Commission and foreclose Verizon's arguments here. The Commission's focus must be on current market impacts, and these are demonstratively anticompetitive.

Nor is there any evidence that wireless service providers could provide the kind of competitive broadband alternative that Verizon claims. The failure of previous efforts to provide commercially viable wireless broadband access are well documented, and the current efforts at delivering wireless broadband remain in the developmental stages. As the Wall Street Journal recently observed:

> Wireless-broadband services have a rocky history. Companies such as Winstar and Teligent tried to offer similar services during the telecom boom of the late 1990s, with limited success. Sprint's efforts with so-called fixed-wireless technology led to a $1.2 billion write-down.
>
> For the technology to get even more affordable, experts say the much-hyped WiMAX technology needs to be certified and standardized, which could still be a year away, and another year after that before it is widely available in laptops and other devices.[51]

In the *TRO*, the Commission discounted mass-market broadband competition from the wireless sector, observing that "fixed wireless and satellite services remain nascent technologies,

49 Public Interest Statement at 46.

50 *See LMDS Order* at 12618, ¶ 165.

51 Jesse Drucker and Almar Latour, Internet and Phone Companies Plot Wireless-Broadband Push, THE WALL STREET JOURNAL, January 20, 2005, p. A10, viewed January 24, 2005 at http://online.wsj.com/article_print/0,,SB110617646006230682,00.html.

with limited availability."[52] And while millions of American consumers have started using cell phones in recent years, there is little evidence that cell-phone technology is an economic substitute for wireline technologies. In other words, very few consumers have "cut the cord" and become "wireless only" users.[53]

But even if wireless broadband alternatives were somehow relevant to the analysis (which they are not), Verizon owns a majority share of the country's second largest wireless company, Verizon Wireless.[54] According to the methodology used by the federal antitrust agencies, partially owned subsidiaries are assigned entirely to their parents when calculating market shares and the Herfindahl-Hirschman Index ("HHI").[55] And although the parties have not provided the data, we can presume that Verizon Wireless's market share in Verizon's region is larger than elsewhere in the country. Thus, even if wireless service is included in the relevant market, it is not clear that the concentration levels for a "wireline plus wireless market" in the relevant area would be significantly lower than for wireline alone.

Finally, Applicants' reliance on the presence of systems integrators – who purchase service components from various providers – and the buying savvy of their business customers is laughable.[56] The acquisition of MCI threatens to undermine the very basis for whatever success

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52 *TRO* ¶ 231.

53 Julian V. Luke and Marcie L. Cynamon, *The Prevalence of Wireless Substitution* (presented at 59th Annual Conference of the American Assn. for Public Opinion Research May 15, 2004).

54 *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Description of the Transaction, at iii (filed March 11, 2005). Notably, SBC Communications owns 60% of the largest wireless company, Cingular.

55 "Instructions," Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions, p. v.

56 Public Interest Statement at 22 and 26.

systems integrators have enjoyed in recent years. Systems integrators rely on the presence of many providers competing with one another at all levels in the market. This acquisition, together with SBC's acquisition of AT&T, will extinguish much of the competition on which systems integrators depend. Likewise, the negotiating savvy of business customers will become irrelevant if there are few competitive alternatives from which to choose.

Accordingly, there is no basis to conclude that intermodal competition justifies the proposed merger.

V. THE PROPOSED MERGER WOULD PRODUCE SERIOUS HARMS

A. The Merger Would Result in Undue In-Region Market Concentration

In order to make a valid public interest determination, the Commission must also evaluate the merger's likely effect on future competition as well as current market conditions. Although Applicants bear the burden of proof,[57] they have provided, as noted, no market share data for any of their services. Commenters request that the Commission ask, as it did in its April 18, 2005 data request to SBC and AT&T, that Verizon and MCI provide "the market shares analyzed by any appropriate metric separately for [Verizon, MCI], and each of the competitors cited in...the Public Interest Statement, separately for each class of business and wholesale customers." This market share information is indispensable for the Commission and parties to evaluate the impact of the proposed merger adequately. This information is also necessary given the Commission's contemporaneous consideration of SBC's and AT&T's proposed merger,[58] which will also affect most of the same markets that are affected by the Verizon/MCI merger. The Applicants must

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[57] *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, ¶ 12 ("*WorldCom/MCI Order*").

[58] *SBC Communications, Inc. and AT&T Corporation Applications for Approval of Transfer of Control*, WC Docket 05-65 (filed February 22, 2005).

also base their market share information on reasonable market definitions. As noted above, Commenters recommend that the Commission direct Applicants to respond to the questions set forth in the attached Appendix. In any event, despite the paucity of data with the Application, it is clear that the proposed merger would significantly increase concentration in the voice and data markets and would diminish competition.

1. The Merger Would Unduly Concentrate the In-Region Mass Market

Verizon currently has a market share in the in-region local wireline market of just under 80%, which should increase to an approximate 90% share after the merger.[59] In long distance, Verizon has an estimated 40% market share in its service region, while MCI has an approximate 20% share.[60] Thus, the post-merger in-region long distance share would be in the range of 60% and may be as high as 70% for residential customers.[61] Consequently, the merger would likely

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59 *Competition in the Communications Marketplace: How Technology is Changing the Structure of the Industry; Hearings Before the House Energy and Commerce Committee*, (2005) (statement of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America) (*citing* Federal Communications Commission, *Local Telephone Competitions: Status as of June 20, 2004*, December 2004).

60 *Id.* (*citing* Precursor, *Telecom Vital Statistics: Pillars of the Bell 2005 Competitive Respite Thesis*, January 24, 2005 and Industry Analysis and Technology Division, *Trends in Telephone Service*, Federal Communications Commission, May 2004). In those regions where Verizon has been providing long distance service for the longest periods of time, its in-region long distance presence is even higher. *See Confronting Telecom Industry Consolidation: A Regulatory Agenda for Dealing with the Imposition of Competition*, National Association of State Utility Consumer Advocates, page 23 (April 2005).

61 *Competition in the Communications Marketplace: How Technology is Changing the Structure of the Industry; Hearings Before the House Energy and Commerce Committee*, (2005) (statement of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America).

result in undue concentration in Verizon's region for mass market services under any reasonable definition of the mass market.[62]

Applicants attempt to avoid the obvious fact of vastly increased concentration in the mass market by claiming that MCI has made a "decision to exit the consumer business."[63] The timing of this decision is unclear because MCI never made a specific announcement.[64] However, MCI stated in its SEC 10-Q filing on August 9, 2004 that it "intends to de-emphasize its consumer business and reduce efforts to acquire new customers."[65] This statement is suspect given that it came not long before the merger was announced. Applicants have also failed to show that this decision is irreversible. MCI could easily resume marketing activities because of its recognized brand name and service capabilities.[66] In fact, MCI recently entered into a "commercial agreement" with BellSouth in order to continue to provide services to the mass market. MCI could also resume marketing to residential customers by partnering with a CLEC to implement a UNE-L approach. Furthermore, Verizon would not necessarily acquire MCI customers in either the short or long term, absent the merger. After all, MCI's customers effectively fired Verizon when they first became MCI local customers. Even if the decision were irreversible, MCI

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62 The Commission should ask Verizon and MCI to provide more specific definitions of mass market and enterprise customers as well as small, medium, and large business customers. *See* Public Interest Statement at 9, fn. 3.

63 *See* Public Interest Statement at 4.

64 AT&T did announce its cessation of marketing to new customers. *See* AT&T to Stop Competing in the Residential Local and Long-Distance Market in Seven States (dated June 23, 2004). *See also*, AT&T to Stop Some Residential Service, Forbes.com (dated June 23, 2004).

65 MCI, Inc., Form 10-Q (filed August 9, 2004).

66 Public Interest Statement at 44.

continues to serve customers[67] and may be adding new customers (including new Verizon customers) without actively marketing. Therefore, MCI's decision is essentially irrelevant to determining whether the proposed merger would diminish competition. Given that MCI is a current and potentially future provider of mass market services, the proposed merger ultimately results in Verizon acquiring one of its largest mass market competitors.

The proposed merger would also result in a significant concentration of the mass market for long distance voice service when viewed from a national perspective. According to the most recent market tracking data released by TNS Telecoms, the entity used by the Commission to conduct its Trends in Telephone Service report, Verizon has a 15% market share in the national long distance market, while MCI has a 8% market share.[68] Thus, the Verizon and MCI share for the long distance market, if the proposed merger is consummated, would be 23%. These figures do not take into account potential future market share, but they demonstrate the dramatic increase in concentration that will occur if the merger is approved.[69] In addition, SBC and AT&T control 17% and 20% of the long distance market, respectively.[70] If both mergers are approved, the two newly-created entities would control 60% of the long distance market, a dramatic increase as compared with the present top-two share of 37%.

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[67] Declaration of Wayne Huyard.

[68] *See SBC/AT&T Shuffles Wireline Stats*, TNS Telecoms Market Research, February 11, 2005 at www.lightreading.com/document.asp?doc_id=67306.

[69] The percentages generated by TNS Telecoms come from bills and promotional material from 32,000 U.S. households. *Id.*

[70] *Id.*

2. The Merger Would Diminish Competition in the Business Market

Although Verizon and MCI compete in the enterprise market,[71] Verizon (again very typically) does not identify its market share, MCI's share, or any named competitor's share on an in-region basis, and should be required to provide this information.[72] Nevertheless it is clear that combining Verizon and MCI will eliminate an actual competitor from the market and will make the merged company the leading contender to serve enterprise customers in a significant portion of the country where Verizon is the dominant provider of local services.[73] In-region market shares for Verizon in the enterprise market following the merger has been stated to be in "the mid-80 percent range."[74] MCI's national market share for "corporate telecommunications" is 12%.[75]

Commenters look forward to reviewing Applicants' market share information if the Commission issues a data request asking for it. In the meantime, based on the scant data that is available, it is clear that the merger will cause undue market concentration in the enterprise market.

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71 Public Interest Statement, page 23.

72 Please note that the Commission asked for market share information in an April 18, 2005 data request to SBC and AT&T and should make a similar request to Verizon and MCI.

73 *See* Comments of AT&T Corp. WC Docket No. 04-313, CC Docket No. 01-338, at 132-133 (Oct. 4, 2004) (stating that the Bells concede they are thriving in the enterprise market).

74 *Competition in the Communications Marketplace: How Technology is Changing the Structure of the Industry; Hearings Before the House Energy and Commerce Committee*, (2005) (statement of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America) (*citing* Richtel, "Valuing MCI in an Industry Awash in Questions," *New York Times*, February 9, 2004, C-4).

75 Matt Richtel, "Valuing MCI in an Industry Awash in Questions," *New York Times*, February 9, 2004, C-4.

Verizon attempts to justify the proposed undue concentration in the business market on the basis that there is no shortage of available capacity for services provided over long-haul networks.[76] However, as discussed below, market concentration will create incentives for discrimination even if available capacity exists. Further, there are other less harmful alternatives than the proposed merger with MCI assuming any of Verizon's justifications had merit. For example, Verizon already uses the long distance network of independent stand-alone facilities-based IXCs,[77] and therefore, one alternative would be for Verizon to purchase or joint venture with some other independent stand-alone facilities-based IXC. If Verizon entered into such a purchase or joint venture, the enterprise market would not suffer from nearly as much of an increase in concentration as with a MCI acquisition. Another possibility would be for Verizon to purchase a systems integrator. If Verizon purchased a system integrator, it might be able to enhance its capability to manage and control the network over which the service to business customers is provided without removing a facilities-based competitor with a valuable trade name and customer base from the market. Verizon could also hire key personnel from a systems integrator in order to enhance its own capabilities to manage and control the networks to become more appealing to large business customers.

Moreover, contrary to Applicants' contention, the sophistication of business customers does not reduce concerns about the proposed increased in-region concentration in the enterprise market. Even sophisticated customers are not able to avoid Applicants' discriminatory practices if alterative providers are not available.

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[76] Public Interest Statement at 12.

[77] Public Interest Statement at 56.

Verizon's point that it concentrates its long distance network in its local service areas suggests that it engages in only a limited amount of out-of-region competition in locations where it is not the incumbent monopolist.[78] MCI and AT&T are, however, not so limited, since the entire United States is "out-of-region" for them in the sense that neither AT&T nor MCI is the incumbent monopolist anywhere. Thus, competition between AT&T and MCI for enterprise customers has been vigorous throughout the United States. Following the merger, however, MCI, as a subsidiary of Verizon, will face a much lower access charge to serve customers in the Verizon region than AT&T, while AT&T will face a much lower access charge to serve customers in the SBC region than MCI. The likely outcome of such circumstances will be a tacit geographical allocation of markets, in which AT&T and MCI each concentrate on serving customers in the areas sheltered by their ILEC parent's monopoly control over local access. This, in turn, will inevitably lead to a reduction in competition in the national enterprise market.

The proposed merger would also harm the in-region business market because it would eliminate MCI as a purchaser of wholesale services from CLECs. Post merger, MCI will have no incentive to obtain access services from, or partner with, CLECs. This will seriously harm the viability of competitive services because CLECs will lose a potential major customer and major vendor.

3. The Proposed Merger Threatens the Viability of Independent IXCs

Apart from creating an immediate undue concentration of the in-region mass and enterprise markets, the proposed merger, like that of SBC and AT&T, is likely to undermine the viability of an independent facilities-based interexchange carriers. Verizon uses the long

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78 Declaration of John J. Lack and Robert F. Pilgrim at ¶ 16.

distance network of third parties to provide certain long distance services.[79] It is reasonable to assume that if the merger is approved, Verizon will transfer all of its traffic to the MCI network. As a result, especially in conjunction with the SBC and AT&T merger, independent facilities-based long distance providers may no longer have a viable market in which to participate. As indicated above, the combined long-distance market share of Verizon/MCI and SBC/AT&T will be extremely high, and therefore, no significant, viable market will be able to support independent facilities-based long distance providers. This, in turn will impede competition for local service. Most consumers desire bundled service. If independent facilities-based IXCs are unable to compete with Verizon/MCI and SBC/AT&T, CLECs will have no choice but to purchase long-distance service from Verizon or SBC, both of which will be able to use their control over long distance to impede CLEC competition for customers wanting bundled service.

MCI has already shown that Verizon can discriminate against independent long distance providers through network integration, which might make it more difficult to detect discrimination in the provision of access, and in its provision of special access.[80] If Verizon had that much power before the merger, its *ability* to discriminate will increase because provision of better service to its long distance operators will be masked by "integration" that Verizon will implement. Verizon will also have an increased *incentive* to discriminate, because it can favor

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79 Public Interest Statement at p. 56.

80 Comments of WorldCom, *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112 (August 5, 2002). *See also*, Reply Comments of WorldCom, WC Docket No. 02-112 (August 26, 2002).

its own in-house long distance network, that of MCI, as MCI has admitted.[81] That is the precise reason it was necessary to break up AT&T in the first place.[82]

4. The Proposed Merger Would Unduly Concentrate the IP Backbone Market

Although the Applicants have failed to provide meaningful information concerning the impact of the merger on the IP backbone market, it is clear that the proposed merger raises serious public interest questions because of undue concentration in the IP backbone market.

From a horizontal impact perspective, the merger of Verizon/MCI, combined with the merger of SBC/AT&T, creates the potential for excessive concentration in the provision of Internet backbone services that will have a detrimental impact on horizontal competition for Internet backbone services. While Verizon and MCI have not provided any data, the data submitted by Dr. Michael Kende does not specify which of the unidentified companies in the AS Connection data is Verizon.[83] Depending on which company's data relates to Verizon, the post-merger HHI for AS Connections could be in excess of 1800.[84] An HHI over 1800 is a sign of a

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81 *Id.* at 6.

82 *U.S. v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982).

83 *See* Declaration of Michael Kende, Annex B (March 9, 2005). *See also*, Declaration of Marius Swartz on behalf of SBC and AT&T, *SBC Communications, Inc. and AT&T Corporation Applications for Approval of Transfer of Control*, WC Docket 05-65,Table 2 (Feb. 18, 2005).

84 The Herfindahl-Hirschman Index ("HHI") is a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in a market, and then summing the resulting numbers. The closer a market is to being a monopoly, the higher the HHI will be. A company with a 100% market share will have an HHI of 10,000 and in a perfectly competitive market with thousands of competitors all having small market shares the HHI will approach 0. The U.S. Department of Justice considers a market with a result of less than 1,000 to be a competitive marketplace; a result of 1,000-1,800 to be a moderately concentrated marketplace; and a result of 1,800 or greater to be a highly concentrated marketplace. As a general rule, mergers that increase the HHI by more than 100 points in concentrated markets raise antitrust concerns.

"highly-concentrated" market according to the joint-merger guidelines of the Federal Trade Commission and Department of Justice.[85] In a highly concentrated market, an increase in the HHI of more than 50 points raises significant competitive concerns.[86] Evidence shows an HHI increase of 105 points for the SBC-AT&T merger on its own, and an HHI increase of as much as 677 if the MCI-Verizon merger is also included, depending on which of the unidentified companies is Verizon.[87] Either way, in a highly concentrated market, significant competitive concerns are raised by the Verizon/MCI merger.

Also, as noted also by commenters in connection with the SBC/AT&T application, the data cited above to calculate market shares for Internet backbone providers is outdated.[88] The data on Internet traffic is from the fourth quarter of 2003, while the IDC revenues are from 2003. The most recent data, for AS Connection shares, is eight months old.[89] This outdated data is used despite the fact that the identity of the top-ranked firm changed twice between January 2003 and May 2004.[90] Use of such data is problematic because there is reason to believe the market for the provision of Internet backbone services has been changing rapidly. Therefore,

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85 1992 Horizontal Merger Guidelines §1.51.

86 *Id.*

87 *See* Declaration of Marius Schwartz on behalf of SBC and AT&T, *SBC Communications, Inc. and AT&T Corporation Applications for Approval of Transfer of Control*, WC Docket 05-65 (Feb. 18, 2005).

88 *See* Comments of ACN Communications Services, *et. al*, WC Docket No. 05-75, at 32 (filed April 25, 2005).

89 *See* Declaration of Michael Kende at ¶¶ 4-5 (March 9, 2005). *See also*, Declaration of Marius Schwartz on behalf of SBC and AT&T, WC Docket 05-65 at ¶ 21.

90 *See* Declaration of Marius Schwartz on behalf of SBC and AT&T, WC Docket 05-65 at ¶ 24.

Verizon/MCI should be required to submit more recent data to the Commission in order to properly measure the effect that this merger will have on the Internet backbone market.

Commenters stress here, as elsewhere in these comments, that the Commission should not judge the merger of Verizon/MCI without an evaluation of other mergers occurring in the market, including potential mergers. Verizon/MCI have failed to present any evidence to the Commission of the effect that its merger, along with the merger of SBC and AT&T, will have on competition in the market for Internet backbone services. In order to appropriately gauge the effect on competition, the Commission needs to look at all the mergers occurring in the market at this time, including potential mergers that could occur as a result of the competitive imbalances created by the Verizon-MCI and SBC-AT&T mergers. Other decisions involving the lawfulness of mergers have looked at the combined impact of contemporaneous mergers, rather than examining each in isolation.[91] Although Applicants have failed to submit evidence of other merger activity in the same market, the SBC/AT&T merger must not be ignored by the Commission. The Commission would be ignoring its duty to protect the public if it failed to properly review the proposed Verizon/MCI merger without fully taking into account the SBC/AT&T merger.

The Commission should also consider near term changes in the market. Given the substantial recent growth of the Internet backbone services of Verizon and SBC, the Commission could reasonably project that these carriers will have an even greater market share today and in the near future, providing an additional reason for concluding that the proposed merger is not in the public interest.

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[91] *See Memorandum and Opinion*, U.S. District Court for the District of Columbia, Federal Trade Commission v. Cardinal Health, Inc. and Bergen Brunswick Corp., Civ. Act. No. 98-595 and Federal Trade Commission v. McKesson Corp. and Amerisource Health Corp., Civ. Act. No. 98-596 (Jul. 1998).

In addition, from a vertical integration perspective, the merger of Verizon, one of the largest Internet backbone purchasers and MCI, one of the largest Internet backbone providers, creates very serious public interest issues. The potential power of the merged company is critical, given that that all Internet backbone providers will have to compete with the merged Verizon-MCI and SBC-AT&T. As described below, the undue concentration in the IP backbone market that the merger would produce creates a significant potential for harm.

B. The Proposed Merger Would Enhance Verizon's Ability to Harm Competitors

1. The Merger Would Enhance Verizon's Ability to Engage in Price Squeeze Behavior

Given Verizon's and MCI's market concentration levels and the reduction in competition, competitors as well as the public interest will be harmed by the merger. Very importantly, Verizon will have a greater ability to engage in price squeeze behavior. MCI has agreed that BOC mega mergers "would enhance [Applicants'] ability to engage in anticompetitive price squeezes because it would enable them to engage in price discrimination on both ends of more calls."[92]

So long as Verizon continues to exercise market power over special access – a necessary input for competitors in both the local and long distance markets – it can subject its competitors to price squeezes. The opportunity to impose a price squeeze exists because Applicants' access services are priced well above actual cost.[93] When Applicants provide long distance or local services, however, they will not pay these inflated access costs. Rather, because they will be

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92 Comments of MCI WorldCom, Inc., FCC CC Docket No. 98-184, at 37 (Nov. 23, 1998).

93 *See generally Town of Concord v. Boston Edison Co.*, 915 F.2d 17 *(1* Cir. *1990)* (Breyer, J.) (explaining economics of price squeeze); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Hand, J.); *Covad v. BellSouth*, ___ F.3rd ___ (11th Cir. 2005) (holding that *Trinko* does not bar antitrust claim against RBOC).

vertically integrated – *i.e.,* they will provide access and long distance services together--they will bear only the actual economic cost of providing access when using their own facilities to originate and terminate their long distance traffic. The portion of the access charge above economic cost amounts only to an intra-company transfer payment that will be meaningless to the merged entity. Thus, Applicants will be able to underprice competitors and still earn a profit because inflated access charges will not be a cost of doing business for the combined Verzion/MCI. Given that these access charges to IXCs are a substantial part of the cost of a long distance call, Applicants can significantly underprice their rivals and still earn a profit.

Finally, the Commission should give no credit to Applicants' suggestion that it address Verizon's stranglehold over the special access market in an industry-wide proceeding, rather than in this merger proceeding.[94] While Commentors support a resolution of problems caused by ILECs' abuse of their special access monopoly on an industry-wide basis, whether and when such a proceeding will cure this problem is a matter of speculation, and Applicants seek to have their merger approved *now*. Commenters suggest that if an industry-wide resolution of abuse of special access is to constitute a basis for approving this Application, any new rules that address special access must be final before the Application is approved.

2. If Consummated, This Merger Would Make The Maintenance Of The *Status Quo,* In Which No RBOC Competes With Each Other, Much More Likely

Viewed in the context of the proposed SBC and AT&T merger, the Verizon/MCI merger is particularly problematic. If consummated, these mergers not only would facilitate the unilateral exercise of market power discussed above, but would further make maintenance of the *status quo,* in which no RBOC significantly competes with another in its home markets, much

[94] *See* Public Interest Statement, page 33, fn. 33.

more likely.[95] These mergers would create two vertically integrated super-RBOCs with each controlling about 35 percent of the nation's access lines. Given this market structure, it is highly unlikely that the two remaining "mini"-RBOCs, BellSouth Corp. ("BellSouth") and Qwest Corp. ("Qwest"), would break ranks and invite retaliatory entry by Verizon and SBC.

The possibility of collusive behavior is particularly strong where, as here, conditions are conducive to detecting territorial deviations. The local exchange market is currently characterized by existing territorial divisions, high market concentrations, significant barriers to entry, economies of scale, history of non-competition, and easy detection of violations of the territorial divisions.[96] The mergers would also make retaliation for violation of the existing territorial divisions a greater possibility. While both Verizon and SBC claim they will enter each other's territories post-merger, neither has made a firm commitment to do so or actually invested the necessary resources to make such entry likely in the near future. In light of these facts, and given these RBOCs' historic refusal to compete with each other in core markets, these public statements about out-of-region competition are most properly viewed as "shots across the bow" that are intended to maintain the *status quo*. Moreover, while approval of the previous wave of RBOC mergers (SBC's roll-up of PacTel and Ameritech and Bell Atlantic's acquisition of NYNEX and GTE, forming what is now called Verizon) were premised on SBC and Verizon's promises to compete out-of-region, Verizon makes no such promise here.

It is also the case that this collusive behavior is likely to extend beyond just the existing territorial divisions, spilling over into other markets as well, such as innovation markets where

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95 *See Cf. Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211 *(1889)* (holding such territorial divisions per se illegal under the Sherman Act).

96 *See* DOJ/FTC Horizontal Merger Guidelines § 2.12 (discussing in detail why these factors make collusion more probable); Richard Posner, *Antitrust Law: An Economic Perspective* 55-62 (1976) (same).

there is limited competition between the RBOCs. In the *BA-NYNEX Merger Order,* the Commission observed that "[r]esearch and development . . . is a means through which firms engage in non-price competition, by seeking means to differentiate products either in function or quality" and that "[e]limination of parallel research and development efforts would eliminate this form of non-price competition" and "reduc[e] output."[97] Likewise, the federal antitrust authorities have stated that they will view firms with specialized research and development capabilities as competing in separate "innovation markets" and will block transactions that reduce competition in those market.[98] Any evaluation of these mergers must consider the impact in this market as well.

3. The Merger Would Increase Verizon's Incentive to Exclude Competitors from the Local Market

Given Verizon's control of bottleneck facilities, and the high costs of duplicating those facilities, new entrants generally must have access to Verizon's network in order to compete effectively. Verizon, of course, has substantial incentives to deny such access in order to preserve market power.[99] The Act seeks to prevent such abuses, however, by mandating that incumbent LECs provide such access on "just, reasonable, and nondiscriminatory conditions" and "rate[s] . . . based on the cost" of the access.[100] Nonetheless, detection of discriminatory

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97 *Bell Atlantic-NYNEX Merger Order* ¶ 171.

98 *See, e.g.,* United States Department of Justice/Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property § *3.2.3,* Example 4, *reprinted in* 4 Trade Reg. Rep. ¶ 13,132 (1995) ("DOJ/FTC Intellectual Property Guidelines") *(citing cases).*

99 *See generally Premier Elec. Constr. Co. v. National Elec. Contractors Ass 'n,* 814 F.2d 358, 368 (7th Cir. 1987) (citing T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price,* 96 Yale L.J. 209 (1986)) (explaining the ability to obtain or preserve market power from raising rivals costs).

100 47 U.S.C. §§ 251-252.

conduct by incumbent LECs is difficult. Beyond outright refusals to allow access, incumbent LECs can engage in more subtle forms of "non-price" discrimination such as delaying the availability of access, degrading the quality of access and charging more than the economic costs of access.[101] The ability to detect and prevent such discrimination is further made difficult by the significant technological changes that have recently swept the telecommunications industry.

More importantly, the interrelationship between Verizon as a special access monopolist and MCI as a dominant retailer in the enterprise market will only increase the likelihood of Verizon abusing its power in the special access market. As noted, Verizon currently has the ability to discriminate among long distance carriers through price squeezes and discriminatory provisioning. After the merger, Verizon will also have an increased incentive to discriminate since its newly acquired long distance affiliate will be one of the competitors. Indeed, as MCI has noted, Verizon favors its end users in the provision of special access.[102] Thus, the Commission should anticipate that after a merger between them, Verizon will favor MCI.

In addition, the merger between Verizon and MCI and removing Section 272 restrictions placed on Verizon will have a combined effect of making cost allocation and discrimination virtually undetectable. Verizon will be able to conceal any discrimination by "integration." Plus, in the major markets, Verizon and other BOCs have obtained pricing flexibility for special access. As a result, special access is not subject to price caps and Verizon and the other BOCs can indiscriminately raise prices. Meanwhile, competitive alternatives to ILEC special access

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[101] Comments of AT&T Corp., *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, page 6.

[102] Comments of WorldCom, *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, at 6 (August 5, 2002).

services are already only available at a small number of locations.[103] Thus, the merged Verizon and MCI entity will reduce the competitive alternatives even more, including in MSAs with the largest CLEC presence.[104] Accordingly, the Commission should consider whether the merged Verizon and MCI entity will have the ability to establish discriminatory special access arrangements, charge uniformly high prices for access that would harm others but not itself, or offer volume discounts that as a practical matter would be unavailable to others.

4. The Merger Would Harm the IP Marketplace

If the Verizon and MCI merger is approved, sellers of Internet backbone services will lose Verizon, one of the biggest purchasers in the market, as a customer. As with independent IXCs, this loss of purchasing volume for companies that sell to Verizon could force some of them out of the market. It will also have a potential damaging effect on buyers of Internet backbone services, as one of their largest competitors, Verizon, will now be one of the primary sellers they have to turn to for these services.

Verizon/MCI will also have the ability to adversely affect competition by discrimination in pricing, access and quality of services. "Interconnection" of IP broadband networks is currently implemented outside the normal telephone company regulatory framework pursuant to "peer-to-peer" relationships. The FCC has to date declined to exercise regulatory oversight over peering. Whatever the validity of that policy in a market in which there were several providers of backbone services and barriers to entry were relatively low, the impending concentration of this market in the hands of local access providers, who can erect new barriers to entry by denying

103 Reply Declaration of Lee Selwyn on behalf of AT&T Corp., *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, FCC RM No. 10593, ¶ 18, filed Jan. 23, 2003.

104 *Id.* at ¶ 20.

access to their local facilities, calls for an urgent re-examination. Currently, carriers like MCI and AT&T peer on a cost-free basis because they have similar networks. On the other hand, smaller carriers must pay for peering with the larger networks. As a result, CLECs and ILECs are on an equal footing in terms of getting access to the Internet backbone because neither have large IP networks. With the merging of MCI with Verizon and AT&T with SBC, however, the combined companies will be large enough that they can peer with each other at no charge, but demand peering fees from CLECs.

In fact, as previously argued in connection with the proposed MCI and Sprint merger several years ago, the size of the combined company's Internet backbone networks would hamper competition.[105] As SBC stated:

> The size of a backbone is critical because a backbone's value to its users lies in its ability to provide connectivity to the entire Internet. . . . [W]here one backbone achieves a substantial size advantage over its rivals, it necessarily "reduces the value of, and therefore the demand for, the rivals' products." At some point, "the market may 'tip,' with customers abandoning the rivals altogether because their networks are too small to be viable."[106]

AT&T likewise stated that:

> IBPs [Internet Backbone Providers] with unbalanced traffic, then, are expected to become customers rather than be peers. They can do so by entering into a "transit arrangement" pursuant to which, for a fee, an Internet Backbone Provider [ ] agrees to transport the traffic to terminating points on its network or on the networks of other IBPs with whom it has a private peering relationship. Alternatively, a large IBP might agree to a "paid-for" private peering relationship allowing traffic to be terminated on its network, but the IBP paying for such an interconnection cannot represent to its customer that it has a private peering relationship.

105 *Petition of AT&T Corp. to Deny Application*, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T at ¶9 (Feb. 18, 2000) and *Opposition of SBC Communications Inc.*, CC Docket No. 99-333 at 41 (Feb. 18, 2000).

106 *Opposition of SBC Communications Inc.*, CC Docket No. 99-333 at 41 (Feb. 18, 2000).

> This significantly hampers its ability to compete with those that do have settlements-free private peering relationships.[107]

In addition, since Verizon and SBC will likely follow their past patterns of not competing in each other's regions, competitors will be forced to pay whatever peering fees they demand. Verizon will be in a position to raise fees for network access while at the same time its costs disappear. Further, unless the Commission changes its hands-off approach at least in the context of this merger application, there will be no interconnection regulations like Section 251 that require reasonable and timely peering for all traffic.

Applicants could also engage in myriad forms of non-price discrimination including providing other competitors problematic circuits, and providing priority routing to itself. Electronic data exchange traverses a series of points where data is converted from one medium, format, language, or technology to another. Each of these control points in the IP network would provide the merged company an opportunity to discriminate. For example, at each switch or router control over the end user's data could be exercised via firewalls, IP port forwarding, rate limiting, packet inspection and restriction, or forced caching. ATM cells flowing across any ATM network could be subject to a wide variety of controls for anticompetitive purposes. The diagram following provides a high level view of how end users served by wireless, DSL, or cable modem service connect to the IP backbone and the various control points that could be used by the merged companies to engage in non-price discrimination.

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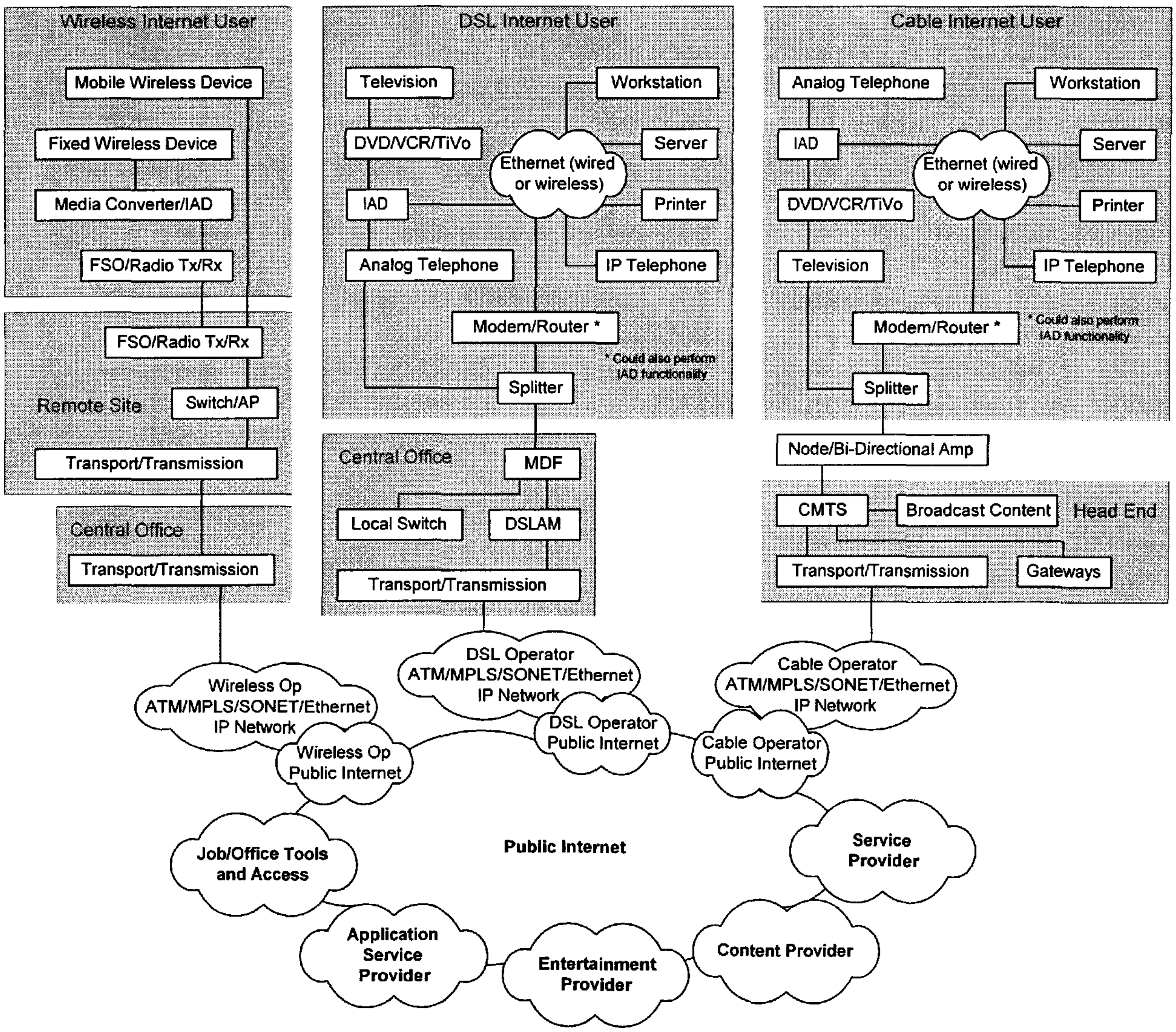
[107] *Petition of AT&T Corp. to Deny Application*, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T at ¶9 (Feb. 18, 2000) (footnotes omitted).

SIMPLIFIED HIGH SPEED INTERMODAL ACCESS TECHNOLOGIES

Darren Sandford, Pac-West
Current Revision 1.0, Apr 6 2005



Indeed, in rejecting the WorldCom/Sprint merger because of concerns about the Internet backbone market, the EU referred to the capacity of the merged entity "to discipline the market notably through the threat of selective degradation of its competitors' Internet connectivity offering."[108] It is also clear that ILECs are very capable of engaging in port blocking.[109]

Accordingly, the proposed merger would enhance Applicants' ability to harm competitors through their control of IP backbone facilities.

VI. THE PROPOSED MERGER WOULD NOT PRODUCE SIGNIFICANT PUBLIC INTEREST BENEFITS

In the *GTE/Bell Atlantic Order*, the Commission determined that it would consider only those "redeeming public interest benefits" that were "demonstrable" and "sufficiently likely and verifiable."[110] That standard requires that Applicants demonstrate that the proposed merger "is a reasonably necessary means" to achieve the purported benefits.[111] As the Commission has held: "A mere recitation by the Applicants that they will provide some benefit if and only if their license transfer is approved cannot suffice to show that such a benefit is merger specific."[112] The Commission has also articulated a "sliding scale" approach, in which more substantial and likely harms require a showing of more substantial and likely benefits:

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108 European Commission, Merger Case No COMP/M.1741-MCI WorldCom/Sprint, § 146.

109 *See, e.g.*, Consent Decree, *In re Madison River Communications, LLC*, DA 05-543 (2005). Madison River was blocking ports used for VoIP applications, thereby affecting customers ability to us VoIP. SBC-AT&T would have the same power here, and as a competitor in the VoIP market with AT&T's VoIP services this potential issue must be addressed by the Commission.

110 *GTE/Bell Atlantic Order*, 15 FCC Rcd at ¶ 209.

111 *Id.* at ¶ 211.

112 *Id.*

> As the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest. This sliding scale approach requires that where, as here, potential harms are indeed both substantial and likely, the Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.[113]

Here, Verizon and MCI make numerous but unpersuasive claims that the proposed merger will benefit the public. The Applicants espouse benefits that are unlikely to materialize, are unsupported, or simply represent wild exaggerations regarding minor benefits. In other words, Applicants do not show that the purported benefits are "sufficiently likely or verifiable." Regardless of the merits, or lack thereof, of Applicants' public benefit arguments, Verizon and MCI completely fail to link the purported benefits to the merger in any meaningful manner. Thus, because the claimed benefits are neither likely nor verifiable and not "merger specific," the Commission may not conclude that the Application, as filed, would serve the public interest.

A. The Merger Will Not Promote Innovation, Investment, Service Quality, Provision of New Services, or National Security

1. The Applicants' Claims Are Unsupported by Objective Evidence

In the *GTE/Bell Atlantic Order*, the Commission held that merger applicants have the burden of proof and, that in order to satisfy its burden, any claims regarding the public interest benefits purportedly derived from the merger must be accompanied by evidence supporting those claims.[114] Instead of providing such evidence, all the Applicants can muster is a daisy chain of unsupported assertions that separately or taken together do not constitute any substantial

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[113] *Id.* at ¶ 210 (citing *In the Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 157 (1997)).

[114] *GTE/Bell Atlantic Order* at ¶ 209.

evidence of possible benefits from the proposed merger. While Applicants contend that the proposed merged entity will allow service innovation, including "next-generation multimedia services," they fail to explain or describe the new services adequately or indicate why these services would result only from the merger of Verizon and MCI. Applicants' failure to give any concrete meaning to its assertion of innovation and new services by itself warrants rejection of their public interest showing

2. The Applicants Fail to Show that the "New" Services the Applicants May Provide are "Merger Specific" Benefits

Applicants also contend that the undefined services they will offer post-merger are somehow unique to the merger. This is virtually impossible to accept because, as noted, the Applicants fail to give any concrete idea of what new services and innovations they are speaking of.

The Applicants further imply that the alleged benefits are merger specific because the merged entity will allow greater innovation than either pre-merger company could achieve on its own.[115] According to the Application, the combined company will have this supposedly greater incentive to innovate because the merged firm will have a "stronger, and geographically broader, converged solution."[116] If a greater geographical presence, however, is all that is needed for this "benefit," then certainly this merger cannot be the only way to achieve it. Licensing or contracting, for example, are alternative ways for Verizon to reach many new customers.

More importantly, if one assumes that the combined Verizon/MCI can best be modeled as a regional variation of the pre-divestiture Bell System, the likely outcome of this merger is less investment in new services rather than more. Typical of monopolist behavior, only when finally

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[115] Public Interest Statement at 11.

[116] Public Interest Statement at 17.

faced with direct competitors would the pre-divestiture AT&T generally take steps to "catch up" to consumer demand with competitive services or products. The pre-divestiture AT&T, however, did not rush innovation to market and there is no reason to expect that a combined Verizon/MCI would differ appreciably from that model. Traditional economic theory and the experience of the last two decades regarding competition suggests that the Applicants' claims lack merit. Rather, companies that control markets rarely are the innovators. Instead their focus becomes preserving their hegemony and stifling those innovations that threaten their dominant market position.

In fact, the other BOC mega merger applicant now before the Commission, has articulated these concerns in comments filed opposing the proposed Final Judgment in *United States v. Microsoft*. In that case, SBC complained that the Final Judgment did not go far enough to check Microsoft's market power. With respect to Microsoft's operating systems monopoly, SBC argued that:

> Microsoft's monopoly has created not only the power, but also the incentive, to exclude competition: every technological innovation that emerged to challenge Microsoft's dominance was met with a successful strategy of anticompetitive exclusion. Microsoft was able to "extinguish," perhaps permanently, the two greatest innovative threats to its dominance that arose in the 1990's -- Netscape and Java.[117]

Once combined, Verizon and MCI should be expected to operate as Microsoft did, thwarting the adoption of innovative technologies that threaten the core services in which they hold market power.[118] This is no surprise because Verizon, like other monopolists in

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117 *United States v. Microsoft*, No. 98-1232, Comments of SBC, D.C. Cir. (filed January 28, 2002).

118 *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

telecommunications, has delayed or stifled innovation to protect its legacy services from possible cannibalization while simultaneously thwarting competitive efforts to deploy similar innovations.

The most recent and appropriate example of such anti-competitive behavior is that of Verizon and the other RBOCs keeping xDSL off of the market for years. In the enterprise market, the RBOCs feared that xDSL service would cannibalize their existing T-1 services which, because of their monopoly in the local services market, the RBOCs priced far in excess of their costs to provide the service. In the mass market, xDSL would undercut Verizon's market for adding second lines for consumers that wanted to access the Internet. Because xDSL proved more cost-effective than either a second line or a T-1, Verizon and other RBOCs kept the technology on the shelf, or at least it was kept on the shelf until CLECs began offering xDSL service using UNE loops and cable companies began to offer high speed cable modem service as an alternative method of accessing the Internet at high speeds. Only then did the RBOCs begin to roll out xDSL service.

The Commission must not forget the example of the pre-divestiture Bell System that was slow to replace analog with digital transmission facilities. It was not until Sprint and MCI announced digital networks that the post-divestiture AT&T moved to change-out its analog facilities. It is reasonable to conclude that, absent the divestiture, the Internet would not exist since it relies in part on digital facilities. This merger would return to the conditions that predated the divestiture.

Carriers have explored this issue in opposing previous RBOC mergers. For example commenters have argued that the RBOCs, with monopolies in their local service areas, not only lack the incentive to invest but also have the perverse incentive to delay or withhold new technology from the marketplace in order to continue collecting monopoly profits from captive ratepayers.

> As the Commission has also found in the past, they are firms who have powerful incentives to withhold investments in new technologies that will limit the value of their existing monopoly assets, who delayed rolling out DSL- and ISDN-based service for a decade because it would impair their second telephone line services, and who introduced the DSL-based service only in response to cable modem services and the DSL-based offerings of data CLECs.
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> "ILECs are entrenched monopolists with substantial high-margin second telephone line and other services that are cannibalized by broadband, and ILECs thus did not roll out DSL (or ISDN) technology until cable modem and CLEC services began to cut into their second line revenues. The Commission found that it was "the development of competition, and the threat of losing revenue and customers to carriers offering advanced services," that caused incumbent LECs to invest in facilities for advanced services. *UNE Remand Order* ¶ 138. If that threat is diminished, ILECs will invest less, not more.
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> "The ILECs have never been a significant source of innovation, and they ultimately invest in improving their networks for only two reasons: (1) to increase revenue by improving network efficiencies or stimulating demand, or (2) to protect revenue by responding to actual or feared competitive threats."[119]

3. The Applicants Fail to Demonstrate Any Benefit From Network Management

Applicants claim that the combining of the two companies' networks will lead to efficiencies by being able to provide end-to-end connectivity to the customer and by offering comprehensive network management capabilities.[120] Applicants provide little, if any, evidence that such benefits would be likely, and further fail to show that any benefits, to the extent they

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[119] Comments of AT&T Corp., CC Docket Nos. 01-338, 96-98, & 98-147 at 9, 20-21, 43 (April 5, 2002) (internal citations omitted).

[120] Public Interest Statement at 12-13.

may accrue, would result from the merger. These same arguments were used by the Bell System prior to the divestiture to justify its anti-competitive behavior. To the extent that any of the network managed "benefits" identified in the Application would be likely to occur, these benefits could just as easily occur if the companies remained separate, or if Verizon acquired another facilities-based long-distance carrier that is not one of its largest local and long distance competitors.

Moreover, Applicants make no showing that the purported "benefits" they describe can only be achieved through the proposed merger. First, Verizon is currently providing "end-to-end" services by contracting with companies for long distance services. These contractual arrangements certainly qualify as "practical alternatives" to the merger since they are actually in use today. Further, Applicants fail to establish that the "benefits" from vertical integration will actually flow to the consumers in the local and long distance mass market who will be harmed by the anticompetitive effects of the proposed combination. Thus, even if the Commission can credit the Applicants' claims regarding improved network performance, the purported benefit from the network merger cannot offset the anticompetitive harm to mass market customers. The Merger Guidelines underscore this concern, providing that the reviewing agency "considers whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market."[121]

Applicants also assert that combining Verizon's and MCI's network will benefit the public by reducing the combined entity's costs and making the combined entity a more efficient competitor."[122] Even if the Commission accepts at face value the claim that the merger would

[121] 1992 Horizontal Merger Guidelines, §4.0.

[122] Public Interest Statement at 14-15.

lower costs or provide the opportunity to improve service to customers, there is no clear benefit to the public. The combined company's customers would only receive these "benefits" if there were competitive pressures on Verizon/MCI to provide such benefits. Indeed, "benefits" that lower the merged firm's costs without the company passing on those savings to consumers only serve to increase the profits of the merged firm. These increased profits can hardly be characterized as a benefit to consumers.

4. The Federal Government and American Taxpayers Will Not Benefit From a Combined Verizon and MCI

Like SBC and AT&T, the Applicants assert that a combined Verizon and MCI can "reinforce" technology and network infrastructures that "play a critical role in national defense and homeland security."[123] Under this flawed theory, the government would be better off with a single nationwide supplier of telecommunications services than with multiple competitors for end-to-end services and multiple carriers providing "niche" services. The Application's claim flies in the face of a more than decade of federal government telecommunications procurement policy, as well as the same government's determination to break up the old AT&T in 1983. Since the late 1980s, the government, acting as a purchaser of telecommunications services, has sought lower prices and greater network redundancy in telecommunications procurement (as do many non-governmental customers). Abandoning that policy to obtain more services from fewer providers is not in the interest of American taxpayers, who, under the policy that Applicants propose be abandoned have enjoyed remarkable cost savings in government telecommunications services while government use of telecommunications services has exploded.[124]

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[123] Public Interest Statement at 11.

[124] *See* FTS Networx Program, Presentation of Karl Krumbholz, at slide 3, Sep. 30, 2004 available at http://www.gsa.gov/Portal/gsa/ep/programView.do?pageTypeId=8199&ooid=16100&progr

In contrast to the pleas for monopoly from Applicants, since 1988 and the first FTS2000 contract, the federal government has wisely sought to obtain the benefits of telecommunications competition for government customers and American taxpayers. Thus the current series of government telecommunications procurements are part of "the overall strategy to foster so-called, 'ruthless competition' for government telecommunications services."[125] Likewise, the government's current plans to address the telecommunications needs of the Federal government call for multiple suppliers providing multiple and overlapping services so Federal agencies always receive the benefits of competition even after procurement is complete.[126] In this instance, the Application fails to show any public benefit.

Applicants also fail to acknowledge that the combined Verizon/MCI would still need to have partners with local facilities in the approximately 65% of the United States where Verizon is not the incumbent LEC. While the Applicants tout the benefit of a single end-to-end network, they will not have such a network that covers all areas in the United States unless they complete the job they have begun of re-assembling the entire Bell system monopoly on a nationwide basis. Again, the Application fails to demonstrate any likely public benefit.

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amPage=%2Fep%2Fprogram%2FgsaDocument.jsp&programId=11455&channelId=-16201. reviewed April 19, 2005.

125 *See* GSA's Metropolitan Area Acquisition Home page at http://www.gsa.gov/Portal/gsa/ep/programView.do?programId=10081&programPage=%2Fep%2Fprogram%2FgsaOverview.jsp&P=TRA4&pageTypeId=8199&ooid=9694&channelId=-13485 reviewed April 19, 2005.

126 *See* GSA Networx Overview Presentation available at http://www.gsa.gov/Portal/gsa/ep/programView.do?pageTypeId=8199&ooid=16100&programPage=%2Fep%2Fprogram%2FgsaDocument.jsp&programId=11455&channelId=-16201 reviewed April 19, 2005. (Network contract designed to "Leverage the volume of government requirements" and "Provide the lowest prices in the telecommunications marketplace").

As a result of the reduction in competition brought about by the merger, government telecommunications users will pay more, and have fewer choices and less redundancy.

VII. CONDITIONS ARE NECESSARY TO PRODUCE A BETTER BALANACING OF COSTS AND BENEFITS

A. The Commission Should Reject the Application as Filed

In light of Verizon's pervasive market power in the local, long distance, special access, high capacity facilities, and other markets, and the likely anticompetitive effects of the proposed merger as described in these comments, and the concurrently proposed SBC/AT&T merger, the Commission must deny the Application as filed as contrary to the public interest.

B. Conditions

Alternatively, the Commission should condition any grant of all or a portion of the Application with merger conditions that ameliorate some of the market problems that have prompted MCI to give up trying to compete with Verizon and other anticompetitive effects described above that are certain to arise from the proposed merger. The Commission has broad authority to approve a merger subject to conditions, such as divestiture of certain assets, based upon, *inter alia*, Section 214 of the Act which authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[127] Pursuant to this authority, if it determines to approve the merger at all, the Commission should impose the following conditions.

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[127] 47 U.S.C. § 214(c); *See, e.g., In re Application of GTE Corp. Transferor and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations,* CC Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, at ¶¶ 1-4, 248-259, 319 (June 16, 2000) ("*Bell Atlantic/GTE Merger Order*") ("we find in this order that, absent conditions, the merger of Bell Atlantic and GTE will harm consumers of telecommunications services;" "spinoff of GTE's Internet backbone and related assets into a separate public company" required.); *In re Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee,* CC Docket No. 98-24, FCC 98-169, 13 FCCR

1. Verizon Should Be Required to Divest In-Region MCI Local Exchange Assets and Customers

Divestiture of In-Region Assets & Customers: The Commission should require that Verizon divest all of the in-region local exchange and exchange access facilities as well as all in-region MCI residential and business customers.[128] This is the only condition that would prevent further concentration in the local market that is already dominated by Verizon in its service territory. Verizon should be required to divest all of MCI's enterprise customers. Verizon should be required to divest these in-region assets and customers to a third party identified by Verizon and approved by the Commission and the Department of Justice prior to approval of the Application.

Divestiture of in-region assets, while helpful, is not sufficient by itself to ameliorate the anticompetitive effects of the proposed merger. Independent CLECs and IXCs are heavily dependent upon Verizon for special access services and other services. Any purchaser of MCI's in-region assets would face an even greater reliance on its principal competitor. For these reasons and the reasons provided above, the Commission should impose the additional merger conditions discussed below.

15,243-15,244, Memorandum Opinion and Order, at ¶ 12 (rel. July 23, 1998) ("*Teleport/AT&T Merger Order*"); *United States v. FCC,* 652 F.2d 72, 81-81, 88 (D.C. Cir. 1980); *In the Applications of NYNEX Corporation, Transferee, and Bell Atlantic Corporation, Transferor,* FCC 97-286, 12 FCCR 20,0002, Memorandum Opinion and Order, at ¶ 32 (Aug. 14, 1997) ("*BA/NYNEX Merger Order*").

128 The Commission has ample authority to require divestiture. *See, e.g., Bell Atlantic/GTE Merger Order*, at ¶¶ 1-2, 28-29 (Commission required the transfer of the Internet backbone and related assets of GTE Internetworking, Inc. (Genuity) to "an independently owned public corporation" be completed prior to merger closing).

2. The Commission Should Impose Safeguards to Mitigate Discrimination In the Provision of Access to Bottleneck Facilities

Cost-Based Access: In light of Verizon's dominance in the market for special access, if Verizon is permitted to acquire MCI, Verizon should be required to implement safeguards designed to reduce the opportunities for collusion between RBOCs, discrimination in the provision of access to local bottleneck facilities, and other anticompetitive effects. Verizon should be required to first implement, on a temporary basis, incremental cost-based pricing of switched and special access services, including interconnection facilities at TELRIC, until the Commission completes its existing rulemakings regarding ILEC overpricing and other anticompetitive conduct in the special access market[129] and its rulemaking to establish a unified intercarrier compensation regime.[130]

Non-Discrimination in Volume Discounts: Further, the Commission should preclude Verizon from providing an unfair advantage to its new MCI affiliate and its other long distance affiliates by ensuring that Verizon cannot engage in a price squeeze by offering volume and term discounts and other incentives for which only its affiliates (or those of other RBOCs) can qualify in the market for special access and high capacity wholesale services. To preclude this anticompetitive conduct, the Commission should impose a merger condition that requires Verizon to tariff any special access services or wholesale services that it offers to MCI, its other affiliates, and other RBOCs and make such services available to competitors at the same price

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[129] *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* WC Docket No. 05-25, RM-10593, FCC 05-18, Order and Notice of Proposed Rulemaking, at ¶ 3 (rel. Jan. 31, 2005).

[130] *See, In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, FCC 05-33, at ¶ 15 (rel. March 3, 2005) ("Our current classifications require carriers to treat identical uses of the network differently, even though such disparate treatment usually has no economic or technical basis.").

without the volume and term commitment that it requires of its affiliates or RBOCs. Finally, all agreements between Verizon, MCI, SBC, and AT&T for access to each others' local networks must be made available and subject to opt-in on an pick-and-choose basis.

Performance Measures: In light of the fact that the merger will increase Verizon's dominance in the special access and high capacity services markets, the Commission should impose rigorous performance measures and self-effectuating remedies governing Verizon's performance in processing orders, provisioning, repairing, and maintaining special access services and UNEs for its competitors. The performance measures should be sufficiently comprehensive to assure nondiscrimination in provision of special access services.[131] In light of some RBOC's past record of discrimination in the provisioning of UNEs in "no facilities" situations,[132] comprehensive performance measures should be imposed to prevent such discrimination in the more concentrated market that will result from the mergers. These performance measures and other merger conditions must be enforced through self-effectuating remedies that impose liquidated damages that compensate the carriers that were injured by Verizon's violations, not the United States Treasury. The liquidated damages and penalties imposed for anticompetitive practices should also escalate with multiple violations so that such

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[131] At a minimum, the required performance measures should include metrics, standards, and damages for the following parameters: mechanized provisioning accuracy, mean installation interval, order completion due date met, percent of due missed because of lack of facilities, percent of trouble reports within 30 days, percent of missed repair commitments, receipt to clear duration, percent or repeat trouble, percent or repeat trouble reports, percent of billing accuracy.

[132] *Triennial Review Order*, at ¶¶ 630, 637 (The Commission rejected the RBOCs' no facilities policy and held that "with the exception of constructing an altogether new local loop, we find that requiring an [ILEC] to modify an existing transmission facility in the same manner that it does so for its own customers provides competitors access to only a functionality equivalent network.").

damages have a deterrent effect on Verizon, rather than being an acceptable cost of doing business.

Affiliation for Purposes of UNE Rules: In addition, the proposed mergers of Verizon/MCI and SBC/AT&T would make MCI and AT&T collocations affiliated. For purposes of implementation of the rules governing unbundled access to network elements established in the *Triennial Review Remand Order,*[133] the Commission should require as a condition of any approval of the merger that Verizon treat MCI collocations as affiliated under those rules. This should include a retroactive application insofar as Verizon has treated these collocations as unaffiliated prior to the merger.

Rooftop Collocation: In light of the fact that the availability of wholesale high capacity loops will be substantially reduced by removal of MCI and AT&T as sources of supply and by the FCC's determination to reduce the availability of UNEs, the Commission should impose a merger condition that requires Verizon to permit collocation of fixed wireless equipment on the rooftops of its premises. Section 251(c)(6) of the Act requires RBOCs to provide for physical collocation of equipment needed for interconnection or to access UNEs "at the premises" of the RBOC. These "premises" included the provision of collocation space on rooftops for equipment needed for interconnection and to access customers.[134] In order to preclude Verizon from evading the collocation requirement, the Commission should require Verizon to offer rooftop collocation under standard terms and conditions, at cost based rates and within a provisioning interval determined by the Commission.

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[133] 47 C.F.R. §§ 51.319(a)(4)-(5) and (e); *Triennial Review Remand Order,* at ¶¶ 66, 126, 129, 146, 174-180,

[134] 47 U.S.C. § 251(c)(6).

OSS Enhancements: Finally, the Commission should require Verizon to implement an enhanced OSS by the merger closing date to provide real-time access to Verizon's databases for remote terminal location and vacant facility information for purposes of obtaining UNE loops.

3. The Commission Must Impose Safeguards to Ensure an Open IP-Enabled Marketplace

Safeguards for IP-Enabled Marketplace: As demonstrated above, the proposed merger will unduly concentrate the IP backbone market. Further, the mergers will enable Verizon and other RBOCs to undermine competitive providers in the market for IP-enabled services by imposing higher costs on critical inputs, and by refusing to provide, or discriminating in the provision of, access to the IP backbone. In light of these anticompetitive effects, the Commission should require Verizon to divest the MCI backbone. Alternatively, the Commission should require (1) Verizon to allow any IP network to peer with the merged Verizon and MCI if that network interconnects at a specified number of peering points, and (2) Verizon to provision interconnection to the IP backbone and transit service to non-peering ISPs and CLECs at LRIC rates. The Commission should impose net neutrality requirements to preclude ILECs from blocking or providing inferior quality access to non-ILEC IP-enabled services. Further, the Commission should prohibit the merged company from imposing any restrictions or limitations on use of Session Initiation Protocol ("SIP") by its customers or services obtained from third parties by the customer. SIP is a signaling protocol used for establishing sessions in an IP network. Absent appropriate conditions, SIP could be a useful tool for discrimination by the merged company.

Structural Separation: The Commission should impose structural separation requirements that are similar to those imposed under Section 272 of the Act to minimize opportunities for cross-subsidies and discriminatory conduct, and ensure that Verizon operates its

MCI and Verizon long distance affiliates on an arm's length basis. Among other structural separation requirements, the Commission should require that Verizon and MCI provide interexchange services through a separate subsidiary.

4. The Commission Should Require Verizon to Negotiate Section 271 Network Elements Under the Section 252 Process

Negotiation of 271 Terms: The Commission should order Verizon to negotiate and arbitrate, if necessary, the rates, terms and conditions for "271 network elements" (*i.e.*, 47 U.S.C. §§ 271(c)(2)(B)(iv) (local loop transmission), (v) (local transport), and (x)(signaling/call related databases)) pursuant to the § 252 process. Verizon currently refuses to do so on the grounds that *Coserv Ltd Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003) relieves it of this obligation.[135] Verizon's position is wrong because the law specifies that – (1) Verizon is obligated to offer 271 network elements;[136] (2) § 271 requires that interconnection agreements approved by a state commission, pursuant to § 252, contain both § 251(c)(3) and § 271 network elements;[137] (3) the *TRO* and *TRRO*, among other things, established new standards pertaining to Verizon's obligation to offer 251(c)(3) and 271 network elements that must be negotiated and implemented pursuant to the § 252 process;[138] and (4) a state commission is legally obligated to

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[135] Verizon's position is that § 252 only requires it to negotiate and, if necessary, arbitrate § 251(b) and (c) issues and that the independent duties imposed on it by § 271 or elsewhere cannot be subject to the § 252 arbitration process so long as it refuses to negotiate such provisions.

[136] 47 U.S.C. §§ 271(c)(2)(B)(iv),(v), (vi), & (x) (expressly stating that BOCs are obligated to offer access to local loop transmission, local transport, and signaling/call related databases); *TRO*, ¶¶ 652-53 (emphasizing that "BOCS have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251").

[137] 47 U.S.C. § 271(c)(1) (requiring that agreements be "approved under Section 252").

[138] *TRO*, ¶¶ 656-664 (prescribing the standard that needs to be applied when establishing rates, terms and conditions for 271 network elements and recognizing that although the FCC may have relieved BOCs from offering certain UNEs in the *TRO* (and later in the *TRRO*)

resolve related open issues and establish the appropriate terms for offering such facilities in a § 252 arbitration.[139] Although Commenters and other CLECs believe the law is unequivocal, Verizon is forcing them to devote precious resources litigating this issue. As discussed, the merger of Verizon and MCI would have a harmful impact on local wireline competition and to mitigate those harms, the FCC should put an end to this senseless litigation and require Verizon to negotiate and, if necessary, arbitrate its § 271 obligations pursuant to § 252.

C. If the Commission Approves the Merger, it Should Impose Transition Safeguards to Mitigate the Anticompetitive Impacts

In addition to the permanent conditions set forth above, the Commission should impose transition safeguards to ensure the proposed merger does not unduly disrupt the marketplace. Specifically, the Commission should require Verizon to provide DS1 loops and EELs in every wire center regardless of the impact of the FCC's existing UNE rules for a period of at least five years. Further, the Commission should require promotional discounts of 25%-30% on all loops and subloops for a period of at least three years. The Commission should also require Verizon to offer unbundled access to FTTC, FTTP, and hybrid loops for all customers at commercially negotiated rates for five years. The Commission should require Verizon to commit to pay CLEC intrastate access charges for three years at the rates extant on January 1, 2005. Finally, in order

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pursuant to § 251(c)(3), BOCs still have an independent obligation pursuant to § 271 to provide access to them at just, reasonable, and not unreasonably discriminatory rates, terms and conditions consistent with § 201 and § 202 of the Act); ¶¶ 703-704, 706 (holding that the § 252 process be followed in implementing the *TRO* and stating that "Parties may not refuse to negotiate any subset of the rules we adopt herein [which includes the FCC's 271 determinations]"); *see generally* 5 U.S.C. Sec. 551 (a "'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency....").

[139] 47 U.S.C. § 252(b)(4)(C) (requiring a state commission to resolve all open issues in a § 252 arbitration); *TRO*, ¶¶ 701-705 (holding that the § 252 process should be used to conform interconnection agreements to reflect the *TRO*).

to mitigate market disruptions resulting from the proposed merger, Verizon should be required to continue to maintain its existing level of interexchange traffic with unaffiliated, non-RBOC carriers for a period of five years, at the election of the third party IXC.

Both the permanent and transitional merger conditions should be self-enforcing to the extent feasible. In particular, the performance measures should be self-enforcing. Moreover, in light of the Commission's limited enforcement capability, the Commission should authorize the state commissions to enforce these merger conditions in their particular state.

VIII. CONCLUSION

For the reasons discussed herein, the Commission may not conclude that grant of the Application as filed would serve the public interest. The Commission should impose significant conditions on any approval of the proposed merger.

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Lightwave Communications, LLC
Lightyear Network Solutions, LLC
Mpower Communications Corp.
Pac-West Telecomm, Inc.,
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US LEC Corp., and
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Dated: May 9, 2005

APPENDIX

Additional Suggested Questions to Applicants

1. Michael Kende submitted information concerning IP backbone issues based on 2003 and 2004 data. Please submit the same information using March 2005 data; if such data is not available, please use the most recent data that is available.

   Explanation. The information submitted by Mr. Kende is outdated.

2. Provide evidence demonstrating Verizon spent at least $500 million to provide competitive local service and associated services outside of the Bell Atlantic and GTE legacy service areas, which Verizon was obligated to complete to fulfill the requirements of the Bell Atlantic/GTE merger.

   Separately for each of out-of-region market, separately for each year commencing with the year in which Verizon first began offering service in each market, provide total Verizon revenues, total Verizon expenditures on switched and special access services purchased from LECs, and Verizon market shares separately for mass market and enterprise segments.

   Explanation. This information will permit the Commission to verify the nature and extent of Verizon's out-of-region competition in compliance with the conditions of its merger and otherwise.

3. Provide the share of the wireless market held by Verizon Wireless nationally, in-region, and out-of-region.

   Explanation. This information would permit the Commission to evaluate Applicants' claims that they will be subject to intermodal competition from wireless competitors after the proposed merger.

4. In an June 24, 2004 ex parte submission in CC Docket 01-338, Verizon provided a series of maps of a number of Metropolitan Statistical Areas (MSAs) including maps of central business districts ("CBDs") within the Verizon region. These maps identified locations at which, according to Verizon, CLECs were serving enterprise customers via special access or via CLEC-owned fiber. The CBD maps also included the routes of CLEC-owned fiber optic facilities.

   Please provide a new, and corresponding, set of maps in which the following additional information is identified:

(1) Indicate the MCI special access and on-net fiber-served locations that are identified only as "CLEC" locations on the June 24, 2004 maps.

(2) Indicate the locations of Verizon enterprise customers, which are not included on any of the June 24, 2004 maps.

(3) For each MSA and CBD, provide a count of enterprise customer locations, broken down as follows: (a) Locations at which Verizon provides service at retail to end-user enterprise customers; (b) Locations at which MCI provides service at retail to end-user enterprise customers using special access services obtained from Verizon; (c) Locations at which MCI provides service at retail to end-user enterprise customers using MCI-owned fiber optic facilities ("on-net" MCI locations); (d) Locations at which MCI provides service at retail to end-user enterprise customers using facilities being leased from or otherwise provided by other CLECs not affiliated with Verizon or MCI; (e) Locations at which MCI provides service at retail to end-user enterprise customers using special access services obtained from Verizon where the customer location is passed by fiber optic facilities owned by MCI; (f) Locations at which Verizon provides service at retail to end-user enterprise customers where the customer location is also served by fiber optic facilities owned by MCI; (g) Locations at which Verizon provides service at retail to end-user enterprise customers where the customer location is passed by fiber optic facilities owned by MCI.

(4) Provide maps in the same format as those requested in (3) for any MSA or CBD outside of the Verizon region where Verizon or a Verizon affiliate has deployed fiber optic facilities. For each such location, provide the same information as is requested in (3)(a) through (3)(g) above.

Explanation. This information is the minimum necessary to permit the Commission to evaluate the increase in concentration in local markets that would be caused by Verizon's acquisition of MCI's local facilities.

5. Using the methodology of the DOJ/FTC Horizontal Merger Guidelines,[1] define all relevant product and geographic markets in which Verizon and

[1] In this and the following questions that refer to the methodology of the DOJ/FTC Horizontal Merger Guidelines, the reference is primarily to "§1.1 Product Market Definition." This section of the Guidelines explains the concept of the "hypothetical monopolist" and the "smallest market principle":

> Specifically, the Agency will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed at lease a "small but

MCI compete. For each relevant product and geographic market, provide the market shares of Verizon, MCI, and all other competitors measured alternatively by subscribers and by revenue.

Explanation. This information will permit the Commission to define relevant product markets.

6. State the number and current monthly dollar volume of revenues generated by new residential customers that MCI has added subsequent to its decision that it would no longer market to residential customers.

Explanation. Applicants have argued that MCI is not competing in the residential market as the result of its decision to exit the consumer business. The number of new customers acquired (and the dollar volume of revenue produced) is one test of the extent to which MCI's exit truly reflects the removal of MCI as a competitive force in the market.

7. For each type of Internet service and Internet-related product (excluding Internet backbone services) – e.g., broadband Internet access services, narrowband Internet access services, voice over IP services (VOIP) – provided by Verizon and MCI, use the DOJ/FTC Horizontal Merger Guidelines' methodology to define the relevant product market in which it is sold.

For each product market identified above, use the Merger Guidelines methodology to define the relevant geographic market. For each product and geographic market, identify the competitors and calculate Verizon's, MCI's and each competitor's market shares measured alternatively by subscribers and by revenue. Also provide the "universe" number of

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significant and nontransitory" increase in price, but the terms of sale of all other products remained constant. If, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Agency will add to the product group the product that is the next-best substitute for the merging firm's product. ...The price increase question is then asked for a hypothetical monopolist controlling the expanded product group. In performing successive iterations of the price increase test, the hypothetical monopolist will be assumed to pursue maximum profits in deciding whether to raise the prices of any or all of the additional products under its control. This process will continue until a group of products is identified such that a hypothetical monopolist over that group of products would profitably impose at least a "small but significant and nontransitory" increase, including the price of a product of one of the merging firms. The Agency generally will consider the relevant product market to be the smallest group of products that satisfies this test. [emphasis added] subscribers, and the total revenue, used as the denominator when calculating these shares.

Explanation. This information will permit the Commission to define relevant VOIP and Internet product markets.

8. State whether Verizon and MCI compete with each other in longhaul services. If so, using the DOJ/FTC Horizontal Merger Guidelines methodology, please define the relevant product markets for longhaul services for this merger.

For each product market identified above, use the Merger Guidelines methodology to define the relevant geographic market. For each product and geographic market identify the competitors and calculate Verizon's, MCI's and each competitor's market shares measured alternatively by subscribers and by revenue. Also provide the "universe" number of subscribers, and the total revenue, used as the denominator when calculating these shares.

Please provide a map of all longhaul interexchange fiber optic network facilities owned by Verizon or any affiliate of Verizon, separately for in-region areas and for out-of-region areas. In responding to this request, include all interLATA administrative network facilities constructed pursuant to the administrative facilities exception to the interLATA line-of-business restriction in the MFJ, as well as any interLATA facilities constructed specifically for the purpose of providing interLATA services to Verizon customers. Separately for each network link, specify the link's capacity (expressed in OC-n units).

Explanation. This information will permit the Commission to define relevant longhaul services product markets.

9. In addition to providing for each Verzion franchise area, the number of residential resold lines, residential UNE-P lines, residential UNE-L lines, competitively deployed access lines, residential wireless only customers, and residential VOIP customers, please additionally provide for each Verizon franchise area the number of Verizon's retail residential customers and the number of customers served by UNE-P equivalent services, such as LWC, being provided by Verizon to CLECs pursuant to negotiated commercial agreements.

Explanation. This information will permit the Commission to examine more detailed information concerning Verizon's retail residential customers and customers served via UNE-P equivalent services, such as Local Wholesale Complete.

10. For each benefit or efficiency that you assert, explain whether it will reduce variable or marginal costs. If so, describe how variable .or marginal costs will be reduced and quantify the savings. Identify the product and geographic market(s) in which each benefit or efficiency will have an effect.

Explanation. Providing this additional information will permit a complete assessment of efficiencies asserted by the Applicants.

11. Please identify all enterprise customers that decided not to use Verizon's services because Verizon's arrangement with another provider did not give Verizon enough end-to-end network management control and flexibility to meet the customer's requirements for system integration and accountability, performance and provisioning and trouble-shooting speed and flexibility and provide all documents relating to Verizon's attempts to sell service to the customer and the customer's response. Please provide all materials prepared by Verizon for potential use by its sales representatives that describe or discuss Verizon's use of another provider's network.

Explanation. A justification for Verizon's need to purchase MCI appears to be that unless it owned its own long haul network, it would not be able to satisfy the demands of enterprise customers for seamless network management.. This question tests the veracity of that claim in the actual business world.

12. When did Verizon first begin providing services to national enterprise customers? How long did it take, from first contact to closure of the deal, to negotiate your first contract with a national enterprise customer?
For what length of time does this contract cover?
Provide a copy of that contract and all documents that indicate when the negotiations were taking place.

How long does it typically take, from first contact to closure of the deal, to negotiate contracts with national enterprise customers?
What is the shortest length of time, from first contact to closure of the deal, that it has taken Verizon to sign a contract with a national enterprise customer?
What is the longest length of time, from first contact to closure of the deal, that it has taken Verizon to sign a contract with a national enterprise customer?
Provide all documents that indicate how long it took to negotiate each of your national enterprise customer contracts.

Explanation. Verzion was first permitted to begin selling to nationwide enterprise customers in late 2002. Because it has been in the market such a short time, its current market share might not reflect its potential in a few years. These questions will permit the Commission to better assess likely Verizon future market shares.

13. Please provide the number of potential enterprise customers and amount of potential revenues currently "in the pipeline" for Verizon – i.e., between initial contact and signed contract.

What is the typical contract length for national enterprise customers?
What is the shortest contract length for any MCI or Verizon national enterprise customer?
What is the longest contract length for any MCI or Verizon national enterprise customer?
Provide copies of all Verizon contracts that cover sales to national enterprise customers.

Is Verizon currently trying to gain additional national enterprise customers?
What rate of growth does expect in its sales to national enterprise customers?
What is Verizon's current share of all new sales to national enterprise customers?
Absent this merger, what do you predict will be Verizon's share of all sales to national enterprise customers in two years? three years? four years? five years?
Provide documents that show Verizon's current share of all sales to national enterprise customers and your forecasted sales growth to national enterprise customers.

Explanation. This would provide a better indication of "potential competition" than the data on customers currently receiving service.

14. Describe and quantify the major types of cost savings, benefits, or efficiencies that Verizon achieved through the merger of Bell Atlantic and GTE. For each of these types of cost savings, benefits, or efficiencies, explain whether it will be achieved in the Verizon/MCI merger, and compare the amount of each cost saving, benefit, or efficiency with its counterpart from the earlier merger. Do you expect to achieve any types of cost savings, benefits, or efficiencies with the MCI acquisition that you did not achieve in the Bell Atlantic/GTE merger? If so, describe each one, explain the amount expected, and explain why you expect to achieve it with this merger but not the Bell Atlantic/GTE merger.

Explanation. This will provide some concrete details to evaluate Applicants' claims of cost savings.

15. Separately for MCI and Verizon, provide the net price (or average revenue per minute) for each of the following types of calls: wireline local, wireline long-distance, wireless within MSA, and wireless outside MSA. If there is no single net price for each type of call, indicate the range of net prices from the minimum to the maximum.

    <u>Explanation</u>. Questions 15 and 16 are designed to provide evidence concerning contribution margin for wireless and wireline calls, which is one of the indicia as to whether such services are in the same product market.

16. Separately for MCI and Verizon, provide your best estimate of the short-run variable costs per minute for each of the following types of calls: wireline local, wireline long-distance, wireless within MSA, and wireless outside MSA. Consider short-run variable costs to be those that vary with quantity in a time frame of less than one year, or use your own definition and describe what it is. Explain which cost components or categories you include in your definition of short-run variable costs.

    <u>Explanation</u>. Questions 15 and 16 are designed to provide evidence concerning contribution margin for wireless and wireline calls, which is one of the indicia as to whether such services are in the same product market.

CERTIFICATE OF SERVICE

I, Crystal Moses, Swidler Berlin LLP, certify that I have caused copies of the foregoing comments in WC Docket 05-75 to be hand delivered, unless otherwise indicated, on this 9th day of May 2005 to the following:

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