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

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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I. SUMMARY

Verizon Communications Inc. (Verizon") and MCI Inc. ("MCI") ("Joint Applicants") seek approval from the Federal Communications Commission ("Commission") of Verizon's takeover of MCI and its subsidiaries. The comments submitted by the National Association of State Utility Consumer Advocates ("NASUCA")[1] demonstrated that this merger, as currently structured, does not serve the public interest, convenience and necessity, as required by the governing statutes and this Commission's rules. NASUCA's comments also demonstrated that, as with prior mergers considered by this Commission, the proposed Verizon/MCI merger will not serve the public interest, convenience and necessity unless definitive and enforceable conditions are adopted that will promote competition in the local, broadband and long distance

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[1]NASUCA is a voluntary association of 44 advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

markets for residential and small business consumers; protect residential and small business customers from negative impacts of the merger, such as declines in MCI's or Verizon's service quality; and provide additional benefits to residential and small business customers. NASUCA's comments showed conclusively that this merger is both qualitatively and quantitatively different -- more likely prejudicial to consumers -- from mergers previously considered by the Commission. Thus the conditions need to be more substantial and more effectively enforceable than the conditions previously adopted.

The comments filed in support of the merger do not refute the anti-competitive aspects of the merger identified by NASUCA. The comments filed in opposition to the merger reinforce and add to NASUCA's concerns.

In its totality, this merger -- as currently structured -- fails to pass the public interest test. The concerns raised by this merger are substantially heightened by the other major merger currently under consideration, that between AT&T -- the largest interexchange carrier ("IXC") and competitive local exchange carrier ("CLEC") in the United States -- and SBC, another Regional Bell Operating Company ("RBOC"). Taken together, these two mergers would result in the elimination of competition far greater than for each merger taken individually. In assessing both mergers, the Commission must consider the interrelationship and cumulative effect of the mergers, rather than looking at them in isolation.

These reply comments are structured, like NASUCA's initial comments, to respond first to others' views of the current competitive landscape and the impact of the merger on that landscape. The reply comments then address the benefits claimed by the Joint Applicants and their supporters. Finally, the reply comments address the conditions that would be necessary to bring this merger within the public interest, including conditions proposed by other commenters.

II. INTRODUCTION

A wide and numerous range of industry stakeholders either oppose the Verizon/MCI merger or look to numerous conditions on the merger to enhance the public interest. This includes consumer advocates,[2] and all stripes of the industry: CLECs;[3] rural incumbent local exchange carriers ("ILECs");[4] cable telephony providers;[5] VoIP providers;[6] Internet service providers;[7] wireless providers;[8] and others.[9] Their reasons for opposing this merger cover the waterfront, as discussed here.

Those who support the merger are a somewhat diverse but shallow coalition. There are doctrinaire anti-regulators;[10] a group of telecom equipment manufacturers who believe that the merger will enhance investment;[11] and non-profit organizations.[12] One common feature of the comments that support the merger is that they accept the Joint Applicants' assertions of lack of

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[2] Consumer Federation of America, Consumers Union and U.S. Public Interest Group ("CFA, et al."); New Jersey Ratepayer Advocate ("NJRPA"); New York State Attorney General ("NYAG"); and the Texas Office of Public Utility Counsel ("TxOPC").

[3] CompTel/ALTS; a group of nineteen CLECs ("ACN, et al."); a group of seven CLECs ("Cbeyond, et al."); a group of two CLECs (Broadwing, et al"); CloseCall America Inc. ("CloseCall"); PAETEC Communications, Inc.; and WorldNet Telecommunications, Inc.

[4] Independent Alliance.

[5] Cox Communications, Inc. ("Cox").

[6] Vonage.

[7] EarthLink, Inc. ("EarthLink").

[8] United States Cellular Corporation ("USCC").

[9] American Antitrust Institute ("AAI"); Global Crossing North America, Inc.

[10] Randolph J. May, Progress & Freedom Foundation ("May"); Competitive Enterprise Institute ("CEI"). CEI's comments are styled as "Reply Comments."

[11] Ad Hoc Telecom Manufacturers Coalition ("AHTMC").

[12] Alliance for Public Technology ("APT"); Competitive Business Enterprise Institute.

competitive harm and of substantial public interest benefits, as nothing short of gospel.

As before, these reply comments are presented in the context of the Commission's definitive statements regarding the last round of mergers.[13] This merger deserves even greater scrutiny because Verizon and MCI customers deserve more than the unfulfilled promises that arose from the SBC/Ameritech and Bell Atlantic/GTE mergers.[14]

III. THE LAW PLACES THE BURDEN ON VERIZON AND MCI TO DEMONSTRATE THAT THEIR MERGER WILL SERVE THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

There is little dispute about the law involved here, or on the burden of proof under the law that is imposed upon the Joint Applicants. One commenter, however, says that despite the Commission's duties under the law, the Commission should defer to the expertise of the Department of Justice ("DoJ") regarding competitive concerns regarding the merger.[15] The Commission should reject this constricted view of its responsibilities.

It is true that the DoJ -- and the Federal Trade Commission ("FTC") -- also have duties to review this and other mergers.[16] May says that "[t]he difference between deciding whether a merger will substantially lessen competition [the focus of the DoJ/FTC review] or fail to enhance

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[13] *In re Applications of Ameritech Corp. and SBC Communications Inc., for Consent to Transfer Control*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("*SBC/Ameritech Order*"); *In re Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000) ("*BA/GTE Order*").

[14] As with NASUCA's initial comments in this docket, which closely resembled NASUCA's initial comments on the SBC/AT&T merger, these reply comments closely resemble NASUCA's reply comments on SBC/AT&T. The issues on this merger closely resemble those on the SBC/AT&T merger; and as argued by many of the commenters, the Commission must consider the mergers in tandem.

[15] May Comments at 3.

[16] *Id*.

competition [the task of the Commission] is related more to semantics than anything else."[17] It is **not** mere semantics to say, as the Commission does, that in ensuring that a merger will promote the public interest it must **promote** competition. In that analysis, a neutral result -- neither promoting nor harming competition -- is inadequate. A merger that does not substantially lessen competition -- thus meeting the DoJ's test -- *may not* promote competition, and would thus fail the Commission's test.

In addition, the Commission must apply its competitive test based on its expertise in this industry, rather than the generalistic competition review undertaken by the DoJ and FTC. The Commission's competitive review must also take place in the context of its public interest responsibility, a broader context than competition taken in isolation. The Commission should not defer to other agencies in this review.

In any event, it is clear that under traditional analysis, this merger and the SBC/AT&T merger will diminish the current level of competition. As CFA, et al. demonstrate,

> if these mergers go through, the telecommunications market will look a lot like the old days of "Ma Bell" before AT&T was broken up. SBC and Verizon will have about a 90 percent market share in residential local wireline, 70 percent in long distance, and 40-50 percent in wireless. They will have the incentive and opportunity to squeeze out competitors that need access to the long or interstate "long haul" networks.[18]

These are not the characteristics of a fully competitive market, and the Commission must act to prevent this result, either by denying the merger or by establishing numerous enforceable conditions to alleviate the potential competitive harms and otherwise to benefit the public.

AAI states that,

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[17] *Id*.

[18] CFA, et al. Comments at 22.

> [T]he proposed transaction affects not only a multitude of markets but also the *relationships* between these markets. The tools of merger analysis customarily relied on by the Commission, therefore, cannot resolve the numerous policy issues that these transactions force the Commission to confront, and it will fail to deliver a useful assessment of their likely competitive effects. To adequately evaluate the transaction under its public interest standard, the Commission will need a method of evaluating the *industry-level implications*, as well.[19]

The Commission cannot consider this merger in isolation.

IV. THE CURRENT COMPETITIVE LANDSCAPE IS BLEAK.

On the wireline side, TxOPC provides a stark example of the impact of the RBOCs' war of litigation that ended in *USTA II* and the *Triennial Review Remand Order*.[20] In Texas, over 75% of CLEC customers are served via the unbundled network element platform ("UNE-P"), which will soon be disappearing.[21] Likewise, in Ohio more than 90% of residential customers served by CLECs were served via UNE-P.[22]

Many of the comments present compelling evidence that the "intermodal" competition touted by the Joint Applicants is not real competition.[23] For example, CFA, et al. identify the flaw with VoIP quite succinctly: "Both telephone companies and cable operators force consumers to buy bundles of services -- to pay twice -- if they want to purchase VoIP service

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[19] AAI Comments at 5 (emphasis in original).

[20] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"); *In the Matter of Unbundled Access to Network Elements,* WC Docket No. 04-313*, Review of the Section 271 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Order on Remand, FCC 04-290 (rel. February 4, 2005) ("*Triennial Review Remand Order*").

[21] TxOPC Comments at 4-5.

[22] *Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, NASUCA ex parte (February 13, 2003).

[23] See, e.g., TxOPC Comments at 6-7.

from a competitor."[24] And Vonage, for its part, asserts that the merger will have substantial negative impacts on VoIP.[25]

CFA, et al. discuss at length how the Commission's actions have resulted in a "cozy duopoly" for broadband service.[26] The many negative effects of this duopoly are also discussed.[27]

CEI cites a study that it has done that purportedly shows that wireless service is a substitute for wireline service, and that if wireline rates go up 1%, wireless subscriptions will go up 2%.[28] Of course, the current figure of 5-6% of consumers who have only wireless service (cited by the CEI study[29]) means that even those customers who subscribe to wireless service as a result of wireline price increases do not drop their wireline service. Some "competition"! CEI's theoretical postulations clearly do not play out in the real world. For example, in Ohio SBC Ohio has recently increased many of its rates by far more than 1%, but we have not seen a boom in wireless subscription. Despite the study's claim that there is a statistically significant relationship between wireline prices and wireless penetration,[30] it is more likely that this is a classic "*post hoc, ergo propter hoc*" situation.

CFA, et al. colorfully summarize the dilemma that Verizon and MCI -- along with SBC

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[24] CFA et al. Comments at 17.

[25] Vonage Comments at 3-6.

[26] CFA, et al. Comments at 3-9.

[27] *Id*.

[28] CEI Comments at [3], citing Pociask, "Wireless Substitution and Competition: Different Technology but Similar Service -- Redefining the Role of Telecommunications Regulation," Issue Analysis 2004 No. 5 (December 15, 2004) ("Pociask").

[29] Pociask at 9.

[30] *Id*. at 15.

and AT&T -- pose for the Commission:

> These two mergers represent a double dose of anticompetitive chutzpah that spells disaster for consumers.
>
> - Within their regional market, first the Bells made life so miserable for competitors that they go into bankruptcy or throw their hands up in despair. Then the Bells say they should be able to buy up their largest local competitors, because they really aren't very good current or potential competitors.
>
> - When competing head-to-head with other companies outside their region, the Bells flip the argument around, with the same unfortunate result for consumers. In order to secure approval of their previous mergers, which eliminated potential out of region competitors, the Bells promised to compete out of their home region markets, but they did not try very hard and have not done very well. So the Bells say, since we cannot be considered really good competitors now or in the future, we should be able to buy up the companies we were supposed to compete with. The failure of competition becomes an excuse for further re-consolidation and re-integration of the market, which eliminates the vestiges of competition and makes new entry into the market more difficult.[31]

The Commission must resist SBC's (and Verizon's) unconditional urge to merge.

CompTel/ALTS provide a graphic numerical demonstration of the impact of the various market changes on carriers. When the Act was passed, the RBOCs and GTE had revenues of over $109 billion, and the three main competitors (AT&T, MCI and WorldCom) had revenues of almost $99 billion.[32] As of 2004, the RBOCs had revenues of almost $158 billion, and the competition had under $61 billion in revenues.[33] *After* the SBC/AT&T merger and the Verizon/MCI merger, the RBOCs will have $209 billion in revenues, while the remaining

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[31] CFA, et al. Comments at 14.

[32] CompTel/ALTS Comments at 35.

[33] *Id*. at 45.

competitors will have less than $10 billion in revenues.[34] Thus we will have gone from near-parity to a situation where the RBOCs out-earn the competitors by twenty to one.

V. THE IMPACT OF THE MERGER ON THE COMPETITIVE LANDSCAPE WILL BE SUBSTANTIAL HARM TO THE PUBLIC INTEREST.

In initial comments, NASUCA asserted that "[i]n order to accurately assess the application, Verizon and MCI should provide the Commission substantive data on their competitive positions -- at least on a state by state basis, if not wire center by wire center -- for local service, long distance service and broadband."[35] CFA, et al. sum it up nicely: "[T]he merging parties have provided the Commission with a mountain of rhetoric, but not even a molehill of specific product and geographic market data…."[36]

As to the residential market, ACN, et al. note that, in acquiring MCI and its remaining millions of residential customers, Verizon will get those customers without "having to fight for them in the competitive marketplace, and Verizon's market share … will become even larger."[37] That should be a significant consideration in finding this merger not to be in the public interest.

NASUCA had noted the importance of the presence of MCI as a "policy competitor" to Verizon and the RBOCs.[38] Qwest notes that

> If AT&T had not offered itself up to SBC, it would be the loudest opponent of the Verizon-MCI merger. The converse is also true; MCI would be the most vigorous critic of the SBC-AT&T combination. These two transactions completely fail the

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[34] *Id*. at 37.

[35] NASUCA Comments at 16; see also ACN, et al. Comments at 2; Cbeyond, et al. Comments at 67.

[36] CFA, et al. Comments at 1; see also Qwest Comments at 9.

[37] ACN, et al. Comments at 10.

[38] NASUCA Comments at 16; see CompTel/ALTS Comments at 33.

> Communications Act's mandate that a merger must be shown to "enhance competition" -- defects that AT&T and MCI have not hesitated to address in transactions with far less competitive harm.[39]

CompTel/ALTS also point out that, at the time of the SBC/Ameritech merger, the merged entity's incentives to discriminate against competitors were somewhat muted by the need to show open networks in order to meet Section 271 requirements for interLATA and interstate entry.[40] Now, of course, such restraint will no longer be in evidence, because SBC will no longer need it.

Qwest points out the impacts of this merger on the wholesale market.[41] USCC shows in detail the range of impacts of this merger on a single carrier -- this one a mid-sized wireless carrier.[42] The Independent Alliance tells a similar tale for rural ILECs.[43] These patterns probably hold true for most of the carriers that have to deal with Verizon.

Vonage explains how the market power of the combined Verizon/MCI would include "their ability to discriminate in the quality of the broadband connection they offer end-users."[44] This discrimination could take three different forms in a packet-switched world: prioritizing Verizon's end-users' packets; degrading other providers' packets; and actually blocking transmissions.[45] EarthLink points out that

> [e]ither [the Applicants'] description of a new, seamless network from the

[39] Qwest Comments at 5.

[40] CompTel/ALTS Comments at 51.

[41] Qwest Comments at 16-18.

[42] USCC Comments at 2-3.

[43] Independent Alliance Comments at 2-8.

[44] Vonage Comments at 9.

[45] *Id.* at 16-17.

disparate components of the current network are pure hyperbole, and therefore the purported public interest benefits do not exist, or the Applicants truly are poised to create a network that is qualitatively different in terms of vertical integration than anything that has existed since the break-up of AT&T.[46]

Tellingly, Qwest quotes AT&T's own words, from the Bell Atlantic/GTE merger, that underscore the competitive issues here. AT&T stated, "It is virtually always more profitable for rivals to merge than compete. Where such profitability comes at the expense of competition, however, consumers are harmed."[47] NASUCA agrees with Qwest's position now -- and with AT&T's position back then.

In the end, NASUCA agrees with the ACN, et al. statement that "the merger between the largest provider of local exchange services in its region, Verizon … with one of its largest competitors, constitutes a competitive injury *per se* that should preclude this Application as a matter of law."[48] As CompTel/ALTS state, "Consumers will be hurt because the loss of one of Verizon's largest competitors for local connectivity will increase costs in wholesale and retail markets."[49] Qwest and Cbeyond, et al. describe at length how the mergers will increase the incentives for SBC and Verizon not to compete against each other.[50]

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[46] EarthLink Comments at 10; see also CompTel/ALTS Comments at 27.

[47] Qwest Comments at 10, quoting *Affidavit of John W. Mayo and David L. Kaserman on Behalf of AT&T Corp.,* ¶ 60; see also ACN, et al. comments at 6-8.

[48] ACN, et al. Comments at 3.

[49] CompTel/ALTS Comments at 14; see also *id*. at 42.

[50] Qwest Comments at 39-44; Cbeyond, et al. Comments at 47-53.

VI. THE BENEFITS THAT VERIZON AND MCI ASSERT THE MERGER WILL PRODUCE ARE NOT MERGER-SPECIFIC, NOT LIKELY AND NOT CREDIBLE.

APT recites the Joint Application's statements that the merger will provide benefits from increased research, development and innovation.[51] Yet APT cites this as a "commitment,"[52] when in reality it is nothing of the sort. Under the merger as currently structured, if the combined Verizon should decide next year to decrease its research and development spending, neither the Commission, APT nor Verizon's customers will have any ability to challenge that decision. Therefore, if the Commission is going to treat increased spending as a benefit of this merger, the increased spending should be made an enforceable condition before the merger can be approved. The same can be said for AHTMC's support for Verizon's "promise" to upgrade MCI's network.[53] ACN, et al. point out that, rather than innovation, the focus of "companies that control markets … becomes preserving their hegemony and stifling those innovations that threaten their dominant market position."[54]

One of the benefits the Joint Applicants claimed was cost savings. Cbeyond, et al. point out that

> the savings alleged by Applicants here substantially involve reductions in fixed and overhead, rather than marginal costs. … Such reductions represents two sides of the same coin. On the one hand, the merged firm may realize certain fixed cost reductions by the elimination of the target companies' redundant resources, which may then have the effect of reducing industry averaged fixed costs. …[T]hese costs, due to their fixed nature, will likely not be passed on to consumers. On the other hand, if the merger were not to take place, the target

[51] APT Comments at 2.

[52] *Id*.

[53] AHTMC Comments at 2-3.

[54] ACN, et al. Comments at 44-45. ACN, et al. give examples, including suppressing xDSL and delaying the replacement of analog facilities with digital. *Id*. at 45.

company, in this case MCI, would remain in the market, and while possibly increasing industry average fixed cost, would provide the competition necessary to lower prices, thus benefiting the overall social welfare. This is the fallacy that is rampant throughout the Application. History has demonstrated that mergers such as that proposed do not result in substantial cost savings or price reductions, rather it is competition that creates these consumer benefits.[55]

ACN, et al. summarize the issue of claimed benefits nicely:

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."[56] also point out that in the declarations discussing benefits, "[n]owhere do Applicants cite to supporting facts from outside sources. Instead, each witness merely repeats the conclusions of another witness and credits them as if they were objective facts."[57] This is not nearly enough to meet the Applicants' burden.

Under these circumstances, on balance, the merger as proposed is not in the public interest.

VII. THE PUBLIC INTEREST HARMS THAT WOULD RESULT FROM THIS MERGER ARE SO SUBSTANTIAL THAT A MULTITUDE OF CONDITIONS WOULD BE REQUIRED TO MAKE IT IN THE PUBLIC INTEREST.

A. The context of conditions

Commenter May objects to "the extraction of conditions [from merging firms] unrelated to competitive concerns or to compliance with existing clearly-defined regulatory mandates…."[58] Mr. May says that the acceptance of these conditions -- as in the SBC/Ameritech merger --

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[55] Cbeyond, et al. Comments at 80.

[56] CAN, et al. Comments at 42.

[57] Cbeyond, et al. Comments at 56.

[58] May Comments at 4.

cannot really be called "voluntary."[59]

The Commission found that the SBC/Ameritech merger, as originally proposed, did not meet the public interest test and could not be approved. With the conditions added, however, the Commission found that the merger was, **on balance**, in the public interest, and the Commission was able to approve it. Without the conditions, the merger could not have been approved. Thus the stress on whether the conditions were "voluntary" is misplaced. At bottom the choice was SBC's and Ameritech's: either accept the conditions or accept the fact that the Commission would not otherwise approve the merger.

That also addresses Mr. May's concern about conditions "unrelated to competitive concerns."[60] Admittedly there were, among the SBC/Ameritech conditions those whose primary focus was consumer benefit rather than competitive concerns. Yet the public interest test is not a simple seesaw having only anti-competitive issues on one side and pro-competitive issues on the other; rather, in terms of the net public interest a positive condition like the roll-out of advanced services to low-income households[61] -- along with the other conditions -- can balance out the negatives.

It should also be noted that a merger condition that requires "compliance with existing clearly-defined regulatory mandates"[62] imposes nothing new on the merged company, and thus cannot in itself enhance the public interest.[63] It is precisely conditions that **add** to current

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[59] *Id*.

[60] *Id*.

[61] *Id*.

[62] *Id*.

[63] That is, unless it is assumed, somehow, that absent the condition in the merger order the merged firm will be able at will to disobey the clearly-defined regulatory mandate.

requirements that can make up for a merger's shortcomings.

It appears that Mr. May's main concern is with "the Communications Act's indeterminate public interest standard."[64] Yet that is the law. Mr. May's constricted view of the public interest -- which would not allow the sorts of conditions that were imposed in the SBC/Ameritech merger and should be imposed here, in order to make the merger in the public interest -- would in fact result in the disapproval of more mergers, not fewer.

CFA, et al. correctly characterize the result of the previous round of mergers: The Bells "never competed in one another's regions as envisioned by Congress, and they never fulfilled the promises they made during their previous mergers."[65] Thus if the Commission approves this merger with conditions (and the Commission cannot possibly approve this merger without conditions), there must be adequate assurances that the latest set of conditions will in fact be met.

CompTel/ALTS have doubts whether any conditions on this merger are workable:

> The public harms that will be caused by the Verizon/MCI merger … cannot be rectified through the imposition of conditions. Although the Commission imposed conditions when it approved the Bell Atlantic/GTE merger, Verizon failed to comply with them and with other pro-competitive provisions of the Act and Commission's rules, demonstrating that even at its current size, it is virtually unregulatable. The Commission should not again be lulled into a false sense of security by presuming that it can remedy competitive harms with conditions that have no teeth.[66]

NASUCA is not so pessimistic. Yet merger conditions need not be "toothless"; NASUCA urged the Commission to ensure that any conditions it imposes on this merger are in fact enforceable.

The comments submitted by other parties have not disturbed, but have rather added to,

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[64] *Id*. at 3.

[65] CFA, et al. Comments at 15.

[66] CompTel/ALTS Comments at 53.

NASUCA's proposed list of conditions. Therefore, except where other commenters have raised points pertinent to those conditions, NASUCA will merely reiterate those conditions here.

B. Federal conditions should be a floor, not a ceiling.

As in the SBC/Ameritech Order, the Commission should adopt a condition that allows states to impose their own conditions on the merger.[67] Given the greater importance of this merger, allowing such state flexibility is even more necessary.

C. The conditions should remain in place for five years and survive changes in law.

Verizon, MCI, the rest of the industry and the public in general would likely benefit from the certainty of knowing that the conditions will persist for an extended time, even in the face of legislative action. Thus the conditions should remain in place for five years and survive changes in the law, unless they are forbidden by the new statutes.

D. The conditions

NASUCA placed the conditions that the Commission should adopt into four broad categories: 1) conditions to encourage and enable the prospects for competition for residential and small business customers; 2) conditions aimed at limiting the harm to competition and consumers from the merger; 3) conditions to ensure that residential and small business customers benefit from the merger; and 4) conditions to realign the regulatory regime to recognize the new market conditions arising from the merger.[68] The comments do not cause NASUCA to retreat from any of those proposals.

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[67] Condition XXX; see also Bell Atlantic/GTE Condition XXV (see Attachment C to NASUCA Comments). For an example of state conditions, see *SBC/Ameritech Order*, ¶ 34 (Ohio conditions).

[68] The conditions are proposed here specifically for the Verizon/MCI merger. As *Confronting Consolidation*, the White Paper attached to NASUCA's Comments makes clear, similar conditions will have to be imposed for the SBC/AT&T merger.

1. Conditions to promote competition

NASUCA proposed that a condition of this merger should be that Verizon makes the UNE-P and the HFPL available to competitors at TELRIC rates.[69] NASUCA agrees with the New York Attorney General, Qwest and Vonage that this should include a requirement to sell customers so-called "naked" DSL.[70] Verizon should also be required to open its network to other carriers' VoIP traffic, especially E9-1-1 traffic.[71]

APT states that it "supports open, interoperable advanced networks. …[T]hese openness principles, however, should apply to *all* providers of advanced network facilities (including cable), not merely to these Applicants."[72] NASUCA agrees that all providers of advanced network facilities, including cable providers, should be subject to open access requirements. Yet NASUCA also believes, in apparent distinction from APT, that one open network -- such as could be accomplished through a merger condition here -- is preferable to **no** open networks (which is the likely result of APT's position).

On the other main competitive front, many of the comments note the lack of success of conditions requiring the merged firms to compete outside the incumbents' territories in the Verizon/MCI and Bell Atlantic/GTE mergers.[73] It is fair to say that SBC and Verizon never gave

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[69] NASUCA Comments at 22; see also ACN, et al. Comments at 70, 76; Vonage Comments at 6. HFPL refers to the high frequency portion of the loop.

[70] CloseCall Comments at 3-4; NYAG Comments at 12-13; Qwest Comments at 42; Vonage Comments at 23-26.

[71] See also Qwest Comments at 42.

[72] APT Comments at 4 (emphasis in original).

[73] Cbeyond, et al. Comments at 54-59; CFA, et al. Comments at 5.

their conditions any real effort.[74] NASUCA repeats its recommendation that the merged company should be required to its out-of-territory competition strategy on today's terms.

As noted by NASUCA, a standard anti-trust and regulatory response to anti-competitive combinations like this one is to open duplicative facilities to competition.[75] NASUCA proposed that as a condition of merger, Verizon and MCI should be required to divest themselves of duplicative long-distance and Internet backbone capacity.[76] Qwest proposes such a condition, stressing that a little more than a year ago, the DoJ required it to divest Allegiance facilities prior to the proposed merger with Allegiance.[77] As Qwest describes it, the SBC/AT&T merger is like the Qwest/Allegiance merger, only "super-super-sized."[78]

2. Conditions to limit harm to competition and consumers

NASUCA proposed that as a condition of the approval of the merger, the merged firm should be subject to the terms of the originally-adopted California Consumer Bill of Rights, for all of its operations -- wireline, wireless and broadband.[79] If the regulatory commission or other body within a state is unable to enforce such a condition, the Commission should retain enforcement jurisdiction.

Further, Condition V of the Bell Atlantic/GTE merger should be reinvigorated as a

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[74] Cbeyond, et al. Comments at 59-62.

[75] NASUCA Comments at 23.

[76] *Id*.; see also ACN, et al. Comments at 69, 73-74; PAETEC Communications Comments at 9-10. NY Attorney General would not go as far but does advocate for non-discriminatory access to the internet backbone that MCI controls. .

[77] Qwest Comments at 38-40.

[78] *Id*. at 40.

[79] NASUCA Comments at 24.

condition of the Verizon/MCI merger.[80] In addition to divesting duplicative facilities,[81] Verizon should be required to allow efficient peering.

NASUCA also proposed that the Applicants should be required to commit not to participate in efforts to restrict municipalities and other governmental entities from investing in broadband networks that will be made available to consumers.[82] CFA, et al. show how such networks can provide low-cost, high-quality services.[83]

3. Conditions to ensure consumer benefits

NASUCA proposed that the Commission should require as a condition of approval of this merger that the combined company provide broadband capabilities ubiquitously throughout the Verizon territory within five years.[84] Even APT, which generally supports the merger,[85] recognizes that "the Application provides few, if any, specifics by which to evaluate whether all customers in Verizon's service territory" are likely to enjoy such benefits."[86] Therefore, APT states that

> the Commission should seek more specific information from the Applicants. …[T]he Commission should examine how this merger will affect Verizon's deployment of advanced services in rural areas, in lower-income neighborhoods, to Native American populations, and to the other demographic segments of our society that often do not experience the deployment of succeeding generations of telecommunications technologies at the same pace as customer segments that are

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[80] *Id*.; see also ACN, et al. Comments at 53-54; Cox Comments at 13-14.

[81] NASUCA Comments at 23.

[82] NASUCA Comments at 25.

[83] CFA, et al. Comments at 18-19.

[84] NASUCA Comments at 25.

[85] APT Comments at 2.

[86] *Id*. at 3.

more attractive from a marketing standpoint.[87]

NASUCA agrees, but that examination should be followed by a condition requiring such deployment.

Flowing the benefits of merger synergies and cost-savings back to consumers should be a condition for the merger. Further, Verizon should be required to show, at the end of 2008, that the merger produced the projected savings per year.[88] Verizon should also be required to show how much of these savings flowed back to consumers and in what form (e.g., rate reductions). Finally, the continuation throughout Verizon territory of Lifeline plans that provided benefits comparable to the Lifeline plan adopted as part of alternative regulation in Ohio should be ensured.[89]

4. Conditions to realign the regulatory regime

As explained in detail in *Confronting Consolidation*, reinstatement of many regulations to control market dominance must be considered. This would include de novo reviews of deregulation/detariffing/flexible pricing of "competitive" services; restoration of incentive regulation safeguards such as productivity offset factors and earnings sharing/capping; reinitialization of rates at "authorized" rates of return; and imputation of earnings that benefit from joint BOC/affiliate activities (e.g., local/long distance).

5. Enforcement

The Commission determined that it would "utilize every available enforcement

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[87] *Id*.

[88] NASUCA Comments at 25.

[89] SBC/Ameritech Condition XXIII, Bell Atlantic/GTE Condition XVIII (see Attachment C to NASUCA Comments).

mechanism" to ensure that the benefits of the Verizon/MCI merger conditions were realized.[90] The Commission will have to make that determination again.

NASUCA stated that Verizon's track record on the conditions dictated in that merger is not encouraging, and cited examples of violations.[91] Cbeyond, et al. provide an extensive review of these and other violations.[92] This past behavior dictates that the Commission must adopt specific and effective enforcement mechanisms here. As NASUCA stated,

> The enforcement mechanisms must be substantial enough that Verizon will not make the calculation that it is cheaper -- or more desirable -- to pay the fine than comply with the condition. In the SBC/Ameritech merger, the Commission hinted that enforcement would include, "if necessary, revocation of the merged firms section 214 authority." The Commission must make clear here that such a penalty is a real possibility, in order to give the merged company a real disincentive to not complying with the conditions.[93]

VIII. CONCLUSION

Cbeyond's warning deserves attention:

> The proposed Verizon-MCI merger is truly an industry-transforming event, and the Commission must disregard Applicants' pleas to rubber-stamp their … plan to reinforce Verizon's dominance. A misstep on this Applicant would unravel overnight a decade of progress in opening telecommunications markets to competition pursuant to the 1996 Act.[94]

The Verizon/MCI merger as currently structured is not in the public interest. The comments submitted to the Commission demonstrate the extent of the harm to the public interest

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[90] *SBC/Ameritech Order*, ¶ 360.

[91] See Attachment B to NASUCA Comments.

[92] Cbeyond, et al. Comments at 12-18; see also CompTel/ALTS Comments at 63-68.

[93] NASUCA Comments at 26-27 (citation omitted).

[94] Cbeyond, et al. Comments at 6-7.

that would be caused by the merger. Therefore, the Commission should not approve the merger.

If the Commission wishes to approve the merger, it will have to impose a wide range of conditions that will constrain the harms and add public interest benefits to balance out the remaining harms. These conditions must be easily and effectively enforceable in order to ensure that they are met by Verizon.

Further, as Qwest points out, bringing in the SBC/AT&T merger,

> [T]he anticompetitive effects of each individual merger are multiplied by the way they intersect. First, and most obviously, SBC and Verizon are helping each other by eliminating the two companies that have presented the most competition to both of them -- including competition in wholesale services used by other smaller firms. And second, SBC and Verizon have a demonstrated history of limiting their entry into each other's regions. If these mergers are approved, there is every reason to conclude that this mutual forbearance will continue.[95]

These are results that the Commission should not allow.

Respectfully submitted,

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[95] Qwest Comments at 3.

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