

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

In the Matter of)	
)	
Application for Consent to)	
Transfer of Control Filed by)	WC Docket 05-75
Verizon Communications, Inc. and)	
MCI, Inc.)	

**REPLY COMMENTS
OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL**

Pursuant to *Public Notice*, DA 05-762, the American Public Communications Council (“APCC”) hereby submits these Reply Comments in the above-captioned proceeding.

STATEMENT OF INTEREST

APCC is the non-profit national trade association representing the independent (i.e. non-local-exchange-carrier-owned) payphone industry. Approximately 550,000 of the 1.35 million payphones deployed nationwide are operated by independent payphone service providers (“PSPs”). APCC has 1,144 PSP members, ranging in size from sole proprietorships to publicly-traded companies operating tens of thousands of public payphones, and its wholly owned subsidiary, APCC Services, Inc., is responsible

for the collection of dial around compensation for the vast majority of independent PSPs. APCC's members and customers are direct competitors of Verizon in providing payphone services and will be directly impacted by the resulting anticompetitive market distortions identified in APCC's Petition to Deny should this Application for Consent to Transfer Control be approved.

DISCUSSION

As catalogued by Comptel/ALTS in its Petition to Deny, Verizon has a well-documented history of violating the Commissions' rules, policies and orders. See Comptel/ALTS *Petition to Deny*, WC Docket 05-75, at 53-58 (filed May 9, 2005). Given its current plan to merge with MCI, one of the most troubling aspects of Verizon's prior behavior is its numerous violations of the conditions set by the Commission in approving Verizon's earlier merger with GTE. As a result of those violations, Verizon has entered into numerous Consent Decrees with the Commission, agreeing to tens of millions of dollars in "voluntary payments" to the U.S. Treasury. Verizon's acknowledged misconduct with respect to merger conditions included, among other things, its failure to submit required data to the independent auditor overseeing its performance measurement compliance and its refusal to allow a competitive local exchange carrier ("CLEC") to opt-in to an existing interconnection agreement. See CompTel/ALTS Petition at 55-56.

As CompTel/ALTS points out, the Verizon/GTE merger conditions were imposed by the Commission in an effort to diminish the anticompetitive effects of the

Verizon/GTE merger and were viewed by the Commission as a critical prerequisite for its approval of the merger. CompTel/ALTS Petition at 53. If, as the Consent Decrees reflect, Verizon repeatedly violated those merger conditions, the Commission must act on the assumption that Verizon will violate any conditions imposed by the Commission in this proceeding. The Commission thus is presented with the choice of either allowing the merger to go forward with no meaningful curbs on anticompetitive conduct or taking a strong pro-competitive stance and blocking the proposed merger.

An additional example of the kind of conduct that Verizon has engaged in is illustrative of what the Commission can expect if this merger is approved. In order to combat local exchange carrier ("LEC") incentives to charge PSPs excessive rates for network services, the Commission's 1996 *Payphone Orders*¹ required LECs to bring the rates charged PSPs into compliance with the new services test, and made such compliance a condition of each LEC's eligibility to collect compensation for their own payphones under Section 276(b)(1)(A) of the Act. *First Payphone Order*, ¶ 146, *First Payphone Reconsideration Order*, ¶¶ 131, 162-63. Shortly before the April 15, 1997 deadline for compliance with this requirement, the Commission issued an order reiterating that compliance with the new services test was a precondition for a LEC's

¹ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"), recon. 11 FCC Rcd 21233, ¶ 131 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in relevant part*, *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert denied*, *Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998).

eligibility to collect payphone compensation. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 20997, ¶¶ 30-33 (CCB 1997) (“*First Waiver Order*”). Claiming that they did not understand the Commission’s prior orders, and recognizing that non-compliance jeopardized their eligibility for payphone compensation, a coalition of Bell Operating Companies (“BOCs”) that included Verizon² requested a temporary waiver of the new services test requirement to enable them to begin collecting dial-around compensation even though they had yet to bring their rates into compliance with the new services test. See Letter from Michael K. Kellogg to Mary Beth Richards, April 10, 1997 (“*First Kellogg Letter*”) (Exhibit A to *Petition of the Independent Payphone Association of New York for an Order of Pre-emption and Declaratory Ruling*, CC Dkt. No. 96-128, filed December 29, 2004 (“*IPANY Petition*”). In return, the Verizon/BOC coalition agreed that, “where new or revised tariffs are required” in order to comply with the new services test, they would refund any charges collected from PSPs after April 15, 1997, in excess of the level of charges found to comply with the test. See Letter from Michael K. Kellogg to Mary Beth Richards, April 11, 1997, at 1 (“*Second Kellogg Letter*”) (Exhibit A to the *IPANY Petition*)).

² At the time, the NYNEX telephone companies (New York Telephone Co. and New England Telephone and Telegraph Co.) had not yet been acquired by Verizon. Both Verizon and the NYNEX companies were parties to the waiver request. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370, 21371, n.7 (CCB 1997) (“*Second Waiver Order*”). By the time of the New York proceeding discussed below, Verizon had acquired NYNEX.

In the *Second Waiver Order*, the Commission granted the waiver, subject to the express condition that a BOC would “reimburse or provide credit to its customers for those payphone services from April 15, 1997, if newly tariffed rates, when effective, are lower than the existing rates.” *Second Waiver Order at 21379-80. See also id.* ¶¶ 2, 25.

Thus, the Commission, with Verizon’s own consent, has determined that refunds were the appropriate remedy for non-compliance with the new services test and has legally subjected Verizon to that remedy. To address the acknowledged non-compliance of Verizon and the other BOCs, the Commission could have declared Verizon and the others ineligible to collect dial-around compensation until their rates were found to be in compliance, a process that could have taken a substantial length of time even with the Verizon and the other BOCs highly motivated to complete the proceedings. Rather than postpone Verizon’s and the other BOCs’ eligibility for dial-around compensation – a result that could have interfered with the transition to a competitive payphone market structure – the Commission and the Verizon/BOC coalition agreed to an appropriate remedy. The Commission allowed Verizon and the other BOCs to begin collecting dial-around compensation immediately by granting a blanket waiver of non-compliance with the new services test, subject to the condition that, in the event that Verizon or the other BOCs were required to reduce rates in order to comply, the affected company must make whole the PSPs injured by such non-compliance by refunding the benefits gained by non-compliance – *i.e.*, the excess payphone line charges collected.

Although it would make a mockery of the Commission's *Second Waiver Order* if the Commission allows companies to succeed in attempts to have it both ways – to retain both the dial-around compensation they have collected pursuant to the *Second Waiver Order* and the excessive payphone line charges they have collected from PSPs for years in violation of the *Payphone Orders* – that is exactly what Verizon is doing. Verizon argued in New York that it did not file a “new rate” in reliance on the *Second Waiver Order*, but only filed a cost justification for its existing rates. *IPANY Petition* at 12-14.³ Verizon contends that it did not rely on the blanket waiver granted by the FCC and is not bound by the waiver conditions. This argument is fallacious. The key determinant of whether the *Second Waiver Order* applies is not whether the BOC voluntarily reduced its rates, but whether “new or revised tariffs are required.” *Second Kellogg Letter* at 1. By successfully delaying compliance with the new services test for eight years, Verizon has reaped huge economic gains to which it is not entitled, and has unfairly deprived PSPs and their customers of the benefits of cost based rates, to which PSPs *were* and are entitled, thus conferring a competitive benefit upon itself.⁴

³ See also *Independent Payphone Association of New York, Inc., v. Public Service Commission of the State of New York*, Memorandum and Order, No. 93539, slip op. at 5 (N.Y. App. Div., March 25, 2004), attached to IPANY Petition as Exhibit I.

⁴ Nor does Verizon's merger partner, MCI, have clean hands in its prior dealings with independent PSPs. For five years, APCC has been engaged in litigation with MCI because MCI has failed to pay PSPs all the dial around compensation to which PSPs are entitled. See *APCC Servs., Inc. v. MCI Corp.*, 297 F. Supp. 2d 101 (D.D.C. 2003), appeal

In our Petition to Deny⁵, we warned the Commission that the merged Verizon/MCI entity will have every incentive to manipulate the payphone compensation system in anticompetitive ways. Among the most potentially damaging consequences for independent PSPs would be the merged entity's incentive and ability to:

- fail to devote sufficient resources to ensuring accurate dial-around compensation payments;
- delay compensation payments to their payphone competitors;
- engage in "takebacks" of alleged overpayments from their payphone competitors without allowing PSPs to dispute the overpayment;
- withhold payments from high-volume payphones operated by their payphone competitors;
- deny payments to their payphone competitors for dial-around carried by means of IP technology; and
- make judgment calls to reduce payments to their payphone competitors.

As amply illustrated by the prior actions of Verizon and MCI, our concerns over the harmful effects of the proposed merger on independent PSPs are not speculative. The Commission should carefully weigh the prior history of both Verizon and MCI in failing to meet their obligations under FCC's rules and complying with their commitments when considering our Petition opposing approval of the Application. As

(Footnote continued)

docketed sub nom. *APCC Servs., Inc. v. Sprint Communications Co.*, No. 04-7034 (D.C. Cir. Jan. 2, 2004).

⁵ See *Petition to Deny of the American Public Communications Council* at 3-5.

history is a strong predictor of future behavior, the Commission can only expect even more egregious conduct if this merger is approved.

CONCLUSION

For the foregoing reasons, the Commission should deny the Application for Consent to Transfer Control filed by Verizon/MCI.

May 24, 2005

Respectfully Submitted



By: _____

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DECLARATION

Willard R. Nichols hereby declares as follows:

(1) I am the President and General Counsel of the American Public Communications Council, Inc. ("APCC"), a non-profit trade association representing independent payphone service providers ("PSPS").

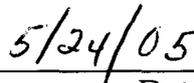
(2) APCC represents more than 1,140 independent PSPs who are direct competitors of Verizon Communications, Inc.'s payphone operations, and payees of dial-around compensation by MCI, Inc. APCC thus has an interest in the outcome of the Application for Consent to Transfer of Control filed by Verizon and MCI.

(3) The facts set forth in the foregoing Reply Comments and in APCC's Petition to Deny are true and accurate in every respect.

I hereby declare under penalty of perjury that the foregoing is true and correct.



Willard R. Nichols



Date

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2005, the foregoing petition was sent via electronic mail to the following:

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