Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Verizon Communications Inc. and	)	WC Docket No. 05-75
MCI, Inc.	)	
Applications for Approval of	)	
Transfer of Control	)	
	)	

REPLY COMMENTS ON BEHALF OF
THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

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I. INTRODUCTION

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") submits these reply comments in response to the pleading cycle established by the Federal Communications Commission ("FCC" or "Commission") on March 24, 2005, regarding the proposed transaction.[1]

A. The Ratepayer Advocate reiterates the concerns and recommendations set forth in its initial comments.

Industry participants, consumer advocates, and regulators express several major concerns regarding the proposed merger between Verizon Communications Inc. ("Verizon") and MCI Inc. ("MCI") (collectively "Applicants"), as it is presently structured. Few comments have been submitted in support of the merger and those that do provide little evidence to support their positions. In these reply comments,

[1]/ Federal Communications Commission, "Commission Seeks Comment on Application for Consent to Transfer of Control filed by Verizon Communications Inc. and MCI, Inc.," Public Notice released March 24, 2005.

the Ratepayer Advocate identifies and briefly discusses the major points that the FCC should heed. Based on the Ratepayer Advocate's review of the initial comments filed in this proceeding, its review of the Applicants' Petition filed with the New Jersey Board of Public Utilities ("New Jersey Board"),[2] and its analysis of the proposed merger between SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T"),[3] the Ratepayer Advocate reiterates the concerns and recommendations set forth in its initial comments and attached Declaration of Susan M. Baldwin and Sarah M. Bosley ("Baldwin/Bosley Declaration") submitted on May 9, 2005, in this proceeding. The Ratepayer Advocate continues to recommend that the FCC condition any approval of the proposed transaction on enforceable conditions that minimize the risk of harm to consumers and maximize the probability of benefits for consumers. The Applicants have thus far failed to demonstrate that the proposed merger is in the public interest.

Also, many of the analyses and recommendations included in the Ratepayer Advocate's Initial and Reply Comments submitted in WC Docket No. 05-65 on April 25, 2005 and May 10, 2005, regarding SBC's proposed acquisition of AT&T, apply also to Verizon's proposed acquisition of MCI.

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[2]/ *In the Matter of the Joint Petition of Verizon Communications Inc. and MCI, Inc. For Approval of Merger*, New Jersey BPU Docket No. TM05030189, Joint Verified Petition, filed March 3, 2005.

[3]/ On April 25, 2005 and May 10, 2005, the Ratepayer Advocate submitted initial and reply comments, respectively, in WC Docket No. 05-65.

B. The Ratepayer Advocate applauds the FCC's request for additional information from the Applicants and urges the Commission to allow sufficient time in the procedural schedule to permit comprehensive examination of the new information.

The Ratepayer Advocate fully supports the FCC in its effort to obtain detailed, comprehensive information from the Applicants.[4] However, the Applicants' response to the FCC's Information Request is due on May 26, 2005, and, therefore, the Ratepayer Advocate and other interested parties have not had the opportunity to review the information before the end of the public comment period. The Ratepayer Advocate urges the FCC to permit adequate time in the procedural schedule for interested commenters to submit *ex parte* filings based on their review of the Applicants' response. The stakes of this multi-billion dollar transaction for consumers are substantial, and the FCC's consideration of the merger should be deliberate and unrushed.

II. THEMES OF THE INITIAL COMMENTS

A. Introduction

The initial comments submitted in this proceeding raise concerns about the impact of the merger on the mass, business, special access, and Internet markets.[5] In these reply comments, the Ratepayer Advocate focuses primarily on the implications of the merger for the mass market although many of the concerns raised apply to the special access, Internet, and other telecommunications markets as well.

4/ Letter to Applicants from Thomas Navin, Acting Chief, Wireline Competition Bureau, May 5, 2005, Initial Information and Document Request.

5/ *See, e.g.,* Comments of Eliot Spitzer Attorney General of the State of New York ("New York Attorney General") noting that "the Joint Petition fails to identify: (1) whether Verizon already controls a share of the Internet backbone, (2) the share of the Internet backbone held by MCI, and (3) the combined share of the Verizon/MCI assets. These omissions are striking." New York Attorney General, at 18.

Several themes emerge from the initial comments submitted in this proceeding:

- The FCC should consider Verizon's proposed acquisition of MCI, not in isolation, but rather in concert with its analysis of SBC's proposed acquisition of AT&T.

- The monopolization and re-monopolization of local, long distance, data, and bundled markets by the Bell operating companies ("BOCs") represent a troubling trend that will limit competitive choice by consumers and expose consumers to the risks of high prices, service quality deterioration, and lack of innovation.

- Head-to-head competition among rival BOCs would benefit mass market consumers, but based on past and present BOC practices, is unlikely absent strong, enforceable regulatory conditions.

- The imminent expiration of unbundled network element platforms ("UNE-P") eliminates the precarious foundation upon which BOCs obtained regulatory relief, and should trigger the FCC's and state public utility commissions' re-imposition of regulatory safeguards to protect consumers from BOCs' exertion of their market power.

- The consumers most vulnerable to fall-out from the merger are residential and small business consumers, including both those who subscribe to bundled services and those who choose not to subscribe to bundled services.

- Intermodal alternatives, although they offer consumers *supplemental* choices, do not provide economic substitutes for basic local exchange service.

- The loss of MCI as a BOC-rival would diminish the depth and breadth of regulatory proceedings and eliminate a source of innovation in the mass market.

- The Applicants have failed to demonstrate that, on balance, their proposed merger is in the public interest.

- The Applicants should provide detailed market-specific data to the FCC.

- The FCC should condition any approval of the merger on enforceable conditions.

The Ratepayer Advocate discusses these concerns below, which supplement those described in the Ratepayer Advocate's Initial Comments and the accompanying Baldwin/Bosley Declaration.

B. The FCC should consider Verizon's proposed acquisition of MCI, not in isolation, but rather in concert with its analysis of SBC's proposed acquisition of AT&T.

The post-*TRRO*[6] proposals by the two largest BOCs to acquire their two largest rivals raise unique and serious concerns. One concern, discussed below, is that the BOCs are re-monopolizing the telecommunications industry. Another concern is that the decisions by AT&T and MCI to join the RBOCs (since they apparently cannot compete with them) underscore the FCC's misplaced optimism in the purportedly beneficial impact on competition of terminating competitive local exchange carriers' ("CLECs") access to UNE-P.

Several commenters have expressed the need for the Commission to consider both proposed mergers together and the cumulative impact they will have on the local exchange market. As stated by the National Association of State Utility Consumer Advocates ("NASUCA"), "In assessing both mergers, the Commission must consider the interrelationship and cumulative effect of the mergers, rather than looking at them in isolation." NASUCA Comments, at 3. As stated in initial comments jointly filed by several national consumer advocate organizations the FCC "simply cannot ignore the combined impact of the mergers, which involve the four largest firms in the industry." Petition to Deny of Consumer Federation of America, Consumers Union, and U.S. Public Interest Group ("CFA/CU/PIRG Petition"), at 2. *See*, also Comments of the Texas Office of Public Utility Counsel ("Texas OPC"), at 3.

Qwest Communications International, Inc. ("Qwest") contends that:

> Barely two weeks after [the SBC/AT&T merger] was announced, the proverbial "other shoe" dropped and Verizon entered into a parallel agreement to acquire MCI.

6/ Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, FCC WC Docket No. 04-313; CC Docket No. 01-338, *Order on Remand*, rel. February 4, 2005 ("Triennial Review Remand Order" or "TRRO").

> Like SBC – Verizon is proposing to foreclose competition by acquiring one of its two primary rivals in the wholesale and retail markets in its large 29 state local service territory. Like SBC capturing AT&T – Verizon is trying to eliminate MCI as a competitive threat in its region before MCI can partner with others, including emerging cable, wireless, and VoIP providers.

Petition to Deny of Qwest Communications International, Inc. ("Qwest Petition to Deny"), at 2. Qwest further observes that "these two mergers present perhaps the most significant dockets the Commission has faced since Divestiture." Qwest, at 2.

C. The BOCs' re-monopolization of local, long distance, data, and bundled markets represent a troubling trend that will limit competitive choice and expose consumers to the risks of high prices, service quality deterioration, and lack of innovation.

The BOCs' incumbent position in the local market combined with (and fostering) its phenomenal successes in the long distance, data, and bundled markets has transformed the baby Bells into unbeatable Goliaths. In its initial comments , the Ratepayer Advocate discussed, among other concerns, the implications of Verizon's bundled, or Freedom, offerings for consumers and competitors, and highlighted data indicating the enormous success with which Verizon has leveraged its position in the local exchange market to enter the long distance market and data markets.[7] Data reported to investors at the end of the first quarter of 2005 in offering bundles of telecommunications services indicates this enormous success:

- Verizon's long distance revenues increased 8.3 percent between the first quarters of 2004 and 2005; SBC's long distance revenues were up 20.3% from the first quarter of 2004 to the first quarter of 2005.
- Verizon's long distance revenues, in the first quarter of 2005, were $1.1 billion; SBC's long

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7/ Initial Comments of the Division of the Ratepayer Advocate, at 8-9; Baldwin/Bosley Declaration at paras. 34-36.

distance revenues were $901 million in the first quarter of 2005.

- As of the end of the first quarter 2005, SBC has 22 million long distance lines in service and Verizon served over 8 million long distance lines, an increase from first quarter 2004 of 29.6% and 11.6% respectively.

- Fifty-eight percent of Verizon's residential customers subscribe to local and long distance and/or Verizon's DSL service (an increase from 51 percent the previous year); SBC reported that 64% of its consumer retail lines bundle their local wireline with at least one other service (*e.g*., long distance, digital subscriber line ("DSL"), Cingular wireless, video), a substantial increase from the fourth quarter of 2003, when 50% of SBC's retail consumers purchased bundled services and double the rate of penetration two years ago; Qwest reported that bundle penetration increased to 47% in the first quarter of 2005.[8]

Initial comments raise the concern that the merger would heighten risks of excessive prices and anti-competitive behavior. *See*, *e.g.*, CFA/CU/PIRG, at 24; ACN et al, at 32-33. CompTel/ALTS suggests that "the merged Verizon/MCI will have the ability and irresistible incentive to price squeeze competitors who must turn to Verizon for local connectivity."[9] CompTel/ALTS, at 7. ACN Communications Services, Inc., *et al* predict that "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 . . . the merger between Verizon and

[8]/ SBC Communications, Inc. Investor Briefing No. 247, April 25, 2005, at 2-3, 5-6; Verizon Communications Investor Quarterly, VZ first quarter 2005, April 27, 2005, at 3-4; Qwest Press Release, "Qwest Sees Significant Margin Expansion and Growth in Key Areas in First Quarter 2005, May 3, 2005 available at http://media.corporate-ir.net/media_files/irol/11/119535/q_q105er.pdf.

[9]/ Comptel/ALTS assert further that "the merged firm will also have the ability and incentive to engage in non-price discrimination strategies, such as delaying, or degrading, provisioning of these essential inputs to competitors." Comptel/ALTS Petition to Deny, at 7.

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.'" ACN *et al*, at 36. Cbeyond et al comment: "It is hard to imagine a transaction with more potential, indeed likely, anticompetitive effects. To approve such a deal, at least absent expansive and stringent conditions designed to remedy the anti-competitive effects, would render the transfer of control requirements of Sections 214(a) and 310(d) of the Act meaningless." Petition to Deny of Cbeyond Communications, Conversent Communications, Eschelon Telecom, TDS Metrocom, Nuvox Communications, and XO Communications ("Cbeyond et al"), at 2.

Verizon's bundled offerings also raise concerns about possibly anticompetitive tying arrangements. The FCC has previously investigated complaints about tying arrangements, such as when it concluded that the pay phone commissions offered by AT&T on its "0+" services were "an added inducement, when coupled with [AT&T's] dominance in the "0+" market, which AT&T [was] using as leverage in the "1+" market." The FCC's Common Carrier Bureau concluded that "AT&T's conduct ha[d] significant enough anticompetitive consequences to find an unreasonable practice." In its explanation of its finding, the FCC stated, among other things, the "unbundling policy also prevents a carrier from configuring the basic service elements in a way which would be anticompetitive."[10] In a subsequent order the FCC explained the Bureau's order as finding "that AT&T's tying of its "0+" service to its "1+" service violates the underlying policy goals of the antitrust laws, and is, therefore, unreasonable under Section 201(b),"[11] concluded that

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10/ *In the Matter of AT&T's Private Payphone Commission Plan,* File No. ENF-87-19, *Memorandum Opinion and Order*, October 3, 1998, 3 FCC Rcd (1988), at paras. 26-27.

11/ *In the Matter of AT&T's Private Payphone Commission Plan,* File No. ENF-87-19, *Memorandum Opinion and Order*, October 3, 1998, 7 FCC Rcd (1992), at para. 11.

AT&T's bundling practices "constitute[d] an unreasonable practice in violation of Section 201(b) of the Communications Act,"[12] and declined to vacate the Bureau's order.[13] Verizon and other Bell's bundling practices merit further regulatory scrutiny, similar to that afforded more than ten years ago to AT&T's pay phone practices, to ensure that the BOCs do not engage in anticompetitive, discriminatory practices.

Vonage Holdings Corp. ("Vonage") submits that "[t]he practice of DSL tying is clearly anticompetitive because it prevents customers from porting their numbers, and essentially forces them to purchase local services they do not want – either because they have a wireless option or because they prefer to use VoIP alternatives. The net effect is to act as a drag on the adoption of broadband new IP technologies by making services like those offered by Vonage economically unattractive." Comments of Vonage Holdings Corp., at 11. The New York Attorney General expresses similar sentiments, noting that "By selling its DSL service bundled with its monopoly voice service, Verizon discourages its DSL customers from using VoIP competitors." New York Attorney General, at 8. The Attorney General continues:

> Until recent regulatory changes altered the pricing structure whereby Competitive Local Exchange Carriers ("CLECs") lease Verizon's local facilities, both MCI and AT&T had made significant inroads as competing local telephone providers using Verizon's facilities, especially in New York. Since those regulatory changes became final, however, these two largest of the CLECs announced that they have ceased marketing to new customers and, as a result, the prospect of mass market telephone service competition using unbundled network elements is dim. As a result, Verizon's only remaining competition for telephony is from cable and DSL based VoIP providers. Given Verizon's monopoly of wireline services, Verizon has little incentive to open its network to those offering competitive services."

12/ *Id*., at para. 16.

13/ *Id.*, at para. 17.

New York Attorney General, at 9. Furthermore, because: (1) mass market competition is absent, (2) Verizon is offering integrated bundles of non-competitive and competitive services (which complicate the detection of cross-subsidization) and (3) the merger would yield substantial synergies, the Applicants should commit to using the merger synergies to support the offering of broadband services throughout its region to all consumers at basic voice grade prices.

D. Head-to-head competition among rival BOCs would benefit mass market consumers, but based on past and present BOC practices, is unlikely absent strong, enforceable regulatory conditions.

Vigorous, all-out competition among the BOCs would provide compelling evidence that the local mass market could support effective competition. However, given that the two largest CLECs have apparently calculated that they can no longer compete in the mass market in the wake of the *TRRO*, competition among the Bells across their traditional footprints holds out the only hope of creating competitive choice for consumers. This possibility provided some of the rationale for the earlier wave of mergers but the vision of head-to-head inter-BOC competition has yet to be realized. *See*, CFA/CU/PIRG, at 15; Texas OPC, at 6..

As the Ratepayer Advocate stated in its Initial Comments: "The Applicants should commit to out-of-region entry to offer basic local exchange service to residential and small business consumers in more than a 'bare bones' fashion or alternatively state that such out-of-region entry is not profitable and that they have no intention of pursuing mass market "unbundled" customers beyond their home turf. *See*, also, NASUCA, at 22-23. ACN *et al*, observe that the RBOCs did not live up to their out-of-region promises during the last merger wave and "while approval of the previous wave of RBOC mergers . . . were premised on SBC and Verizon's promises to compete out-of-region, Verizon makes no such promise here." ACN *et al*, at 34. *See*, also, Qwest, at 3.

The Petition to Deny filed by Cbeyond *et al* raises questions regarding whether Verizon and SBC ever had serious intentions to compete with each other to provide local telecommunications services using the contiguous service areas in California, Connecticut and Texas as examples. Cbeyond *et al* assert that the maps provided "plainly show that both companies purposely avoid serving the same areas." Cbeyond *et al*, at 60. Cbeyond also suggests that there is little evidence that SBC and Verizon will compete in the mass market to offer long distance services outside their home territories given that the RBOCs primarily offer long distance services in a bundle with local service. Cbeyond *et al*, at 63.

Comptel/ALTS raise the specter of SBC and Verizon acting as a "classic duopoly." Comptel/ALTS, at 7. As explained in the Baldwin/Bosley Declaration, the lack of inter-BOC competition also raises serious concerns about opportunities for collusion, which the pending merger would exacerbate:

> Furthermore, the pending mergers heighten concerns about the absence of sibling rivalry among the Bells and the growing potential for tacit collusion. As one economist observed, "[t]he variety of collusive pricing arrangements in industry is limited only by the bounds of human ingenuity." The pending mergers facilitate collusion because they shrink the number of "players" in the industry, which has anti-competitive consequences. The following excerpts from an economics textbook explains the beneficial impact of *increasing* the number of players:
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>> First, as the number of sellers increases and the share of industry output supplied by a representative firm decreases, individual producers are increasingly apt to ignore the effect of their price and output decisions on rival actions and the overall level of prices.
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>> . . .
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>> Second, as the number of sellers increases, so also does the probability that at least one will be a maverick, pursuing an independent, aggressive pricing policy.
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>> . . .
>>
>> Finally, different sellers are likely to have at least slightly divergent notions about the most advantageous price. ... The coordination problem clearly increases with the

number of firms.

The Declaration continues: "If the FCC approves Verizon's acquisition of MCI, the FCC and state public utility commissions will need to devote substantially greater resources for regulatory scrutiny and oversight."[14]

E. The imminent expiration of UNE-P eliminates the precarious foundation upon which BOCs obtained regulatory relief, and should trigger the FCC's and state public utility commissions' re-imposition of regulatory safeguards to protect consumers from BOCs' exertion of their market power.

The federal and state regulatory frameworks that govern the RBOCs today correspond with a fleeting era in which some hope of local competition existed. Based in large part on the competitive inroads made possible by UNE-P, state public utility commissions (often despite consumer advocates' concerns[15])have relaxed their regulatory oversight of incumbent local exchange carriers ("ILECs").[16] The minimal competition that existed is evaporating. As detailed in the Baldwin/Bosley Declaration, compounding decreases in the fourth quarter, Verizon reported providing 186,000 fewer UNE-P lines in

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[14]/ Baldwin/Bosley Declaration, at para. 112, citing, F. M. Scherer, *Industrial Market Structure and Economic Performance*, Rand McNally & Company, (1970), at 158, 183.

[15]/ *See, e.g.,* Qwest Petition for Competitive Classification of Business Services, Washington Utilities and Transportation Commission ("WUTC") Docket No. 030614. Direct and Rebuttal Testimony of Susan M. Baldwin on behalf of the Public Counsel, August 13, 2003 and August 29, 2003. In its order, the WUTC observed that "Public Counsel and WeBTEC argue that it is paradoxical that UNE-P is under attack by Qwest in the TRO proceeding at the same time that Qwest relies on UNE-P to support its petition here." WUTC Docket No. UT-030614, Order No. 17, Order Granting Competitive Classification, December 23, 2003, at 42.

[16]/ *E.g.*, the WUTC's decision to grant competitive classification for Qwest's basic business local exchange services, which the Public Counsel opposed, was based on data regarding CLECs' presence during the relative "heyday" of local competition, *i.e.*, before the FCC issued the *TRRO* order. In the Matter of the Petition of Qwest Corporation For Competitive Classification of Basic Business Exchange Telecommunications Services, Docket No. UT-030614, Order No. 17, Order Granting Competitive Classification, December 23, 2003. Among other things, the WUTC stated: "CLECs using UNE-P are present in 61 of 68 Qwest exchanges, where over 99% of Qwest's analog business customers reside. *Id.,* at 37. The WUTC also determined that "[a]n important feature of this structure is the availability to competitors of UNE-P, which is the entire platform (loop, transport and switch included) used by Qwest to serve a customer." *Id*., at 49.

the first quarter of 2005 compared to the fourth quarter 2004.[17] The other RBOCs have reported similar results. The FCC and state public utility commissions should revoke the regulatory freedoms that they prematurely granted unless and until effective competition materializes. The pending mergers highlight the harmful mismatch between the lax level of regulation and the emerging telco/cable duopoly.[18]

In discussing the myriad deregulation decisions that the FCC has adopted recently, Comptel/ALTS states that "[i]n each case the FCC has relied upon a *perception* of competition, or worse—the promise of future competition—that does not match *reality*." Comptel/ALTS, at 4 (emphasis in original). NASUCA similarly observes that "the competitive environment that was anticipated and nourished in the SBC/Ameritech and Bell Atlantic/GTE mergers has been choked almost out of existence. This has occurred at a time when Verizon's operating companies have been deregulated – either through state legislative or regulatory action – based on the presumption of a level of competition that was never really reached, and is unlikely to be reached in the future absent major action by the Commission." NASUCA, at 5.

F. Intermodal alternatives, although they offer consumers *supplemental* choices, do not provide economic substitutes for basic local exchange service.

As the Ratepayer Advocate stated in its Initial Comments[19] and as is supported by various other commenters in this proceeding, the FCC should dismiss the Applicants' continued, practically exclusive,

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17/ Verizon Investor Quarterly, VZ First Quarter 2005, released April 27, 2005, at 4. *See*, also, Baldwin/Bosley Declaration, at para. 32.

18/ Other commenters have expressed concerns with regard to an emerging telco/cable duopoly. *See*, *e.g.*, Texas OPC, at 7.

19/ Ratepayer Advocate Initial Comments, at 9-10. See, also, Baldwin/Bosley Declaration, at paras. 57-80.

reliance on the presence of intermodal technologies as evidence of effective competition in the local exchange market. *See*, New York Attorney General, at 8; NASUCA, at 9-11. The ILECs' arguments lack an empirical foundation. Consumers' actual purchasing decisions provide the best evidence of their preferences. Thus far, adoption of alternative technologies has been at the margins and/or supplemental to the basic wireline telecommunications. The FCC estimates that just five to six percent of U.S. households have "cut the cord" completely to migrate to wireless service."[20] That teenagers, college students and households rely on wireless service to meet *new* supplemental demand and to replace *additional* lines does not prove that wireline and wireless services are economic substitutes. VoIP similarly competes for bundles and not basic service. As NASUCA aptly suggests: "The intermodal 'competitors' cited by the Applicants do not compete ubiquitously throughout Verizon's service territory for certain customer segments, and their services are mostly complements to Verizon's services." NASUCA, at 9.

The Ratepayer Advocate is not persuaded by the comments of The Progress & Freedom Foundation in which it is stated: "claims that wireless services are not 'substitutable' for wireline services, or that potential new-technology competitors like independent VoIP, broadband powerline, or WI-MAX providers, are not relevant to assessing the market power of existing leading market participants also should be viewed with considerable skepticism by those government authorities charged with considering the competitive effects proposed mergers." The Progress & Freedom Foundation, at 1-2. These comments do not provide any evidence for the assertions that intermodal alternatives have significantly reduced the RBOCs' market power.

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[20]/ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, FCC WT Docket No. 04-111; *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Ninth Report, Rel. September 28, 2004, at footnote 575.

As stated by consumer coalitions in initial comments filed in this proceeding, "VoIP is not yet an effective competitor to the traditional wired phone service." CFA/CU/PIRG Comments, at 16.[21] The Texas OPC similarly states that VoIP is not a substitute for local exchange service, noting that over 70% of households do not have the requisite broadband. Additionally, the Texas OPC observes that if one needs broadband access through cable TV package, the total monthly bill for access may end up totaling $80-$100, plus $10 to $30 for VoIP services. Texas OPC, at 7. Price, service quality, and limited access to the 911 system[22] prevent wireless from competing with basic service. CFA/CU/PIRG Comments, at 18. Others similarly demonstrate that intermodal alternatives do not provide economic substitutes. *See, e.g.*, ACN *et al*, at 15-20; NASUCA, at 9-10; Cbeyond *et al*, at 75; Wilkie Declaration, at para. 39; New York Attorney General, at 8; Qwest, at 26-27.

As stated in the Baldwin/Bosley Declaration:

> Residential consumers' increasing reliance on DSL and intermodal substitutes for additional lines does not provide evidence of facilities-based competition in the provision of mass market consumers' primary lines. Intermodal competition that disciplines dominant carriers' prices, service

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21/ The Ratepayer Advocate lauds the FCC for taking the first step to ensure that VoIP customers have access to E911 services. "Commission Requires Interconnected VoIP Providers to Provide Enhanced 911 Service: Order Ensures VoIP Customers Have Access to Emergency Services," FCC News Release, May 19, 2005. However, as Commissioner Adelstein stated, "This Order recognizes that power outages, loss of a consumer's broadband connection, or the time needed to update E911 location databases may affect a consumer's ability to reach public safety through 911" and that VoIP providers "face significant implementation challenges." Statement of Commissioner Jonathan S. Adelstein Re: IP-Enabled Services; E911 Requirements for IP-Enable Service Providers, First Report and Order and Notice of Proposed Rulemaking, WC Docket Nos. 04-36, 05-196, FCC 05-116 (May 19, 2005). Industry observers also suggest that as these "alternative" technologies become more mainstream, more highly regulated cost differentials will disappear. See, for example, "FCC Wants 911 On Web Phones Within 4 Months," *The Wall Street Journal*, May 20, 2005, at A2. Communications analysts suggest that VoIP providers may face a higher cost of entry and it is not yet evident that VoIP providers will meet the FCC deadline. *Id.*

22/ A recent test of the E911 system for wireless calls by the New York City Police Department found that "none of the major carriers met federally required thresholds for pinpointing locations of the callers." "Tests Show Many Cellphone Calls to 911 Go Unlocated," The Wall Street Journal, May 19, 2005, at B1. Similar results have been reported in Chicago and New York's Long Island suburbs. *Id.*

> quality, and service innovation is still in the future. Rather than rely on data based on now-extinct forms of competition (i.e. UNE-P) and on future, uncertain competition, the Commission should base its review of the merger on the local market structure as it exists today. This is consistent with the Commission's decision in its *Cingular/AT&T Wireless Merger Orde*r to base its findings on the current state of intermodal competition instead of estimates of potential future competition.

Baldwin/Bosley Declaration, at para. 67. Competition at the margins by intermodal providers is simply not sufficient to limit the market power of the merged companies proposed here and to blunt the incentives for anticompetitive behavior. In fact, many of these intermodal providers rely on incumbent wireline providers network to provide service (such as a broadband connection to DSL) or the incumbent also owns, or has a stake in, the alternative technology. Qwest, at 27; New York Attorney General, at 8; NASUCA, at 10-11.

G. The loss of MCI as a BOC-rival would diminish the depth and breadth of regulatory proceedings and innovation in the mass market.

The Ratepayer Advocate reiterates its concern that MCI's merger with its competitor (coupled with the loss of AT&T as an independent voice) will irrevocably change the dialogue in federal and state regulatory proceedings. Through the Ratepayer Advocate's participation in numerous federal and state regulatory proceedings, it is well aware of the value of MCI as a voice distinct from Verizon, often articulating positions and submitting evidence that otherwise might go unheard. As the Ratepayer Advocate stated in its Initial Comments, "MCI's metamorphosis from competitor to incumbent would silence an important voice."

Commenters urge the Commission to carefully consider the regulatory vacuum that will exist in the wake of the merger, especially considering the compounding loss of AT&T in the policy arena. "[B]oth

MCI and AT&T were vigorous proponents of pro-competitive telecommunications policy presenting countervailing positions to the RBOC policy positions. The proposed merger will eliminate MCI as a competitor and public policy advocate for open competition." Texas OPC, at 9. Comptel/ALTS also has expressed concerns regarding the loss of MCI as a regulatory rival to the RBOCs, stating that:

> [T]he merger effectively represents Verizon's acquisition of its most effective regulator of wholesale services. The pro-competitive provisions of the Telecommunications Act were never expected to implement themselves. Congress deliberately adopted a structure whereby the creative tensions between the RBOCs and their largest expected customers – MCI and AT&T included – would engage in bilateral arbitrations to establish reasonable wholesale offerings. When the Act was passed, this structure was reasonable – the resources available to competitors and to the incumbents were generally in balance. The proposed mergers, however, will produce a resource imbalance between entrants and incumbents that is so severe that the effectiveness of this regime is destined to fail.[23]
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> . . .
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> The facilities of MCI and AT&T, their retail presence, and their ability to aggressively prosecute violations by Verizon—acting as the only security patrol in a neighborhood where no police are present—were the only factors that had even limited effect in constraining Verizon's market power.[24]

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[23]/ Comptel/ALTS, at 9-10.

[24]/ *Id.*, at 24.

...

> In addition to doing violence to the intended goal of the Act (a competitive local and long distance market), the proposed acquisition of MCI by Verzon violates a fundamental assumption underlying the Act itself – that is, that a reasonable resource balance would exist between entrant and incumbent so that the creative tensions of negotiation and arbitration could produce just and reasonable wholesale arrangements.[25]

ACN *et al* suggest that "[a]s 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." ACN *et al*, at 7.

Furthermore, as NASUCA observes, the Commission expressed concern about maintaining a number of policy competitors when it approved the SBC/Ameritech merger.[26] As NASUCA states: "Also extremely important has been the presence of MCI along with AT&T as a 'policy competitor' to Verizon and the RBOCs. Both on the national level and in the states, MCI has been one of the few with the resources to stand in opposition to Verizon. Now Verzon is 'buying out' its main competitor in the economic marketplace as well as in the political and regulatory arenas." NASUCA, at 14-15. The loss of MCI and AT&T would be a major setback as they are perhaps the two competitors best equipped to compete in the policy arena in terms of resources and clout. As stated in the Baldwin/Bosley Declaration: "The transformation of this regulatory activist into an incumbent's partner will irrevocably alter state and federal investigations of telecommunications policy, ultimately harming consumers." Baldwin/Bosley

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[25]/ *Id.*, at 32.

[26]/ NASUCA, at 14, citing *SBC/Ameritech Merger Order*, at para. 149.

Declaration, at para. 92.

Several commenters also discuss the fact that the loss of MCI as an independent competitor also means that consumers lose a source of innovation in the market. *See*, *e.g.*, Qwest, at 27-30; CFA/CU/PIRG, at 10; Cbeyond et al, at 88. The Ratepayer Advocate urges the Commission to consider Qwest's observations that "MCI has played an important role in innovation in the industry, while Verizon has often balked at introducing innovations that might undermine its incumbent ILEC businesses. As a result of the proposed merger, MCI will be lost as an independent innovator." Qwest, at 28. Consumer groups suggest that because of MCI's leadership and "maverick" role in providing new services to consumers, "ILECs have been forced to match the offers and the resulting consumer savings are totaling huge sums." CFA/CU/PIRG, at 10.

H. The Applicants should provide detailed market-specific data to the FCC.

Verizon and MCI have failed to provide sufficient detail and data in their Application to the Commission. The FCC's request for detailed information from the Applicants is an important first step in obtaining the information necessary to analyze the competitive implications of the proposed transaction. However, the comment period fails to provide any time for parties to the proceeding to review the additional forthcoming data and file comments with the Commission.

Concerns regarding the vacuousness of the filing have been raised by several commenters. One commenter observes that "The application apparently reflects a strategy of withholding important information" and fails to "provide, among other things, market share and market definitions for the services provided by the Applicants." ACN, *et al*, at 2; See, also, NASUCA, at 15-16; New York Attorney

General, at 8; Cbeyond *et al*, at 6. Comptel/ALTS urges the Commission to seek additional information from the Applicants on several issues in its Petition to Deny and concludes that "Verizon and MCI have failed to come forward with even the minimum relevant and probative information that the Commission needs to assess the potential anticompetitive effects of the merger." Comptel/ALTS, at 32. See, also, *Id.*, at 22..

I. The FCC should impose appropriate conditions to foster the competitive market place and to protect consumers from potential harm.

After reviewing initial comments in this proceeding, the Ratepayer Advocate continues to urge the Commission to approve the proposed merger of Verizon and MCI only if said approval is accompanied by enforceable conditions. The Ratepayer Advocate recommended several conditions to mitigate consumer harm and provide consumer benefit.[27] The FCC should consider these conditions and those described in other parties' comments. According to NASUCA, the proposed merger is "more serious from the consumer perspective than those previously authorized by this Commission that were approved subject to numerous conditions; hence the conditions proposed [by NASUCA] are broader in scope than those previously ordered." NASUCA, at 4. Competitors state: "It is hard to imagine a transaction with more potential, indeed likely, anticompetitive effects. To approve such a deal, at least absent expansive and stringent conditions designed to remedy the anti-competitive effects, would render the transfer of control requirements of Sections 214(a) and 310(d) of the Act meaningless." Cbeyond *et al*, at 2; See also, Texas OPC, at 10; New York Attorney General, at 13, 23; Vonage, at 10. Qwest contends that if the FCC approves the merger, it "would have to be conditioned on substantial divestiture of MCI facilities, customer

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[27]/ See discussion in Initial Comments of the Division of the Ratepayer Advocate, at 15-18.

contracts, and related operations in the Verizon territory." Qwest, at 6.

Commenters have identified and proposed numerous conditions in addition to those that the Ratepayer Advocate describes in its initial comments (at pages 15-18) and accompanying declaration. These include several specific conditions proposed by NASUCA. Based on the Ratepayer Advocate's review of the Applicants' submission of detailed information, further consideration of these diverse proposed conditions, and its participation in federal and state investigations of the proposed Verizon/MCI merger, the Ratepayer Advocate may supplement its discussion of conditions in a future filing with the FCC.

If Verizon does not commit to competing out-of-region in mass markets, which seems likely, the Ratepayer Advocate supports the recommendation that the Commission require Verizon to divest all in-region MCI residential and small business customers. ACN *et al*, at 51.

The Ratepayer Advocate also supports the proposed condition that the Commission "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," and further the condition that "the Commission should require that Verizon and MCI provide interexchange services through a separate subsidiary." ACN *et al*, at 55-56. As described in the Ratepayer Advocate's initial comments in this proceeding (at pages 8-9), and in more detail in the Baldwin/Bosley Declaration (at paras. 35-56), the Bells' bundling of telecommunications packages poses numerous risks to consumers and competitors.

Several commenters also support the Ratepayer Advocate's proposal that the Commission require the Applicants to commit to the provision of DSL on a stand-alone basis. As stated in the Ratepayer

Advocate's Initial Comments, Verizon's current plans are insufficient and may not materialize.[28] The New York Attorney General made the following observation with respect to Verizon's recent announcements regarding its limited rollout of "naked" DSL: "The inference is inescapable that Verizon's stalling is designed to hinder competition from other VoIP providers." New York Attorney General, at 11. The Attorney General observes that Verizon has no incentive to offer DSL on a stand alone basis and that "in order to ensure the competitive environment that most benefits consumers, the Commission should condition the merger on the combined Verizon/MCI offering stand-alone DSL service to all customers, existing or otherwise, not later than 30 days following Commission approval." New York Attorney General, at 13. Vonage similarly asks the FCC to ensure that Verizon follows through with its commitment to provide naked DSL. Vonage, at 12.

The Ratepayer Advocate again reiterates its position that the Commission should not approve the proposed merger without appropriate conditions. As Cbeyond observes: "It is noteworthy that nearly every proposed RBOC acquisition of another major carrier since the 1996 Act was enacted has been found to be unlawful due to their likely anti-competitive effects, and that the Commission has permitted these mergers to go forward only after attaching conditions that were carefully designed to remedy the perceived anti-competitive effects." Cbeyond *et al*, at 9-10. Comptel/ALTS, however, raises serious concerns about the effectiveness of conditions, which the FCC should heed, stating that, "[i]t would be a mistake, and simply another exercise in futility, for the Commission to attempt to mitigate the many public interest harms created by this merger through toothless merger conditions." Comptel/ALTS, at 9. Cbeyond *et al* assert that "in the last ten years, and particularly in the nine short years since the passage

[28]/ See Baldwin/Bosley Declaration, at paras. 105-108.

of the 1996 Act, Verizon has (i) entered into at least eight Consent Decrees with the Commission; (ii) violated merger conditions causing damages to CLECs; and (iii) been found the culprit of an array of other incidents within the purview of the courts and other agencies." Cbeyond *et al*, at 12.

III. CONCLUSION.

WHEREFORE the reasons set forth above and in the Ratepayer Advocate's Initial Comments and the accompanying declaration of Susan M. Baldwin and Sarah M. Bosley, the Ratepayer Advocate reiterates its previous recommendations to the Commission:

- The FCC should impose enforceable conditions to protect consumers from harm and that increase the likelihood of benefits flowing to mass market consumers.

- Absent such conditions, the Applicants have failed to demonstrate that, on balance, the proposed merger is in the public interest.

- The FCC should seek detailed data and information from the Applicants and allow adequate time for the industry, consumer advocates, and state regulators to examine the information.

Respectfully submitted,

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