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Ex Parte- Via Electronic Filing

Mr. Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket Nos. 05-65 (SBC-AT&T) and 05-75 (Verizon-MCI)

Dear Chairman Martin:

The Progress and Freedom Foundation ("PFF"), which is funded in part by SBC Communications, Verizon Communications, and the United States Telecom Association,[1] recently wrote you concerning the pending BOC-IXC mergers.[2] PFF urged the Federal Communications Commission ("Commission" or "FCC"): (1) to defer to the analysis of the Department of Justice ("DOJ") of the competitive impact of the mergers, and (2) *not* to consider whether the mergers would substantially impair implementation of the Communications Act or whether the merger promises to yield affirmative public interest benefits. As explained below, the Commission may not follow that advice without violating the terms of the statute and governing precedent. PFF also urged the Commission not to engage in bargaining over conditions with the applicants, as it did in the SBC-Ameritech proceeding. Although PFF misunderstands the dynamics of that proceeding, we agree with its recommendation that the Commission not engage in prolonged private discussions with the applicants that permit them to attempt to remedy their defective applications without meaningful public comment.

As an initial matter, PFF's letter is remarkable for its lack of citation to the Communications Act or governing precedent. With respect to the issue of deference to DOJ, the only citation is to a report by a non-governmental advisory committee that made recommendations to various countries concerning how relations between regulatory

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[1] *See* http://www.pff.org/about/supporters.html.

[2] Letter from Randolph J. May to Chairman Kevin J. Martin, WC Docket No. 05-65 (Apr. 25, 2005).

agencies and antitrust authorities *ought* to be structured. Whatever the merits of that advisory committee's views, its recommendation that sectoral regulatory agencies defer to antitrust authorities does not reflect the approach Congress adopted in the Communications Act. Section 214(a) and Section 309(a) of the Communications Act each make clear that a petition to transfer a license may not be approved unless *the Commission* determines that the requested transfer will serve the public interest. Section 309(a) states that "the Commission shall determine, in the case of each application filed with it . . ., whether the public interest, convenience, and necessity will be served by the granting of such application." Similarly, Section 214(a) states that "[n]o carrier . . . shall acquire or operate any line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience or necessity" supports transfer of the line.

In addition, the Supreme Court has held that precedents under the Clayton Act and the Sherman Act "cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency; . . . what competition is and should be in such areas must be read in the light of the special considerations that have influenced Congress to make specific provisions for the particular agency." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 98 (1953). Accordingly, the Commission has long undertaken its own analysis of the effect of a merger on competition in the relevant communications markets before approving license transfers.[3]

Of course, Commission staff should work closely with DOJ staff to minimize any burden on the applicants or other parties. As has become standard practice, Commission staff should examine the applicants' DOJ filings and, rather than calling for additional but unnecessary document production, request that some documents filed with DOJ be made part of the FCC record. Furthermore, there is no reason why DOJ could not file comments explaining its views on the competition issues presented by the mergers, if it chooses to do so – and the Commission would be required to take those views into account in making its decision. But under the Communications Act, the Commission must make its own determination as to whether a license transfer would serve the public interest. 47 U.S.C. §§ 214(a), 309(a). In addition, under the Administrative Procedure Act the Commission must provide a reasoned explanation for its decision.[4] Analysis of and adherence to DOJ's views on competition issues could provide the necessary reasoned explanation, but the Commission may not delegate authority to approve license transfers to DOJ.

In evaluating the license transfers accompanying mergers, the Commission has long considered the four factors listed by PFF – (1) whether the merger would violate specific provisions of the Communications Act or another statute; (2) whether the merger

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[3] *See Applications of AT&T Wireless Services, Inc,. and Cingular Wireless Corporation* ("*AT&T-Cingular*"), FCC 04-255 (Oct. 26, 2004), at ¶ 42 n.172 (collecting cases).

[4] *See, e.g., Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 104 (1983).

would violate any FCC rule; (3) whether the merger would substantially frustrate or impair implementation of the Communications Act or other statute; and (4) whether the merger promises to yield affirmative public interest benefits.[5] PFF recommends that the Commission depart from its precedent and consider only the first two factors. Again, the Commission may not follow PFF's advice. The fourth factor – the public interest test – is clearly mandatory. As stated previously, Sections 214(a) and 309(a) by their terms require the Commission to determine whether a license transfer will serve the public interest. Nor could the Commission depart from consideration of the third factor. How could the Commission approve a license transfer that would substantially frustrate or impair implementation of the Communications Act? It would not be possible for the Commission to provide a reasoned explanation for a decision to approve a license transfer in that case.

Nor should the Commission follow PFF's advice and discard its interpretation of the Communications Act as requiring the applicants to establish that the merger would serve the public interest, and instead adopt DOJ's standard under which a merger is permissible unless the challengers establish that it will harm competition. The Commission's interpretation of the Communications Act is the most straightforward reading of the relevant provisions. A court would surely scrutinize a license transfer approved only after the Commission departed from its long-standing interpretation of the Act.

We agree with PFF that the Commission should not engage in a process with the current merger applicants that parallels the process followed in the SBC-Ameritech merger. It is important to understand that the SBC-Ameritech merger process benefited those applicants. It was clear that a majority of the Commission did not think the proposed merger would serve the public interest and would not have approved it without the conditions that SBC ultimately offered.[6] By engaging in extended private discussions, the applicants were able to persuade the Commission that SBC would vigorously compete out of region, and the merger was approved with conditions requiring it to do so – conditions SBC subsequently disregarded. In addition, although the Commission attempted to keep the public informed about the discussions between SBC and FCC staff, it was not really possible for other parties to participate fully when SBC and FCC staff were negotiating for hours on end over many weeks. The fact of those prolonged private negotiations made it unlikely that the Commission would disturb the agreement that was reached.[7]

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[5] *See AT&T-Cingular*, *supra*, at ¶¶ 40-42 & nn. 162-171 (collecting cases).

[6] *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee*, FCC No. 99-279 (1999), ¶ 3 ("the asserted benefits of the merger, absent conditions, do not outweigh the[] significant harms").

[7] In his separate statement, Commissioner Furchtgott-Roth noted that "the deal was struck entirely behind closed doors" and, while comment was sought on the conditions, only "miniscule" changes resulted.

In the case of the pending mergers, the applicants appear to be relying on being able to propose conditions or divestitures down the road, since neither application as proposed plausibly serves the public interest. For example, we showed that SBC and Verizon dominate the special access market in their territories and that AT&T and MCI offer the primary competition. As the Commission recently concluded, a merger that reduces the number of effective competitors from three to two cannot be approved.[8] Similarly, we showed that the applicants will likely exceed the Internet backbone market shares that led to the denial of prior merger applications if they convert a substantial portion of their voice traffic to Voice over Internet Protocol ("VoIP"), as they claimed they would in their applications. SBC and AT&T "responded" by ceasing to tout their post-merger VoIP capabilities in their reply comments – and failed to provide data showing their likely market shares after they convert voice traffic to VoIP. The applicants must be planning to offer conditions or divestitures, and appear to be attempting to determine how little they can offer, preferably with only limited public comment of the sort that occurred in the SBC-Ameritech merger. The Commission should not permit the applicants to play that game.

Thank you for considering this response to recommendations of the Progress and Freedom Foundation.

Sincerely,
/s/
Christopher J. Wright
Counsel for Broadwing Communications LLC and SAVVIS Communications Corporation

Cc: Commissioner Kathleen Q. Abernathy
Commission Michael J. Copps
Commissioner Jonathan S. Adelstein
Daniel Gonzalez
Michelle Carey
Lauren Belvin
Jessica Rosenworcel
Scott Bergmann

[8] *Application of EchoStar Communications Corporation and Hughes Electronics Corp.*, FCC 02-284 (2002), at ¶ 103.