Ann D. Berkowitz
Associate Director
Federal Regulatory Advocacy

1300 I Street, NW
Suite 400 West
Washington, DC 20005
(202) 515-2539
(202) 336-7922 (fax)
aberkowitz@verizon.com

September 12, 2005

Ex Parte

Marlene H. Dortch - Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Applications for Consent to Transfer Control of Filed by Verizon Communications, Inc. and MCI, Inc.*****, WC Docket No. 05-75 – REDACTED**

Dear Ms. Dortch:

On August 17, 2005, Kelley Drye & Warren filed an ex parte attaching a copy of the Virginia State Corporation Commission Staff Report, dated August 12, 2005. I am requesting that the attached response by Verizon and MCI in support of their Petition for Approval of Agreement and Plan for Merger, filed with the Virginia State Corporation Commission on August 26, 2005, be placed on the record in the above proceeding. The attachment exhibits contain confidential information and have been redacted. A confidential version with these exhibits is also being provided.

Please let me know if you have any questions.

Sincerely,

Ann D Berkowitz

Attachment

cc: Gail Cohen
Bill Dever
Tom Navin
Julie Veach
Ian Dillner
Don Stockdale
Gary Remondino

Lydia R. Pulley
Vice President, General Counsel & Secretary
Virginia

600 E. Main St., Suite 1100
Richmond, VA 23219-2441

Phone 804 772-1547
Fax 804 772-2143
lydia.r.pulley@verizon.com

August 26, 2005

Joel H. Peck, Clerk
State Corporation Commission
Post Office Box 1197
Richmond, Virginia 23218

Dear Mr. Peck:

Re: Case No. PUC-2005-00051
Joint Petition of Verizon Communications Inc. and
MCI, Inc. for Approval of Agreement and Plan of Merger

Enclosed for filing please find the original and fifteen (15) copies of Verizon Communications Inc.'s and MCI, Inc.'s Response in Support of Their Petition for Approval of Agreement and Plan of Merger in the above-referenced case.

Also enclosed under seal is the proprietary verison.

I have mailed or hand-delivered copies to the parties shown below. Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

Lydia R. Pulley

Enclosure

Copy to:
William Irby
Eric M. Page, Esquire
Michelle Painter, Esquire
Service List

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Verizon Communications Inc.'s and MCI, Inc.'s Response in Support of Their Petition for Approval of Agreement and Plan of Merger in Case No. PUC-2005-00051 was sent as indicated below on this 26th day of August, 2005, to the following:

Robert M. Gillespie, Esquire
State Corporation Commission
Post Office Box 1197
(U.S. Mail and E-Mail)

C. Meade Browder, Jr., Esquire
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
mbrowder@oag.state.va.us
(U.S. Mail and E-Mail)

JoAnne L. Nolte, Esquire
Kiva Bland Pierce, Esquire
The Conrad Firm
1520 West Main Street, Suite 204
Richmond, Virginia 23219
jnolte@theconradfirm.com
kpierce@theconradfirm.com
(U.S. Mail and E-Mail)

Andrea P. Edmonds, Esquire
Kelley Drye & Warren LLP
8000 Towers Crescent Drive
Suite 1200
Vienna, Virginia 22182
aedmonds@kelleydrye.com
(U.S. Mail and E-Mail)

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

JOINT PETITION OF VERIZON COMMUNICATIONS INC. and MCI, Inc. For Approval of Agreement and Plan of Merger	))))))))	CASE NO. PUC-2005-00051

RESPONSE OF VERIZON COMMUNICATIONS INC. AND MCI, INC. IN SUPPORT OF THEIR PETITION FOR APPROVAL OF AGREEMENT AND PLAN OF MERGER

Verizon Communications Inc.

Lydia R. Pulley
Vice President and General Counsel
Verizon Virginia
600 East Main Street, 11th Floor
Richmond, VA 23219
(804) 772-1547 (tel)
(804) 772-2143 (fax)
lydia.r.pulley@verizon.com

MCI, Inc.

Michelle Painter
Senior Counsel
MCI, Inc.
22001 Loudoun County Parkway
Ashburn, VA 20147
(703) 886-5973 (tel)
(703) 886-0633 (fax)
michelle.painter@mci.com

August 26, 2005

TABLE OF CONTENTS

I. INTRODUCTION

Approval of this parent company transaction between MCI, Inc. ("MCI") and Verizon Communications Inc. ("Verizon") requires the Commission to find only that the transfer of control of MCImetro Access Services Inc. of Virginia ("MCImetro") will not impair or jeopardize the provision of adequate service to the public at just and reasonable rates.[1] The evidence before the Commission shows that this transaction meets that standard. The transaction should be approved without conditions.

As the Commission has ruled in the past, it is not required to make any other finding,[2] and suggestions that it do so are misplaced. Under the governing Transfers Act,[3] the Commission does not apply a public interest test to transactions, nor determine the impact of a transaction on competition:

> Transfers of utility assets or control may have powerful potential effects on economic development, regional competitiveness, the plans of others to enter the market, and many other items. These are important effects to be sure, but our consideration of them is at best secondary, and may well be extraneous, to the duty commended by the Code—to be satisfied that Virginia citizens and businesses will receive quality service at just and reasonable rates.[4]

Passage of the Local Competition Policy Act[5] last year did not change the applicable standard of the Transfers Act. While, the Local Competition Policy Act defined the public interest for the

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[1] Va. Code § 56-90.

[2] *Joint Petition of Bell Atlantic Corporation and GTE Corporation for Approval of Agreement and Plan of Merger*, Case No. PUA-1998-00031, Final Order at 22 (Mar. 31, 1999) ("*BA/GTE Merger Order I*").

[3] Va. Code §§ 56-88 – 56-92.

[4] *Id.* at 21.

[5] Va. Code § 56-235.5:1.

purpose of resolving issues and cases concerning local exchange telephone service in which a public interest standard applies, it did not insert a new public interest standard into other provisions of the Code of Virginia in which the General Assembly did not already expressly create such a public interest test. It is not disputed that the Transfers Act does not contain a public interest standard, and arguments urging the Commission to refer to the Local Competition Policy Act in order to define what standard must be applied under the Transfers Act must be rejected. The Commission has many years' experience in applying the Transfers Act and it is fully aware of the applicable standards. The Commission does not need to refer to the Local Competition Policy Act for further guidance.

The evidence presented by the Petitioners is sufficient, however, to meet the public policy standards embedded in the Local Competition Policy Act if such standards were relevant to this proceeding. As demonstrated in the Petition and the statements attached to this Response, the proposed transaction between Verizon and MCI is consistent with the public interest.[6] Verizon and MCI demonstrate, in both their Joint Petition and in these comments, that the transaction will not jeopardize or impair the provision of adequate service at just and reasonable rates. No other party has demonstrated anything to the contrary.

Rather, opposing parties seek to impose conditions on the transaction that are either designed to address issues irrelevant to the Commission's review of the transaction, or intended to harm Verizon/MCI to the benefit of the private economic interests of their competitors. The CLEC intervenors, in particular, raise the specter of harms to competition in an effort to gain competitive advantages that they have been unable to gain either from this Commission or in

[6] *See* the Statements of Ms. Margaret Hallbach and Dr. William Taylor attached to this Response as Attachments A and B.

other forums. Their mantra that such conditions are required to promote competition is without foundation. As demonstrated by Dr. Taylor in Attachment B, their allegations of potential harms to competition are both unrelated to this transaction and without merit. As further demonstrated by Ms. Hallbach in Attachment A, the telecommunications industry and MCI's position in the telecommunications market, both nationally and in Virginia, has changed dramatically in recent years. The CLEC intervenors' allegations of harm to competition ignore this current state of the market. Moreover, most of the conditions the CLEC parties seek are not only beyond the jurisdiction of this Commission to adopt, but are discriminatory and anti-competitive. The Commission should ignore these various demands for conditions and approve the transaction as proposed by the Petitioners.

The Staff's reliance upon the Commission's authority under the Transfers Act to "make such order in the premises as it may deem proper and circumstance require," is misplaced. The legislative mandate is to fashion only such conditions as may be ***required*** to meet the standards set forth in the statute. It is not an open invitation to fashion whatever conditions others might assert could be in the public interest. If the General Assembly had intended to bestow upon the Commission such sweeping powers, it would have specifically directed the Commission to "take such action as it deems appropriate in the public interest" as it has done in other sections of the Code.[7] Consequently, whatever conditions the Commission considers imposing – and the evidence shows that no conditions are warranted – it must limit itself to those conditions that can be justified as "required" and "proper" to ensure that the transaction does not jeopardize or impair adequate service at just and reasonable rates.

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[7] *See, e.g.*, Va. Code § 56-481.2.

As Petitioners demonstrate below and in the accompanying statements, this transaction more than adequately meets the applicable standard and should be approved without conditions.

II. THE COMMISSION'S REVIEW IS LIMITED TO THE CRITERIA EXPRESSLY ESTABLISHED BY THE VIRGINIA TRANSFERS ACT

A. The Commission Is A Body Of Limited Jurisdiction.

It is well-established, both in the Virginia Constitution and the Code of Virginia, that the jurisdiction and powers of the Commission are limited to those expressly conferred to it. Article IX, section 2 of the Constitution places on the Commission the primary duty of "***administering the laws*** made in pursuance of this Constitution for the regulation and control of corporations doing business in this Commonwealth." Va. Const. Art. IX, § 2 (emphasis added). Consistent with that constitutional mandate, the Supreme Court of Virginia has limited the scope of the Commission's authority, repeatedly stating that the Commission does not have any inherent powers of its own and that its jurisdiction must be conferred by the Constitution or expressly derived from statutes that do not contravene the Constitution. *See, e.g., City of Richmond v. C&P Tel. Co.,* 127 Va. 612, 619, 105 S.E. 127, 129 (1920).

Nothing in the Virginia Constitution or Code gives the Commission authority to conduct an unbounded inquiry or make decisions, apart from express statutory parameters, to effectuate whatever it deems to be in "the public interest." The Supreme Court of Virginia made this clear when, in the course of applying a now superceded statute purporting to grant the Commission expansive powers (the power to order a railroad to pave a portion of a public street), it outlined the following boundaries of the Commission's power:

> A careful scrutiny of this language, and all of the statutes of the State conferring jurisdiction upon the Commission, shows conclusively that the powers of the Commission relate only and always to the performance of the public duties of such public service corporations. . . . ***The jurisdiction is not conferred by the***

> ***mere fact that the subject may be of interest to the public.*** Only the obligations and duties imposed by law upon these public utility corporations and subject to the supervision and control of the Commission. . . . That idea—the requirement of ***adequate service*** due by such companies to the public—is the inspiration and only justification of all of such laws.

City of Portsmouth v. Virginia Ry. & Power Co., 141 Va. 54, 60-61, 126 S.E. 362, 363-64 (1925). Thus, while Staff counsel posits that "[t]he public interest is never out of sight when the Commission is resolving utility transfers of control,"[8] in reality, because the Commission is charged with upholding the laws of the Commonwealth, the beginning and end of the inquiry must be the expressed standard in the statute that grants jurisdiction to the Commission to act. That statute is the Transfers Act.

B. Review Of The Transaction Is Governed Solely By The Transfers Act.

The Transfers Act gives the Commission authority over the transfer of utility assets and securities. The Transfers Act requires that, in order for such a transfer to receive approval from the Commission, the Commission must be satisfied that "adequate service to the public at just and reasonable rates will not be impaired or jeopardized." Va. Code § 56-90.

The Commission has recognized that the Transfers Act supplies the standard for approval of petitions filed pursuant to that act. In the *BA/GTE Merger Approval Order,* for example, the Commission stated "[t]he quoted language is taken from § 56-90 of the Code of Virginia and constitutes the standard that must be met for approval of all petitions filed pursuant to the Utility Transfers Act."[9]

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[8] *OGC Memorandum* at 4.

[9] *Bell Atlantic Corporation and GTE Corporation For Approval of Agreement and Plan of Merger*, Case No. PUC-1999-00100, Order Approving Petition, (Nov. 29, 1999) ("*BA/GTE Merger Approval Order*") at 2, n.1.

Indeed, the Commission itself has recognized that the Transfers Act supplies the ***exclusive*** criteria for approval of transactions such as this one. Specifically, in its first consideration of the BA/GTE merger, the Commission stated that consideration of other factors — beyond whether "adequate service" to the public will continue at "just and reasonable rates" — "is at best secondary, and may well be extraneous, to the duty commanded by the Code."[10] As explained below, the statutory criteria established in the Transfers Act are clearly met here.

C. The Commission Cannot Impose An Additional "Public Interest" Requirement Through Its Power To Impose Necessary And Proper Conditions.

The two express requirements of the Transfers Act — that "adequate service" continue "at just and reasonable rates" — are the only criteria established by the Transfers Act to govern Commission approval, and the only criteria the Commission is entitled to consider in reviewing the current Petition. There are no other affirmative requirements — express or implied — in the Transfers Act. While the Petitioners firmly believe that approval of the proposed transaction ***does*** serve the public interest (for the reasons stated in the Petition and below), there is no basis in the Transfers Act (or any other applicable statute) for the Commission to require the Petitioners to make an affirmative showing that a "public interest" criteria is satisfied.

Staff notes that the Office of General Counsel ("OCG") has filed a legal memorandum which "demonstrates that the public interest standard and [the Transfers Act] are applicable and, therefore, may be taken into consideration in evaluating the proposed merger in Virginia." *Staff Report* at C-1. But the OGC's argument relies upon a tortured reading of the Transfers Act, one which this Commission has never before seen fit to adopt. Specifically, the OGC claims that

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[10] *BA/GTE Merger Order 1* at 20-21.

Section 56-90 authorizes the Commission to "make such ***order*** in the premises as it may deem proper and circumstances require," and focuses exclusively on this provision to argue that the statute allows the Commission to adopt whatever standard it deems proper, instead of the express statutory criteria specified in the Transfers Act. *OGC Memorandum* at 3 (emphasis added and removed). This reading, however, is simply not supported by the statute itself. Section 56-90 is clear in setting out the substantive legal standard that must be applied — *i.e.* that "adequate service" continue at "just and reasonable rates". The Commission's only discretion lies in fashioning ***orders*** to enforce that standard.

Where the General Assembly desires to spell out a statutory standard, and then give the Commission the additional authority to "take such action as it deems appropriate in the public interest," that is precisely what the General Assembly does.[11] The Transfers Act contains no similar sweeping language giving the Commission authority to fashion orders as it deems appropriate in the public interest. The Commission should reject the Staff Counsel's invitation for the Commission to add this language itself.

D. The Local Competition Policy Act Does Not Import A "Public Interest" Requirement Into The Transfers Act.

The Local Competition Policy Act does not require the Commission to import a public interest standard into the Transfers Act. The Local Competition Policy Act defines the public interest for the purposes of resolving issues and cases concerning local exchange telephone service, ***where a public interest standard applies***. However, it did not insert a public interest standard where the General Assembly did not already expressly create one. Because the

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[11] *See, e.g.*, Va. Code §56-481.2 (setting forth a two prong test for determining the appropriate form of regulation for a new entrant, but then conferring the additional power on the Commission in approving the regulation to "take such action as it deems appropriate in the public interest").

Transfers Act does not have a public interest standard, there is no need to look to the Local Competition Policy Act to define what the standard would mean in this case.

Where the General Assembly has determined that an affirmative "public interest" showing is required or supplies the relevant legal standard (or part of the legal standard), it has said so expressly. For example, the General Assembly demonstrated in the Alternative Regulation Statute, that it knew full-well how to craft a public interest standard where one was needed. Va. Code § 56-235.5(B)(iv). As the Commission observed in the *Verizon ARP Order,*[12] "[p]ursuant to § 56-235.5 B (iv) of the Code, the Commission may not approve the Plan unless [it] find[s] that it 'is in the public interest.'" *Id.* at 27. That conclusion finds support in the express language of the statute, which provides that the Commission "may replace the ratemaking methodology set forth in § 56-235.2 with any alternative form of regulation which . . . is in the public interest." In contrast, the words "public interest" cannot be found anywhere in the Transfers Act. [13]

In the same vein, where the General Assembly chooses to set forth some aspects of a statutory standard, and then give the Commission discretion to consider "any other factors the

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[12] *See Application of Verizon Virginia Inc. and Verizon South Inc. for approval of a Plan for Alternative Regulation,* Case No. PUC-2004-0092, Final Order (Jan. 5, 2005) ("*Verizon ARP Order*") at 16.

[13] In addition to the Alternative Regulation Statute, the General assembly has explicitly included a public interest standard in other statutory provisions. *See e.g.,* Va. Code § 56-481.1 ("Rates, charges, and regulations for interexchange telephone service"; authorizing the Commission to approve rates, charges, and regulations for a company providing a competitive interexchange service provided that the rates, charges, and regulations are in the public interest); Va. Code § 56-481.2 ("Rates, charges, and regulations for local exchange telephone services provided by new entrants"; setting forth the public interest standard three times in connection with authorizing the Commission to approve regulation of new entrants); Va. Code § 2.2-4007 ("Notice of intended regulatory action; public participation; informational proceedings; effect of noncompliance"; providing for application of public interest standard); Va. Code § 6.1-13 ("Bank to obtain certificate of authority before beginning business; prerequisites to issuance of certificate"; requiring certification that the public interest will be served by banking facilities or additional banking facilities in the community where the bank is proposed).

Commission considers relevant to the public interest," it knows how to do that as well.[14] Once again, similar language is nowhere found in the Transfers Act.

Federal and Virginia canons of statutory construction provide that when the General Assembly includes an explicit provision in one section of a statute but not in another, the omission should be considered intentional and must be honored.[15] If the General Assembly wanted to require such change or an affirmative public interest showing as a condition of approval under the Transfers Act, it would have expressly provided for this condition. Where, as here, the General Assembly has chosen ***not*** to do so, the Commission should not — indeed, may not — impose a public interest standard in place of the legal standard expressly crafted by the General Assembly. Instead, the Commission must respect the General Assembly's deliberate legislative choice.[16]

E. Requiring An Affirmative Showing Of "Public Interest" Would Mark A Radical Shift In The Applicable Legal Standard.

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[14] Va. Code §56-481.1 (conferring power upon the Commission to determine that a carriers' interexchange service is competitive upon the consideration of four enumerated factors, including any factors the Commission deems relevant to the public interest).

[15] *See generally* 2A Singer Statutes and Statutory Construction § 46.06 (6th ed. 2000) ("The use of different terms within related statutes generally implies that different meanings were intended."); *see also Williams v. Matthews*, 248 Va. 277, 284, 448 S.E.2d 625, 629 (1994) ("When a statute contains a given provision with references to one subject, the omission of such provision from a similar statute dealing with a related subject is significant to show the existence of a different legislative intent." (quoting 2B Sutherland Statutory Construction § 51.02 (5th ed. 1992)); *City of Virginia Beach v. Virginia Restaurant Ass'n Inc.*, 231 Va. 130, 134, 341 S.E.2d 198, 200 (1986) (focusing on the frequent use of the word "tax" elsewhere in the statute to hold that city ordinance prohibiting "regulating" of alcohol does not prohibit imposition of sales tax on the retail sale of alcohol because if the legislature intended to prohibit taxation, it would have said so explicitly).

[16] Another problem with deciding that the Local Competition Policy *added* a public interest standard to the Transfers Act is that the newly imported standard would apply only to mergers involving local exchange telephone companies. Va. Code § 56-88.1, however, applies to telephone companies *and* other public utilities. The standard under the transfers Act should not vary depending upon the type of utility involved.

Staff Counsel suggests that importing an additional "public interest" requirement into the Transfers Act would not "interfere" with the existing standard already in place in the Act, but rather "aids in the Commission's ability to design an order that is proper and fitting to the circumstances." *OGC Memorandum* at 6. But requiring an affirmative showing of "public interest" would mark a radical departure from the legal standard established by the General Assembly, and would amount to legislation by the Commission.

Absent the "public interest" overlay, the language of the Transfers Act requires the Commission to consider whether granting the petition will "impair" or "jeopardize" the provision of adequate service to the public at just and reasonable rates. Stated differently, the Transfers Act ***takes as a given*** that adequate service at just and reasonable rates already exists, and simply considers whether the transaction will impair or jeopardize it. It does not require any affirmative change to the benefit of customers. If an additional "public interest" showing were required, the standard would be higher — and would require the applicants to show an affirmative promotion of competition, or other undefined benefits to the marketplace. Thus, applying a public interest standard is at odds with, and a departure from, the existing standard.[17]

F. The Transaction Is Consistent With the Local Competition Policy Act.

For the reasons outlined above, because an inquiry into the "public interest" is not applicable to transactions governed by the Transfers Act, the Commission need not address whether the transaction is consistent with the Local Competition Policy Act. However, the

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[17] The Attorney General's citation to the Commission's *Dominion/Consolidated Merger Order* is inapposite. *OAG Comments* at 4. The *Dominion/Consolidated Merger Order* does not state that consideration of the "public interest" is required. In discussing what is required of the Commission in evaluating a potential merger under the Transfers Act, the Order says simply that the Commission must "assure continued quality of service and preservation of just and reasonable rates." *Id.* at 11. *See Joint Petition of Dominion Resources, Inc. and Consolidated Natural Gas Co. For approval of agreement and plan of merger under Chapter 5 of Title 56 of the Code of Virginia*, Final Order, Case No. PUA-1999-00020 (Sept. 17, 1999).

transaction does in fact satisfy the standards contained in the policy. As detailed in the Petition and Dr. Taylor's Statement, the proposed transaction satisfies the pro-competitive requirements of subsection (ii), which requires the Commission, in resolving cases concerning local exchange service, "as appropriate," to "promote competitive product offerings, investments, and innovations from all providers of local exchange telephone services in all areas of the Commonwealth." Va. Code § 56.-231.5:1(ii). Specifically, Dr. Taylor explains why the transaction will not reduce competition for any customers in Virginia. *Taylor Statement* at ¶¶ 29-88, 144-147. To the contrary, as outlined in the Petition, the transaction will promote competition, will bolster MCI's ability to continue serving Virginia customers, and will enable Verizon to more effectively compete for enterprise customers, a market segment in which Verizon's past performance has been relatively weak.[18]

III. THE TRANSACTION WILL NEITHER IMPAIR NOR JEOPARDIZE ADEQUATE SERVICE AT JUST AND REASONABLE RATES.

The Petition, this response, and the attached statements demonstrate that the transaction will neither impair nor jeopardize adequate service to the public at just and reasonable rates. *See* Joint Petition ¶¶ 43-68. As Staff recognizes, "the Commission's role in regulating the various companies in their markets can generally provide an implicit definition of 'adequate service at

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[18] If the Local Competition Policy Act applies, then subsection (i), which requires that "all providers of local exchange telephone services" be treated "in an equitable fashion and without undue discrimination" and that "the same rules" be applied to "all providers of local exchange telephone services," constrains the Commission in the conditions it would impose on a transaction. Va. Code § 56-235.5:1(i). Similarly, subsection (iii), which requires the Commission, in resolving cases concerning local exchange service, "as appropriate," to "reduce or eliminate any requirement to price retail and wholesale products and services at levels that do not permit providers of local exchange telephone services to recover their costs of those products and services," would constrain any attempts to freeze or reduce process for Verizon or MCI local exchange services. Va. Code § 56-235.5:1(iii). The Joint Petitioners address these issues as necessary in discussing the proposed conditions.

just and reasonable' rates," *Staff Report* at C-3,[19] and therefore an inquiry under the Transfers Act must begin with an analysis of whether any aspect of the transaction alters the provision of intrastate services under current Commission regulation.[20] The answer in this case is no — the relevant companies will provide the same services, under the same regulations, before and after the transaction. These regulations safeguard both prongs of the Transfer Act's standard — service quality and prices — and as Staff acknowledges, the proposed transaction will "alter neither the responsibility nor the necessity of the Virginia certificated subsidiaries of both Verizon and MCI to comply with or abide by the standards set forth in . . . any . . . regulations of this Commission." *Staff Report* at C-5-6.

A. The Petition Is Sufficient And The Petitioners Have Met Their Burden Of Proof.

Staff raises concerns about "the sufficiency of the Petition in determining whether the proposed merger meets the standards of VA Code § 56-90." *Staff Report* at C-18-19. Staff also appears to contend that the Petition does not meet Verizon's or MCI's burden of proof that the transaction meets the standards set forth in the Transfers Act, and that consequently, the Petition itself is "insufficient." *See id.* at 19. Staff confuses two distinct procedural concepts (sufficiency of pleadings and burden of proof), and it is wrong on both counts.

1. The Petition is Sufficient.

The Transfers Act sets forth the requirements for a petition for authority to acquire utility assets or utility securities there under. A petition must be signed and verified by the president or

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[19] *See also* Staff Report *on MCI WorldCom Sprint Merger* at A-3; Staff Report *on MCI WorldCom Merger* at C-1.

[20] Despite Staff's urging for the Commission to "assess any impact on the Virginia telecommunications marketplace as a whole," *Staff Report* at C-2, any inquiry under the Transfers Act beyond whether the same rules will apply to the same services must still relate to whether the transaction will jeopardize or impair adequate service to the public at just and reasonable rates.

any vice-president and the secretary or assistant secretary of the petitioner, and clearly summarize:

- the object in view,
- the proposed procedure, and
- the terms and conditions thereof.[21]

This is all that is required in a petition for action under the Transfers Act in order to initiate a proceeding.[22] The Petition filed on April 11, 2005 in this case satisfies this requirement.

The Transfers Act does not require that a petition give extensive detail or cite all specific evidentiary matter required for the Commission to find that adequate service to the public at just and reasonable rates will not be impaired or jeopardized by the transaction. If more information is required, the Commission has the authority under § 56-90 to hold a hearing.[23] Consistent with Virginia jurisprudence, it is not necessary for initial pleadings to set out all the facts and

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[21] Va. Code § 56-90.

[22] The pleading requirements contained in the Commission's procedural rules to do not apply to cases arising under the Transfers Act. This is not an adjudicatory proceeding under 5 VAC 5-20-90, as those matters are initiated by the Commission or Commission staff. 5 VAC 5-20-90(A). Nor is this a case initiated under 5 VAC 5-20-100, which governs (i) the promulgation of general order, rules, or regulations, (ii) petitions against a defendant, or (iii) declaratory judgment actions. Finally, the application process for regulatory proceedings under 5 VAC 5-20-80(A) do not apply "where otherwise provided by statute, rule or commission order." The Transfers Act supersedes the generic pleading requirements for transactions such as this one. However, the Petition does, in fact, contain (i) a specific statement of the action sought; (ii) a statement of the facts that the applicant is prepared to prove that would warrant the action sought; (iii) a statement of the legal basis for such action; and (iv) any other information required by law or regulation as required for applications in regulatory proceedings. Thus, on its face the Petition is sufficient. Such other information as the Commission may require is provided in this Response and the testimony and evidence that will be provided at the hearings.

[23] If the General Assembly had intended for the Petition alone to demonstrate that the standard is met, there would have been no need to authorize the Commission to hold hearings. In interpreting a statute, the Commission must give meaning and effect to each word contained therein. *See Michie's Jurisprudence of Virginia and West Virginia,* Volume 17, "Statutes" § 42.

circumstances in a case, but simply to inform the Commission and parties of the essential facts and legal claims.[24]

Moreover, Staff's questions on the sufficiency of the Petition are inconsistent with its own actions, since on April 21, 2005, Staff filed a Memorandum of Completeness indicating that the Petition was complete as of April 20, 2005.[25] Under 5 VAC 5-20-160, a Memorandum of Completeness states:

> whether all necessary requirements imposed by statute or rule for filing the application have been met and all required information has been filed. If the requirements have not been met, the memorandum shall state with specificity the remaining items to be filed.

Having certified completeness, the Staff should not now be heard to contradict its own finding.[26]

Staff's reliance on the Commission's *BA/GTE Merger Order 1* to suggest that the Commission can now dismiss the Petition for failing to meet the burden of proof is inapposite. That Order was not a determination that the BA/GTE Merger ***petition*** failed to satisfy the Commission that the standard had been met. Rather, the Order found that the ***record***, as developed through comments and hearings, did not satisfy the Commission that the standard had been met.

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[24] *See e.g. Michie's Jurisprudence of Virginia and West Virginia*, Volume 14B, "Pleading" § 31; Supreme Court of Virginia Rules 1:4(d) and (j).

[25] Petitioners filed a ***complete*** Joint Petition on April 11, 2005, and the (maximum) 180 day statutory timeclock began on that day. Staff subsequently requested that MCImetro file a verification, and did not consider the Petition complete until such verification was filed. *See Staff Report* at A-1 n.1. However, as explained above, § 56-90 requires certain officers "of the ***petitioner***" to sign and verify the Petition. The Petitioners are Verizon and MCI, *i.e.* as the buyer and seller of the assets in question in this case. Despite Staff's suggestion, MCImetro, the ***subsidiary*** of MCI subject to the transaction is not a petitioner.

[26] This is particularly so in light of Staff's failure to file a motion requesting the Commission to find the Petition incomplete and require the Petitioners to supplement the Petition, as it did in one phase of the BA/GTE merger proceeding.

Although the Staff Report is rife with claims that it cannot conclude whether the transaction meets the standard,[27] Staff's focus is on the requirement that it must engage in the discovery process and develop a record through comments and hearings. *See Staff Report* at C-18-19.[28] However, this is precisely how proceedings before the Commission operate. While Staff may find this process challenging it is what the General Assembly contemplated by giving the Commission the authority to convene hearings if necessary.[29]

2. Staff's Burden of Proof Argument Is Inappropriate.

Staff emphasizes that Verizon and MCI bear the burden of proof to establish that the transaction satisfies the criteria set forth in the Transfers Act. *Staff Report* at C-19-20. At no point in this case have Verizon or MCI claimed to the contrary.[30] While Petitioners carry the burden of persuading the Commission that the transaction meets the standards set forth in the

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[27] *See, e.g. Staff Report* at B-7, C-6, 7, 9, 13, 17, 24.

[28] Although Staff may not agree with Petitioners' objections to Staff's discovery, *Staff Report* at C-19, n.38, the fact remains that Staff propounded discovery, and Petitioners either objected (as was its right), responded, or offered some combination thereof, and even supplemented responses. Staff did not file any motion to compel, and therefore under the Commission's Rules, the objections are deemed sustained. 5 VAC 5-20-260.

[29] Indeed, the Commission clearly contemplated that its Staff would take an active role in developing a record in proceedings when it adopted Rule 5 VAC 5-20-80(D), giving Staff the authority to "appear and participate in any proceeding." Under the Commission's rules, Staff is empowered to conduct investigations and discovery, evaluate the issues raised, testify and offer exhibits, file briefs and make argument, and be subject to cross-examination when testifying. *Id.*

[30] To be precise, the term "burden of proof" has two distinct meanings, which Staff may be confusing. First, as the Petitioners, Verizon and MCI have the burden of persuasion—that is to establish by a preponderance of the evidence that the transaction meets the standards set forth in the Transfers Act. However, there is also a burden of producing evidence, which passes from party to party frequently during the course of a proceeding. *Riggsby v. Tritton*, 143 Va. 903, 918, 129 S.E. 493 (1925). Any party raising an issue of fact bears the burden of producing evidence that a reasonable mind could accept as proof of the fact at issue. *See generally, Westmoreland Coal Co. v. Campbell*, 7 Va. App. 217, 222 (1988); Michie's Jurisprudence Vol. 7B, Evidence § 29.

Transfers Act, they are not required to anticipate and disprove in advance any conceivable argument another party may raise in opposition.[31]

In short, Staff's contradictory claims that the Petition was insufficient, and that the Petitioners have not met their burden of proof, lacks factual or legal support. The Petition was sufficient when filed on April 11th, the Petitioners will meet their burden of persuasion, and the Commission will have everything it requires when the record closes to approve the Petition without condition.

B. Service Quality

Opposing parties make little serious effort to substantiate any allegation that the transaction will jeopardize adequate service. In fact, the transaction raises no concern that adequate service will be disrupted either in the course of completing the transaction or once the transaction has been completed. It does not involve the merger of either company's assets, lines, works, or systems, and therefore does not raise any operational issues. Petitioners do not anticipate that the transaction will lead to headcount reductions in service-related technicians or representatives, particularly since MCI never served mass market customers using its own facilities. Moreover, the Commission's rules, procedures, and remedies governing long distance, local, and wholesale service quality will continue to apply to the Petitioners' Virginia affiliates after the transaction as they do now. Furthermore, market forces will impose pressure on Verizon VA, Verizon South, and MCImetro to continue to provide adequate service lest they lose customers to their wireline or intermodal competitors.[32]

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[31] *See e.g.* 29 Am. Jur. 2d Evidence § 158 ("[a]s a rule, a party is under no obligation to anticipate and negate in its own case in chief any facts or theories that may be raised by another party").

[32] *See Taylor Statement* at ¶¶ 29-88, 237-43.

Nor has any party alleged that the transaction will affect Verizon's ability to finance adequate service in the Commonwealth.[33] This transaction does not involve a financially weak or cash-strapped parent buying a Virginia telephone company, and thereby jeopardizing adequate service. Rather, the financial resources of Verizon will allow for sustained investment in MCImetro's state-of-the-art Internet backbone, facilities, and IT systems, thereby enhancing the quality of the services provided over those facilities.[34] Indeed, based on past spending, Staff "expect[s] Verizon VA and Verizon South to continue to invest in a manner that ensures adequate service." *Staff Report* at C-16.

As the Petition explains and Staff acknowledges, the Commission has never established service quality standards for interexchange services, but instead has relied upon a market-based approach that relies upon customer choice to discipline carrier behavior. *See Joint Petition* ¶ 46; *Staff Report* at C-6. The transaction will not change the current market incentives faced by Verizon VA, Verizon South, and MCImetro to maintain service quality in the Commonwealth. *See Taylor Statement* at ¶¶ 29-88, 237-243. Moreover, even after the transaction, the Commission's rules will continue to provide added incentives in the form of potential sanctions for IXCs with excessive subscriber complaints. *Staff Report* at C-6. Thus, nothing inherent in

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[33] Rather than recognizing Verizon's substantial investment in FTTP, new services, new technology, and competition for the cable companies, Staff seems to suggest that Verizon's FTTP plans, when coupled with the purchase of higher-risk MCI, could increase Verizon borrowing costs. Staff goes on to state, however, that a "shift of such [small] magnitude is unlikely to have a devastating impact on access to capital by Verizon or its subsidiaries." *Staff Report* at B-3. Indeed, Staff admits that it "is unable to determine whether these potential financial concerns could impair or jeopardize adequate service at just and reasonable rates." *Id.* at B-7. For the reasons outlined by Dr. Taylor, the Commission need not worry that the transaction could adversely impact the cost and availability of capital for Verizon's jurisdictional operations. *Taylor Statement* at ¶¶ 19-23.

[34] *See, e.g., Joint Petition of American Water Works Company, Inc. and Thomas Water Aqua Holdings GmbH for Approval Under the Utility Transfers Act*, Case No. PUA-2001-00082, Order Granting Approval at 7 (Apr. 4, 2002) (finding that a transaction that brings the financial backing of a large company to a Virginia public service company can be "a very good benefit[]").

the transaction will affect the Virginia affiliates' incentives to continue to offer adequate interexchange services, and the other parties point to no evidence or incentives related to the transaction that could negatively impact interexchange service quality.

Local exchange services provided by MCImetro, Verizon VA, and Verizon South are governed not only by the market, but also by the Commission's service quality standards. These same standards and market discipline will continue to govern these services after the merger is closed. Specifically, for local exchange service, the Commission will soon adopt new rules "measuring the health of the telecommunications network and assuring a minimum level of service quality for all consumers."[35] The proposed rules, stipulated to by Staff, the Attorney General, and several local exchange carriers in the Commonwealth, apply to ***all*** local exchange carriers certificated to provide local exchange telecommunications services within the Commonwealth.[36] The new rules "prescribe the minimum acceptable level of quality of service under normal operating conditions."[37] MCImetro, Verizon VA, and Verizon South will each be subject to the final rules the Commission adopts, and the Commission need not impose anything further on these entities to ensure adequate local exchange telecommunications service.[38]

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[35] Ex Parte: *Establishment of Rules for Service Quality Standards for the Provision of Local Exchange Telecommunications Services*, Case No. PUC-2003-00110, Third Order Prescribing Notice and Granting Leave to Comment or Request Hearing, (July 19, 2005) ("*Proposed Service Quality Standards*") at 2.

[36] *See id*, Proposed Settlement Rule 20 VAC 5-427-10(A).

[37] *See id*, Proposed Settlement Rule 20 VAC 5-427-20(A).

[38] Indeed, to the extent that the Local Competition Policy Act applies to this case at all, it mitigates strongly against applying any more stringent service quality rules on Petitioners' subsidiaries than those that are generally applicable to all carriers. *See, e.g., Verizon ARP Order* at 16.

Moreover, the alternative regulation plan ("ARP") governing Verizon VA and Verizon South "reasonably ensures the continuation of quality local exchange service."[39] In adopting the ARP, the Commission concluded:

> Section M of the Plan requires Verizon to comply with any service quality rules established by the Commission. If the Companies fail to comply with the Commission's service quality rules, they will be in violation of such rules and the Plan. The remedies for such violations can be achieved through show cause proceedings or any other means provided by regulation or statute. Thus, we find that it is not necessary to link price increases under the Plan to service quality rules in order to reasonably ensure the continuation of quality local exchange service.[40]

The same analysis applies here.

In addition, wholesale services provided by Verizon's Virginia subsidiaries are subject to performance standards and remedies contained in the Carrier to Carrier Guidelines and the Verizon Performance Assurance Plan. As acknowledged by Staff, these mechanisms "currently provide sufficient mechanisms to maintain at least the present level of wholesale service quality to CLECs." *Staff Report* at C-15. The transaction will not change the obligations or financial incentives under these mechanisms.

1. Conditioning Approval Of The Transaction Upon Meeting Service Quality Standards Is Unnecessary.

As discussed above, the Commission's current rules – and the rules under Commission consideration – ensure the continuation of at least adequate service quality. Consistent with its prior finding that conditioning rights under the ARP to service quality was not required, the Commission should here find that conditioning approval of the transaction on an affirmative

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[39] *See id.*

[40] *Id.*

requirement that the merged company maintain current levels of service quality, as suggested by the OAG,[41] is unnecessary.

2. The Commission Need Not Address Directory Listings Issues In This Case.

Cox asks the Commission to condition the transaction upon Verizon's setting aside resources to reform its directory listings process to Cox's liking.[42] *Cox Comments* at 20-22, 26. Ironically, Cox's own handling of directory listings has been the cause of major problems recently, which absent Verizon's help, would have resulted in the omission of several thousand Cox listings from various Virginia directories.[43] In any event, Verizon's directory errors and omissions are the subject of a separate Commission investigation in Case No. PUC-2005-00007. Should the Commission find any action necessary to resolve those problems, the proper place to address such actions is in that case.[44]

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[41] *OAG Comments* at 6.

[42] In the same vein, the OAG suggests the Commission consider requiring Verizon, as condition of the merger, to develop a specific plan to eliminate "significant and ongoing incidents of telephone directory errors and omissions." *OAG Comments* at 6-7; NTELOS asks the Commission to require Verizon to make changes to its directory listings process before approving the transaction. *NTELOS Comments* at 3.

[43] For example, Cox approached Verizon in May 2005, requesting assistance with well over 1900 listings that Cox had not processed for the Northern Virginia directory. Although the last date for submitting this information had passed almost two months prior, Verizon "stopped the presses" to add Cox's listings to that directory. Similarly, in June 2005, Cox found that it had mistakenly omitted over 2500 residential customers from its Roanoke directory listings. To accommodate Cox's requirements, Verizon delayed printing of a supplemental Roanoke directory to include these listings. Verizon delayed the supplement a second time when Cox discovered that it included non-published numbers in the listings it had given to Verizon for the Supplement. Thus, Verizon is making every reasonable effort to address directory listing issues without the need to include that issue in this wholly separate proceeding.

[44] *See e.g. BA/GTE Merger Approval Order* at 3 (finding that several issues argued could "be more efficiently considered" in other pending dockets, and not imposing conditions upon merger approval).

3. The Commission Should Not Require An Investment Commitment As A Condition Of The Merger.

The OAG suggests that the Commission require Verizon and MCI to commit to a minimum amount of investment in the Virginia telecommunications infrastructure. *OAG Comments* at 7. There is neither legal basis nor any practical necessity for such a condition. The service quality rules provide a regulatory incentive to make those investments in the telecommunications infrastructure that are necessary to meet the Commission's standards. The rigors of the marketplace provide an even more significant incentive to all companies to maintain a state-of-the-art telecommunications infrastructure that meets the requirements of Verizon's and MCI's customers.

As Staff acknowledges, Verizon's capital and maintenance expenses have remained relatively constant over the past three years. *Staff Report* at C-16. Staff predicts that, assuming Verizon's financial resources remain sufficient, it will continue to invest in a manner that ensures adequate service. *Id.* Indeed, Verizon is in the process of investing millions of dollars to upgrade its telecommunications infrastructure through its fiber-to-the-premise deployment, both in the Commonwealth of Virginia and in many other states. The Commission should reject OAG's suggested condition as both inappropriate and unnecessary.[45]

C. Just And Reasonable Rates.

The Commission has either explicitly or implicitly determined that the intrastate services provided by MCImetro, Verizon VA, and Verizon South are currently provided at just and

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[45] To the extent the Local Competition Policy Act applies to this case, as with many of the other proposed conditions, any unnecessary requirement that the post-merger Verizon/MCI commit to a certain level of investment into the telecommunications infrastructure, while other carriers can make unfettered choices about such investments, would violate the Local Competition Policy Act by failing to treat all local exchange carriers in an equitable fashion.

reasonable rates.[46] The regulations applicable to these services, as well as the competitive nature of the Virginia telecommunications market, will ensure that rates remain just and reasonable post-transaction. Like the "adequate service" prong, no party has alleged with any specificity that the transaction would jeopardize just and reasonable rates.[47] The Petition and these comments demonstrate that the transaction will not.

With respect to interexchange services, the definition of just and reasonable rates in Virginia is "market based" or "competitively determined."[48] Indeed, the Commission began treating the interexchange market as competitive in 1984, even though at that time the market was highly concentrated. Staff's decades-late concern about post-merger interexchange rates completely ignores what has happened in the marketplace over the last two decades. As the Statements of Dr. Taylor and Ms. Hallbach demonstrate, there is no possibility that Verizon/MCI could pose a "risk to competition" through the pricing of interexchange services.[49]

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[46] The rates for interstate services provided by Verizon and MCI are within the purview of the FCC, not this Commission. Thus, it is left to the FCC to determine what impact, if any, the transaction has on those rates.

[47] The other parties' comments, as well as the *Staff Report*, are replete with vague and conclusory statements that the transaction's alleged effect on the marketplace will jeopardize just and reasonable rates. These allegations are completely without merit, and are discussed in more detail below and by Dr. Taylor. *See* Taylor Statement at ¶¶ 12, 24-28.

[48] *See Joint Petition of MCI Worldcom, Inc. and Sprint Corporation for Approval to Transfer Control of Sprint Corporation's Virginia Operating Subsidiaries to MCI Worldcom Inc.*, Report of Division of Communications, Division Of Economics and Finance, Public Utility Accounting , Case No. PUC-1999-00244 (March 28, 2000) ("*Staff Report on MCI WorldCom/Sprint Merger*") at A-5. Rule 20 VAC 5-411-30 permits an interexchange carrier to request that its rates be set competitively. To date no carrier has been denied such pricing authority. *See Staff Report* at C-3.

[49] *See Taylor Statement* at ¶¶ 36, 45-49, 74, 90-92; *Hallbach Statement* at ¶¶ 2, 12-32. Staff's position is surprising, given that Staff admits that for some time it has not calculated an HHI for the long distance market because it believes that the market is sufficiently competitive, and major IXC mergers in the past have not troubled Staff. *See Staff Report* at B-7.

In any event, the IXC rules provide various safeguards for consumers, such as requiring tariffs and advance notice to customers of any rate increases. *Staff Report* at C-3-4. These rules will continue to apply to the services provided by MCI post-transaction. Should the Commission decide to also regulate resellers – which it should not – then the Verizon affiliates that offer interexchange service in Virginia will be subject to such rules. The competitive nature of the Virginia interexchange market, coupled with the Commission's choice of how to regulate (or forego regulation of) interexchange carriers, will keep interexchange service rates reasonable. No party has provided any meaningful evidence to the contrary.[50]

With respect to local exchange service, MCImetro's services are governed by the definition of just and reasonable rates contained in Rule 20 VAC 5-417-50, which caps CLEC prices at any Virginia ILEC's 1996 price, or not at all pursuant to 20 VAC 5-417-50(E) or (F). Verizon VA and Verizon South's ARP, sets the standard for determining the just and reasonableness of rates for Verizon's ILEC services.[51] Post-transaction, the local exchange services provided by MCImetro, Verizon VA and Verizon South will remain subject to these regulations, which will continue to ensure that rates are just and reasonable. Once again, no party presented any evidence to the contrary.[52]

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[50] Staff's proposed condition to monitor only Verizon's long distance service is discussed in Section III(D)(2) below.

[51] Under the ARP, basic local exchange services ("BLETS") are capped at a ceiling price and that ceiling price may only increase by an annual inflation factor. Other local exchange services ("OLETS") prices are only permitted to increase by a maximum equivalence of 10% per year. Competitive services are free from price constraints, as they are constrained by the market. All of Verizon's local exchange services under the ARP are subject to requirements for customer notice for price increases, competitive safeguards, individual case base filings, and revenue neutral filings.

[52] Staff suggests that the transaction may cause Verizon VA and Verizon South to raise BLETS and OLETS prices (within the constraints of the ARP) that they otherwise would not have raised. *Staff Report* at C-29. Besides lacking any factual support, the claim utterly fails to demonstrate that the transaction could jeopardize just and reasonable rates. Regardless of the reason, Verizon VA and Verizon South are entitled to raise prices within the ARP

Nonetheless, the OAG recommends that the Commission consider limiting the rate increases permitted under Verizon VA and Verizon South's ARP to ensure that rates remain just and reasonable after the merger. *OAG Comments* at 8-9. Specifically, OAG repeats the proposal that it made in the ARP Case — and that the Commission explicitly rejected[53] — to limit the price ceiling for BLETS to one-half of the increase in the Gross Domestic Product Price Index rather than 100%, and limit future increases in BLETS and OLETS to 5% per year rather than 10%. *Id.*

The Commission should again reject the OAG's suggested condition. Not only is such a condition unnecessary because the ARP already ensures just and reasonable rates, it would also be improper.[54] Verizon's ARP can only be altered "after an appropriate proceeding is initiated and held under the provisions of § 56-235.5D of the Code of Virginia."[55] Changing the

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parameters, and the Commission has already decided that those parameters will ensure affordable prices. *See Verizon ARP Order*.

[53] *See Verizon ARP Order* at 13-14.

[54] The Commission rejected a similar proposal to revisit price increases under Verizon's alternative regulation plans in the Bell Atlantic/GTE Merger. *See BA/GTE Merger Approval Order* at 3 ("We were urged herein to re-open the alternative regulation plans of BA-VA. and GTE South as a condition of approval of their proposed merger. We will not now take that step.").

[55] Verizon ARP § B(1). Section 56-235.5(D) provides:

> The Commission may, after notice and opportunity for hearing, alter, amend or revoke any alternative form of regulation previously implemented if it finds that (i) the affordability of basic local exchange service, as such service is defined by the Commission, is threatened by the alternative form of regulation; (ii) the quality of local exchange telephone service has deteriorated or will deteriorate to the point that the public interest will not be served by continuation of the alternative form of regulation; (iii) the terms ordered by the Commission in connection with approval of a company's application for alternative form of regulation have been violated; (iv) any class of telephone company customers or other providers of competitive services are being unreasonably prejudiced or disadvantaged by the alternative form of regulation; or (v) the alternative form of regulation is no longer in the public interest.

regulatory plan by attaching a condition to approval under the Transfers Act would violate § 56-235.5(D), which requires due process and specific findings prior to modifications to an ARP.

D. None Of The Staff's Proposed Conditions Is Necessary For The Transfer To Meet The Statutory Standard, and Many Are Improper.

The only conditions that the Commission can properly entertain are those that would be proper and necessary in order to ensure that post-transaction the provision of adequate service at just and reasonable rates is protected. VA Code § 56-90. Verizon and MCI have demonstrated that the transaction will not impair or jeopardize the provision of adequate service at just and reasonable rates, and no party has provided evidence to the contrary. Thus, the Commission should reject all proposed conditions, including those recommended by its Staff.

Further, some of the conditions Staff proposes violate the Local Competition Policy Act that Staff (incorrectly) contends should apply to this case. To the extent that the Commission finds the Local Competition Policy Act to apply, it must give effect to the whole statute, including the requirement to "treat all providers of local exchange telephone services in an equitable fashion and without undue discrimination and, to the greatest extent possible, apply the same rules to all providers of local exchange telephone services." Imposing conditions on Verizon and MCI that do not apply to other carriers is not consistent with the law.

1. Filing Notice of Affiliate Transactions

Staff proposes to require Verizon VA and Verizon South to file notice with the Commission of affiliate agreements with MCI having an annual value in excess of $250,000, ostensibly to ensure that Verizon VA and Verizon South do not favor MCI in any transaction.

Staff Report at C-32.[56] Such a condition not only runs afoul of the purpose of the Virginia Affiliates Act[57], but is unnecessary because Verizon VA's and Verizon South's agreements with MCImetro are currently publicly available. Staff's proposed condition should be rejected.

The Commission has granted both Verizon VA and Verizon South exemptions from the statutory requirement to file certain affiliate agreements with the Commission for approval.[58] Those exemptions are grounded in the fact that under the applicable ARPs to which each company is subject, there is no link between affiliate transactions and end-user rates.[59] In fact, the very purpose of alternative regulation is to provide incentives for carriers to optimize their efficiencies, including through reliance on affiliates if appropriate. The Commission generally has granted exemptions to the affiliate transaction requirements to carriers operating under alternative regulation rather than rate of return regulation.[60]

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[56] Qwest goes further to recommend that Verizon Va. and Verizon South affirmatively agree not to favor MCImetro or any other affiliate, or SBC/AT&T, with respect to terms and conditions under which it provides special access or any other services, as compared to the terms and conditions under which it offers those services to other competitors. *Qwest Comments* at 18-19, 23. This condition is equally as unnecessary. First, with respect to SBC and AT&T, Qwest's condition is not required. Dr. Taylor demonstrates the significant competition between Verizon and SBC that exists today and is likely to exist in the future. *Taylor Statement* at 81, 82, 97. Verizon has no incentives to "favor" SBC and AT&T with any special deals that would only make them even more formidable competitors than they already are. Qwest has failed to offer any evidence to support its suspicions.

[57] Va. Code § 56-76, *et. seq.*

[58] *Application of Verizon South Inc. and Verizon Virginia Inc. for Exemptions from the Affiliated Interest Filing and Approval Requirements Pursuant to § 56-77 B of the Code of Virginia,* Case No. PUA-2001-00007, Order Granting Exemptions (April 18, 2001) ("*2001 Affiliated Interest Exemption Order*") and *Application of Bell Atlantic – Virginia, Inc. for Exemptions Under § 56-77 (B) of the Code of Virginia,* Case No. PUA-1996-00044, Final Order (March 28, 1997).

[59] *2001 Affiliate Interest Order* at 6.

[60] Specifically, the Commission may exempt public service companies if it determines that such action is in the public interest. The Commission may revoke a previously granted exemption "if it finds that such action is in the public interest." Va. Code § 56-77(B). The Commission uses the public interest as the standard by which it judges affiliate transactions. *Roanoke Gas Co. v. Commonwealth,* 217 Va. 850, 854, 234 S.E.2d 302, 305 (1977). Sprint was also granted affiliate exemptions in 1997. *Application of Central Telephone Company of Virginia for Exemptions Under § 56-77 (B) of the Code of Virginia,* Case No. PUA-1996-00046, and *Application of United*

Staff suggests that the Commission require Verizon VA and Verizon South to file notices of affiliate agreements with MCI because it fears that Verizon may favor MCI to the detriment of other CLECs. *Staff Report* at C-32. If the Staff's reasoning were correct, however, then *all* providers of local exchange services should be subject to mandatory affiliate transaction filings; any contrary holding would violate the Local Competition Policy Act.[61] Thus, all other carriers (such as AT&T, Cox, Qwest or XO) should be equally obligated to file all affiliate transactions with this Commission. Obviously, the Commission has never taken such an approach nor should it now.[62] Indeed, in granting Verizon South's exemption from the requirement, the Commission rejected arguments by AT&T that an exemption would be anti-competitive, agreeing with Staff at the time "that competitive issues raised in AT&T's Comments are more appropriately addressed in other proceedings and/or other Commission procedures."[63]

Further, federal anti-discrimination rules already protect against the harms feared by Staff. As a result of Verizon's purchase of a 13.9% stock interest in MCI, Verizon is currently required to disclose publicly all of its service transactions, including interconnection and commercial agreements with MCI entities that originate interLATA services in in-region states

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Telephone-Southeast, Inc. for Exemptions Under § 56-77 (B) of the Code of Virginia, Case No. PUA-1996-00047, Final Order (March 28, 1997).

[61] Unlike the Transfers act, the Affiliates Act does explicitly incorporate a public interest standard, and thus the Commission should look for guidance to the Local Competition Policy Act's requirement to treat carriers equitable and apply the same rules, where appropriate.

[62] CLECs are exempt from the affiliate agreement requirements of § 56-77. Va. Code § 56-481.2. While the 1996 legislation permitting the Commission to grant exemptions from the filing requirement also permitted the Commission to impose the requirement on CLECs, it has chosen not to do so. Re-imposing the requirement on Verizon (and MCImetro) without imposing a similar condition on other CLECs does not meet the requirement of the Local Competition Policy Act to apply the same rules to all providers of local exchange telephone services to the greatest extent possible. Va. Code § 56-235.5:1 (i).

[63] *2001 Affiliate Interest Order* at 6.

("MCI Affiliates").[64] *See* 47 U.S.C. § 272(b)(5) (requiring MCI affiliates to "conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection"). Verizon VA and Verizon South are also required to provide services set forth in these publicly disclosed transactions to nonaffiliated entities on the same terms and conditions afforded the MCI affiliates. These obligations will apply after the approval of the transaction until sunset of sections 272(b) and 272(c) requirements under the Telecom Act. Verizon is also currently required to provide exchange access, telephone exchange services, and other intraLATA and (when permitted) interLATA services to MCI affiliates and nonaffiliates on a nondiscriminatory basis. *See* 47 U.S.C. § 272(e). These requirements will continue to apply after the transaction is approved, and are not subject to sunset.

To fulfill its § 272 requirements, Verizon added MCI to the 272 affiliates whose agreements are disclosed on Verizon's Regulatory Information website, http://www.verizonldregulatory.com/regulatoryinfo.asp. All agreements between MCI and the Verizon ILECs are disclosed on that website, including the commercial agreement referenced by Staff. The disclosure on the website for each agreement is a list of all parties to that agreement, the term of the agreement, all financial terms, and a summary of the nonfinancial terms. Each agreement on the website is available for public inspection at Verizon's Public Inspection Office as shown on the website. Thus, to the extent that there is any validity to Staff's concerns, such

[64] The term 'in-region State' means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the enactment of the Telecommunications Act of 1996. 47 USC § 271(i)(1). MCImetro provides both local exchange and interLATA long distance services in Virginia. *Staff Report* at C-1.

concerns are more than adequately addressed at the federal level as those agreements that Staff presumably has an interest in are already publicly accessible. There is no reason for the Commission to adopt duplicative requirements and many reasons why it should not depart from its current practices.

2. Monitoring Long Distance Revenues for Verizon's Reseller Affiiates

Staff recommends that the Commission require Verizon affiliates providing intrastate interLATA long distance service in Virginia to submit revenue monitoring information to the staff "consistent with that required by IXC rules." *Staff Report* at ii. As a matter of economics, Dr. Taylor explains why there is no need for a condition ostensibly designed to protect the "long distance market" because there is no longer a stand-alone long distance market. *Taylor Statement* at ¶¶ 90-92. Toll services are widely combined with access, local calling and vertical services, and sold as packages by Verizon and its competitors. In these circumstances, the concept of a stand-alone long distance market is no longer economically meaningful.

That said, Petitioners agree that any monitoring reports that are considered here should be filed "consistent with the rules." The problem with Staff's proposal, however, is that Staff wants to single out the current Verizon affiliates as the only *resellers* required to file such reports.[65]

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[65] The SCC has chosen to forebear certification of IXCs that only resell long distance service. *See Investigation of the Resale or Sharing of Intrastate Wide Area Telephone Service ("WATS")*, Case No. PUC830005, Final Order, (June 7, 1983); *Resale or Sharing of Foreign Exchange and Dedicated Channel Services*, Case No. PUC850009, Final Order, (Sept. 3, 1987). Verizon's current affiliates that provide intrastate interLATA long distance are resellers. *See Verizon Global Networks Inc. & Verizon Global Networks Virginia Inc. - For such relief as may be required under the Utility Facilities Act, Va. Code Ann. sections 56-265.1 et seq., for expedited consideration and interim authority*, PUC-2002-0234, Order Determining Certificates Not Required (Jan. 22, 2003) at 3 (concluding that "GNI's ownership and operation of facilities in Virginia do not require certification by the Commission because such telecommunication services are provided predominantly on an interstate basis and not directly to the public"). MCImetro is a facilities based provider and is subject to the IXC rules.

Under Staff's proposed condition, every other reseller would remain exempt from the reporting rules. Staff's proposal is unnecessary and improper.

Staff acknowledges the competitive nature of the long distance market. *See Staff Report* at C-6. Indeed, Staff acknowledges that while the transaction raises potential concerns of a "considerably more concentrated" long distance market, "a significant increase in market share alone would [not] necessarily result in prices for mass market (residential and small business) customers that are not just and reasonable (still competitively determined)." *Id.* at C-7. Dr. Taylor confirms Staff's belief by demonstrating that this transaction poses no risk to adequate long distance service at just and reasonable rates and no harm to competition. *Taylor Statement* at ¶¶ 157-160. Given today's realities in the long distance marketplace, particularly when coupled with the Commission's past forbearance from regulating the reseller market, adding more monitoring and regulation is an unnecessary and discriminatory step in the wrong direction.

Moreover, requiring only one reseller of long distance services to file revenue monitoring information, but not others, would not provide a meaningful picture of the long distance market (assuming *arguendo* that such a market even exists). When the Commission adopted the IXC rules in 1984, it was adamant that its rules would follow the "level playing field concept" that is still in the statute today:

> [The level playing field concept] guided the Commission's derivation of the following rules. The General Assembly desired to make the transition from regulated, monopoly long distance service to competitive service in a manner that was entirely fair and even-handed, showing favoritism to neither existing carriers nor to proposed carriers. This intent is clearly evinced in the final sentence of Section 56-481.1: "The Commission is authorized to promulgate any rules necessary to implement this provision; provided that any such rules so promulgated <u>shall be uniformly</u>

applicable to all telephone companies that are subject to the provisions of this section.[66]

Staff's desire to single out Verizon, in today's intensely competitive marketplace, more than two decades after this Commission adopted an even handed regulatory approach to long distance services that it had already found to be competitive, simply makes no sense. To the extent that Staff really believes that long distance resellers now need to file revenue monitoring information, it should seek a change in the IXC rules for all resellers, not just Verizon.[67]

3. Response Time For Commission Complaints

Staff recommends requiring Verizon VA and Verizon South to respond to, and resolve when possible, complaints to the Commission within 10 business days. *Staff Report* at ii, C-17. Again, Staff does not even allege, much less actually identify any perceived harm to adequate service resulting from the transaction that this proposed condition would address. As Staff itself points out, it proposed an identical requirement for all local exchange carriers in the Rules for Service Quality Standards being considered by the Commission in Case No. PUC-2003-00110. *Id.* at C-17, n.35. The stipulated rules agreed to by the parties and put forth by the Commission for public comment, require LECs to "provide a written response to the staff detailing its resolution of the complaint within 10 business days following the initial notification by the staff." Proposed Rule 20 VAC 5-427-100(8). Staff's effort to impose this rule on Verizon VA and Verizon South alone as a condition, even if the rule is subsequently changed by the Commission in the current rules proceeding or at some later date, is simply inappropriate. If the

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66 Ex parte: *In the matter of adopting rules governing the certification and setting of rates for inter-LATA, inter-exchange telecommunications carriers*, Case No. PUC-1984-00017, Final Order (June 29, 1984) at 1-2 (underline in original).

67 Again, applying the same monitoring rules to all resellers is the only action that would be consistent with the Local Competition Policy Act.

rule is to be imposed at all, it should be imposed equally on all companies as a part of the rules proceeding. Staff's proposed condition has no place in this proceeding under the Transfers Act.

4. Filing Of Commercial Agreements

Staff recommends that the Commission require Verizon VA and Verizon South to file their commercial interconnection agreements with MCImetro entered into outside of 47 U.S.C. § 251 with the Commission. *Staff Report* at ii, C-21.[68] Staff suggests this condition is necessary to allow the Commission or other CLECs to "readily to ascertain whether Verizon VA and/or Verizon South would be offering superior rates, terms and/or conditions to" to MCI. *Id.* at C-21. As detailed above, anti-discrimination rules contained in 47 U.S.C. § 272 already prevent Verizon VA or Verizon South from favoring their affiliates, and the Wholesale Advantage Agreement between Verizon and MCI referenced by Staff is already publicly available. This condition is unnecessary. It is also unlawful, as the FCC and federal courts have made clear that state commissions have no authority to regulate such agreements.[69]

5. Reclassifying Frame Relay/ATM

Staff recommends that the Commission require Verizon VA and Verizon South to file to reclassify ATM and Frame Relay services as OLETS under their ARP. *Staff Report* at ii, C-22-

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[68] Staff also requests a condition ***requiring*** Verizon VA, Verizon South, and MCImetro to purchase UNEs and/or interconnection arrangements only through interconnection agreements. *Staff Report* at iii. Petitioners already indicated in an interrogatory response that: "It is Verizon Virginia Inc.'s and Verizon South Inc.'s current intention to provide interconnection and/or network elements, under Section 251 of the Telecommunications Act (the "Act"), to MCImetro Access Transmission Services of Virginia, Inc. in Virginia pursuant to interconnection agreements entered into under Sections 251 and 252 of the Act." Verizon Response to Staff Request 1-3.

[69] *See Qwest Corp. v. Schneider*, No. CV-04-053-H-CSO, *slip op.* at 14 (D. Mont., June 9, 2005); *see also MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269 (11th Cir. 2002)(state commissions authority under § 252 is limited to implementing § 251(b) and (c)); Memorandum Opinion and Order *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC rcd 19337, ¶ 8 & n.26 (2002)("only those agreements that contain an ongoing obligation relating to section 251(b) or (c)" are "interconnection agreement[s]" covered by section 252).

24. Staff readily admits that it "cannot necessarily conclude . . . that the enterprise market in Virginia (particularly Frame Relay and ATM services) will be significantly harmed in Virginia as a result of the proposed merger." *Id.* at C-24. In spite of the lack of any connection between the transaction and the proposed condition, Staff recommends Verizon VA and Verizon South be forced to reclassify these services without even a preliminary finding that they are no longer competitive. Such a requirement would violate § 56-235.5(G) and should be rejected.

Staff correctly acknowledges that Verizon's subsidiaries' ARP contemplates procedures for reclassification of services. *Staff Report* at C-24. Specifically, Verizon's ARP ¶ D(4) permits any party to petition to reclassify a Verizon VA service. As noted previously, the Commission may only change the regulatory treatment for a service already found to be competitive, "if, after notice and an opportunity for hearing, it finds that competition no longer effectively regulates the price of that service." Va. Code § 56-235.5(G). There has been no such finding here, and Staff's equivocal and unfounded claim regarding the ***potential*** for harm to competition for ATM or Frame Relay services does not serve as an adequate basis on which to conclude that "competition no longer effectively regulates the price of that service." Absent actual evidence to that effect, there are no factual or legal grounds for adopting Staff's recommendation. Any proposed reclassification of ATM or Frame Relay can be undertaken only in the context of a properly filed and litigated reclassification petition, affording all parties with the required statutory due process and resulting in a finding that the service is no longer competitive.[70] Staff would have the Commission short-circuit these ARP and statutory

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[70] Moreover, there is no basis to find that competition will no longer effectively regulate the prices of ATM and Frame Relay after the transaction. For example, the evidence relied upon by the Commission to find that these services were competitive included five contracts that Verizon VA lost to competitors. Only one of those contracts was lost to MCI.

requirements. The Commission should decline to engage in such action and Staff's proposed condition should be rejected.

6. Reclassifying Non-Impaired Wire Centers

Staff suggests that the Commission require Verizon to modify its high capacity UNE impairment wire center analysis required by the FCC's *Triennial Review Remand Order*[71] to change MCI's designation as a nonaffiliated fiber-based collocator in Virginia wire centers.[72] *Staff Report* at iii, C-25-26. Staff does not dispute that the FCC's rules do not require Verizon to remove any wire center from its impairment analysis once that wire center has qualified under the FCC's non-impairment thresholds. *Id.* at C-26. Instead, Staff requests that the Commission require such new analysis as a condition of the merger. *Id.* This condition is not only unnecessary, it runs afoul of this Commission's previous determinations that it will not order unbundling beyond that required by federal law.[73]

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[71] *In re: Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier,* FCC 04-290, Review Order on Remand, (FCC Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

[72] XO and Covad make a similar request. *XO/Covad Comments, Montgomery Testimony* at 73-74.

[73] *Petitions of the Competitive Carrier Coalition For an Expedited Order that Verizon Virginia Inc. and Verizon South Inc. Remain Required to Provision Unbundled Network Elements on Existing Rates an Terms Pending the Effective Date of the Amendments to the Parties Interconnection Agreements and Of AT&T Communications of Virginia, LLC, and TCG Virginia, Inc. For an Order Preserving Local Exchange Market Stability*, Case Nos. PUC 2004-00073 and PUC 2004-00074, Order Dismissing Petitions (July 19, 2004) at 6 ("*USTA II* establishes that no unbundling can be ordered in the absence of a valid finding by the FCC or impairment under 47 U.S.C. Section 251(d)(2). . . . This Commission will not mandate unbundling requirements that violate federal law."). Moreover, interpreting and enforcing the FCC's unbundling requirements arising out of the *TRRO* would also be a departure from recent Commission decisions. *See Petition of A.R.C. Networks, Inc. d/b/a Infohighway Communications, Inc. and XO Communications, Inc. For a Declaratory Ruling Directing Verizon to Continue to Provision Certain UNES and UNE Combinations*, Case No. PUC 2005-00042, Order Dismissing and Denying (March 24, 2005) at 2 (denying ARC's Petition to require Verizon to continue to provide services under TRRO obligations because "insofar as the matters raised by the Petition require construction of this FCC ruling, the parties may have adequate – and more appropriate – remedy by seeking relief from that agency.").

The FCC's rules make very clear that the classification of a wire center as exempt from unbundling operates as a ratchet – changes in the facts on the ground can cause additional offices to be added to the exempt list, but cannot be used to remove an office from the list once it qualifies. For example, 47 CFR § 51.319 (e)(3)(i), which sets out the criteria for classification of a wire center as "Tier 1" for purposes of exempting routes from dedicated transport unbundling, says, "Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center." *See also* 47 CFR § 51.319 (e)(3)(i). This means that changes in the facts affecting the classification of wire centers after the facts in effect as of the effective date of the *TRRO* can only move offices from impaired to non-impaired – and that any such changes *cannot* remove offices from non-impaired status once they achieve it. This is because the FCC's findings of lack of impairment are "designed to capture both actual and potential competition, based on indicia of significant revenue opportunities at wire centers."[74] Once facts have occurred to show a lack of impairment, those facts imply potential competition is likely, even if those facts change.

Requiring Verizon to revisit its TRRO non-impairment analysis to remove any reliance on MCI would be inconsistent with the FCC's rules on changes in the classification of wire centers over time. As Staff indicates, "the FCC can deal with its own rules," *Staff Report* at C-26, but this Commission should not (and has not in the past) required unbundling beyond FCC rules.[75]

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[74] *Triennial Review Remand Order* ¶ 88.

[75] Staff also suggests that the Commission could require Verizon to raise the issue with the FCC. Putting aside whether such a condition would be proper, it is certainly unnecessary because the issue was raised to FCC as part of its review of the transaction. *See In the Matter of Application for Consent to Transfer Control Filed by Verizon Communications Inc. and MCI, Inc.*, WC Docket No. 05-07, Comments of ACN Communications Services, Inc.,

7. Tracking of Merger Cost And Savings

Staff recommends that the Commission require Verizon and MCI to track merger cost and savings for a minimum of three years, but does not suggest the information be filed with the Commission or otherwise utilized. *Staff Report* at iii, C-27-28. OAG suggests that the Commission require a merger costs and savings tracking and reporting mechanism similar to that approved in prior mergers. *OAG Comments* at 9. However, merger costs and savings are irrelevant in companies governed by intense competition and alternative regulation such as MCI and Verizon. As Staff recognizes, Verizon's subsidiaries' ARP pricing provisions do not require Verizon "to pass any Virginia specific cost savings (from any source) along to its customers." *Id.* at C-27.

Staff suggests that in the event Verizon was to be subject to any cost or other rate proceeding in the future or to change the form of alternative regulation to which its subsidiaries are subject, "merger cost and savings information may be helpful and/or necessary to assist the Commission in making its decision."[76] It is not clear what Staff seeks to accomplish by this recommendation, however, any conditions on the merger must be necessary to prevent the

Biddenford Internet Corporation d/b/a Great Works Internet, Bridgecom International, Inc., Broadview Networks, Inc., Bullseye Telecom, Inc., Cavalier Telephone Mid-Atlantic, LLC, Cimco Communications, Inc., CTC Communications Corp., Gillette Global Network, Inc. d/b/a Eureka Networks, Granite Telecommunications, LLC, Lightship Communications, LLC, Lightwave Communications, LLC, Lightyear Network Solutions, LLC, MPower Communications, Corp., Pac-West Telecomm, Inc., RCN Telecom Services Inc., USLEC Corp., U.S. Telepacific Corp. d/b/a Telepacific Communications (May 9, 2005) ("*ACN FCC Comments*") at 54.

[76] *Id.* at C-28. As Staff no doubt realizes, the possibility of Verizon Virginia or Verizon South returning to rate of return regulation is remote, to say the least. While the Commission may have been able to establish prices in the past that would give incumbents an opportunity to earn an established rate of return from captive customers, that is certainly no longer possible in today's marketplace. There are no guaranteed customers, much less guaranteed rates of return. Moreover, by statute, the Commission cannot force Verizon Virginia and Verizon South to return to rate of return regulation because competitors have been certificated in their territories. *See* Va. Code § 56-481.2 ("If, under subsection B of § 56-265.4:4 a certificate of public convenience and necessity is issued to a new entrant to provide local exchange telephone service, the Commission shall at the same time adopt a form of regulation for the new entrant's local exchange services and, upon application pursuant to § 56-235.5, for the incumbent local exchange telephone company, that does not regulate the earnings of either.")

impairment of adequate service at just and reasonable rates. The imposition of a tracking requirement to be used in the off chance that regulation may be changed at some future, unspecified date, so that the Commission could have information available in some hypothetical future investigation, is unnecessary. The Commission should reject this proposal as a solution in search of a problem.

8. Deferring Action On The Petition Until After The Department Of Justice And FCC Act

Staff suggests that the Commission defer a decision on the transaction until after the FCC and Department of Justice reviews are completed.[77] *Staff Report* at iii, C-30-31. Staff argues that such a delay would allow the Commission to evaluate any conditions imposed by the federal agencies. *Id.* The Commission, however, cannot simply delay a decision on the Petition. The Transfers Act requires the Commission to act on the Petition within 180 days of its filing (including the statutorily-permitted extensions). Va. Code § 56-88.1. The law does not permit additional delays so that the Commission can assess the opinions of other agencies or merely "wait and see" if those agencies raise concerns. Indeed, if the Commission fails to act within the statutory time frame, the transaction is deemed approved. Staff's suggestion is improper.

Staff's further suggestion that the Commission condition approval on a further review of any federal conditions, *Staff Report* at C-31, fares no better. The Commission is charged with applying the Transfers Act's standard to the intrastate services within its jurisdiction; its authority to act is not dependent upon, nor should it be conditioned upon what the federal agencies' rulings do under different standards. While it is conceivable that a federal condition may have an "impact on Virginia customers," *id.* at C-30, it is difficult to imagine how the

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[77] XO and Covad make a similar suggestion. *XO/Covad Comments, Montgomery Testimony* at 67.

Department of Justice in enforcing federal antitrust laws, or the FCC in regulating services within its jurisdiction, could impose a condition that could jeopardize or impair Virginia intrastate service to the public at just and reasonable rates.

More important, the Commission is "charged with the duty of administering the laws made for the regulation and control of corporations doing business in this Commonwealth," Va. Code §12.1-12, and the law, in turn, requires the Commission act within the statutorily-imposed 180 days. The "wait and see" approach advocated by Staff is contrary to the requirements imposed by the General Assembly.[78]

9. Reporting On The Closing Of The Transaction

Staff recommends that the Commission require Verizon and MCI to file "a report of action" with the Commission within 30 days of the consummation of the transaction. Petitioners have no objection to this condition.

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[78] Staff notes that the Commission has imposed contingent conditions in Case Nos. PUC-1999-00100 and PUC-2004-00146. The Commission did not, however, condition the BA/GTE merger on the ability to review any conditions imposed by the FCC and DOJ in Case PUC-1999-00100. Rather, the Commission imposed the limited condition of prohibiting the parties from consummating the merger unless that FCC granted permission for GTE to continue offering certain interLATA routes in local calling plans. Staff's reliance on Case No. PUC-2004-00146 is similarly unpersuasive. That case involved an extremely complex restructuring including offshore interests, with open investigations into the deal by the Department of Homeland Security, the Committee on Foreign Investment in the United States, and the Department of Justice. Upon Staff's advice, the Commission found that it could not be assured that adequate service to the public at just and reasonable rates could be assured until the other agencies approved the deal. *Cypress Communications Holding Company Of Virginia, Inc., Cypress Communications Holding Co., Inc. And Techinvest Holding Company, Inc. For Approval of a transfer of control*, Case No. PUC-2004-00146, Order Granting Approval (Apr. 13, 2005) at 6-8. Although Petitioners are not privy to Staff's advice in that case, they can assure the Commission that neither the Department of Homeland Security, nor the Committee on Foreign Investment in the United States, is investigating this transaction.

IV. VARIOUS WHOLESALE ISSUES RAISED BY CLECS ARE EITHER OUTSIDE THIS COMMISSION'S JURISDICTION OR PROPERLY ADDRESSED IN A DIFFERENT FORUM.

Assuming a "public interest" standard applies to the Transfers Act, the CLEC intervenors seek conditions on the transaction to address alleged harms to competition that could result from the transaction. As discussed above, the "public interest" as defined by the Local Competition Policy Act does not apply to transactions reviewed under the Transfers Act, and even if it did, the transaction is consistent with that policy. The transaction satisfies the only criteria required by the Transfers Act — that it does not jeopardize adequate service at just and reasonable rates. None of the alleged harms to competition raised by the CLECs will jeopardize adequate service at just and reasonable rates. Thus, the Commission need not consider any of the conditions proposed by the CLEC intervenors.

Moreover, most of the suggestions raised by the intervenors are beyond the Commission's authority to adopt, as they either relate to interstate services provided under federal tariff or contract, or they would, if adopted, require Verizon to take action that is inconsistent with federal law, including the Telecommunications Act of 1996 (the "Telecom Act") as authoritatively construed by FCC and the federal courts. As Staff emphasized in its report, "[t]he evaluation of the proposed merger should focus on the affected jurisdictional <u>intrastate</u> service and rates." *Staff Report* at C-2 (underlining in original). Any conditions relating to interstate services and rates should be summarily ignored.

To the extent the proposed conditions do relate to intrastate services and rates, none of them are necessary to ensure that the transaction will not jeopardize adequate service at just and reasonable rates. Many of the conditions sought by the CLECs are related to narrow, private concerns unrelated in any way to this transaction. Many of the proposals would be made, and in fact largely have been made, regardless of whether this transaction takes place. Moreover, many of the proposed conditions are themselves anticompetitive and discriminatory.

The Commission can and should look at the incentives and abilities of Verizon and MCI in the current market environment, and take confidence that those incentives will result in the continued provision of quality service at just and reasonable rates. The Commission should reject attempts to use this proceeding as an opportunity to wring concessions from Verizon on issues that are under review in other Commission proceedings, subject to business-to-business negotiations, unrelated or only tenuously related to the transaction, or otherwise outside of the Commission's jurisdiction.

A. The Commission Should Reject The Proposed Conditions Regarding Unbundled Network Elements And Special Access.

XO and Covad suggest that the Commission require that Verizon and MCI meet a number of conditions related to the availability of UNEs and special access, such as:

- Capping prices for UNEs;
- Creating transitions pricing rules for UNEs that Verizon is no longer required to provide under § 251 of the Telecom Act;
- Enforcing the availability of high capacity loops and transport regardless of whether impairment exists;
- Capping loop and transport rates;[79]
- Recalculating locations where high capacity loops, transport and dark fiber UNEs are to be offered, pursuant to FCC obligations;[80]
- Requiring Verizon to waive the FCC's cap on DS1 loops and transport that can be offered to a particular building or route;

[79] Qwest suggests that the Commission cap Verizon's inter and intrastate access, private line, or equivalent at the lowest rates currently offered by either MCI or Verizon. *Qwest Comments* at 18, 23.

[80] As discussed above, Staff also recommends this condition. *Staff Report* at iii.

- Re-pricing both inter- and intrastate special access rates to produce a return on equity of 11.25 percent; and

- Allowing CLECs to "reinitialize" all existing interconnection agreements with terms of at least three or five years.[81]

Covad/XO Comments, Montgomery Testimony at 67-78. These proposed conditions are not justified by any effects that arise from the transaction. *See generally, Taylor Statement.* To the contrary, these private benefits for competitors are completely unrelated to the transaction at all, let alone its impact on the provision of adequate service at just and reasonable rates. Moreover, these suggested conditions relate to regulatory requirements for which there are other statutory bases, processes, and criteria. To the extent CLECs wish to change those requirements, they can do so in a more appropriate forum. In fact some of these proposals are positions that have been expressly rejected by regulators (state and federal). They are not rehabilitated by offering them in a merger proceeding having nothing to do with these issues. The CLECs should not be allowed to use an unrelated proceeding — this Commission's review of the transaction — to ask for accommodations that they either have unsuccessfully sought or should seek (and in some cases are seeking) in other proceedings, either before the Commission or the FCC.[82] Nor is it appropriate for them to use this proceeding to restrict the rights of any parties, including Verizon, with respect to other issues, such as the process for setting UNE prices. These proposals are

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[81] Cox seeks a three year extension of Verizon and MCI's interconnection agreements, granting CLECs an unlimited right to terminate the agreement at any time. *Cox Comments* at 22-25. Cox also seeks a requirement that Verizon permit CLECs to adopt whole interconnection agreements obtained with Verizon anywhere in its 29 state footprint, exclusive of price and state-specific performance measures. *Cox Comments* at 22. The OAG suggests that the Commission require Verizon to make available to any CLEC any non-price term of any interconnection agreement between Verizon and MCI. OAG Comment at 9-10.

[82] *See Joint Petition of MCI WorldCom Inc. and Sprint Corporation for approval to transfer control of Sprint Corporation's Virginia Operating Subsidiaries to MCI WorldCom Inc.*, PUC-1999-00244, Order Denying Requests for Hearing (Va. SCC, Mar. 8, 2000) at 1 (denying request for hearing in part because "some of the matters raised by the parties are either beyond the control of this Commission" or concern matters "which are the subject of a separate proceeding.")

little more than attempts to overrule recent decisions by the FCC and by this Commission,[83] and should be rejected.

1. The CLECs' Special Access Concerns Are Ill-Founded.

While XO, Covad and Qwest seek to freeze the pricing of special access services,[84] they advance no credible merger-specific arguments to support this condition. Moreover, the vast majority of special access services provisioned in Virginia are interstate.[85] Interstate special access is regulated at the FCC, and the FCC is the proper forum for these arguments – which is demonstrated by the fact that these very arguments have been raised as part of the FCC's review of the transaction.[86] The transaction will not be completed until all necessary governmental and regulatory approvals and reviews have been obtained or completed. This process includes a review by the Department of Justice as well as the FCC. The Commission can be assured, therefore, that XO, Covad, Qwest, and any other party has the opportunity to bring its interstate concerns, if any, to the attention of the appropriate federal agency.

This Commission's review of the transaction cannot be used as a means of extending state jurisdiction over interstate tariffs. While the jurisdictional limitation should be dispositive for this issue, Dr. Taylor also describes how the market for special access services in Virginia is

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[83] For example, the Commission has already found a merger proceeding not the appropriate place to address UNE rates. *See BA/GTE Merger Approval Order* at 4.

[84] *See Covad/XO Comments, Montgomery Testimony* at 63-65; *Qwest Comments* at 18, 23.

[85] Only 5% of the special access provided by the Verizon ILECs in Virginia is intrastate. Intrastate special access and private line are already price regulated as under Verizon's ARP as Other Local Exchange Services ("OLETs"), and those prices cannot be changed absent "an appropriate proceeding is initiated and held under the provisions of § 56-235.5D of the Code of Virginia." Verizon ARP § B(1).

[86] *See generally In the Matter of Application for Consent to Transfer Control Filed by Verizon Communications Inc. and MCI, Inc.*, WC Docket No. 05-07, Joint Opposition of Verizon Communications Inc. and MCI, Inc. to Petitions to Deny and Reply Comments (May 24, 2005).

sufficiently competitive that caps and proxies are not needed to assure that special access rates remain reasonable. *Taylor Statement* at ¶¶ 204, 207-216.

Moreover, as a factual matter, Verizon will not be able to harm competition by manipulating the special access market post-transaction, as suggested by Qwest, since Verizon's interstate special access services are regulated by the FCC. Since 1999, the FCC has regulated Verizon's interstate special access through two different regulatory regimes: price caps, which date back to 1990, and pricing flexibility, which was instituted in 1999.[87] In both pricing flexibility and price cap areas, moreover, Verizon remains subject to the FCC's rules that require Verizon to permit competitors to obtain unbundled access, at TELRIC rates regulated by state public utility commissions pursuant to standards the FCC has established, to high-capacity loops and transport at the DS1 and DS3 capacity levels.[88]

2. The Commission Cannot, And Should Not, Force Verizon To Provide Access To Loops And Transport Regardless Of Whether Impairment Exists.

The CLEC intervenors seek to use this transaction to circumvent federal unbundling policy, and ask that the Commission require unbundling of loops and transport where impairment does not exist. At least twice this Commission has turned down CLEC invitations to undo the FCC's unbundling regime.[89] This case is not the appropriate place to re-litigate issues that have

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[87] *See Pricing Flexibility Order* ¶ 14.

[88] Although Verizon has challenged these rules as unlawful, Verizon will still be required to provide unbundled access to high-capacity UNEs in all instances except where the D.C. Circuit and the FCC conclude that other carriers would not be impaired without access to such UNEs. Thus, to the extent that Verizon obtains further relief from existing unbundling obligations, it would only be because of findings that UNEs are not needed in order for other carriers to compete.

[89] *See, supra,* n. 73.

been already addressed and resolved. The Commission should reject the proposed conditions regarding the high capacity loops and transport.

3. The Commission Cannot Re-Write The Provisions Of Verizon's Interconnection Agreements In This Proceeding.

Although federal law empowers the Commission to arbitrate interconnection agreements between carriers, once those agreements are executed they are binding contracts between the parties.[90] Virginia law is very clear that modification of a contract requires the express consent of both parties. *Powell Mountain Joint Venture v. Moore*, 248 Va. 63, 66, 445 S.E.2d 135, 137 (1994); *Stanley's Cafeteria, Inc. v. Abramson,* 226 Va. 68, 72, 306 S.E.2d 87 (1983). The Commission cannot use this proceeding to re-write the terms of such contracts. *See Graphic Arts Manual Ins. Co. v. C.W. Warthen Co.*, 240 Va. 457, 460, 397 S.E.2d 876, 878 (1990) ("[i]t is the function of the court to construe the contract made by the parties, not to make a contract for them.") Thus, the Commission must reject requests[91] to modify the provisions of Verizon's interconnection agreements through the imposition of new terms and conditions not part of any arbitrated or negotiated agreement.[92]

B. The Commission Should Reject Qwest's And Cavalier's Request That It Force A Divestiture Of Customers And Facilities.

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[90] The Commission has repeatedly held that Interconnection Agreements are binding contracts under Virginia law. *See e.g. Petition of Cavalier Telephone LLC v. Verizon Virginia, Inc.*, Case No. PUC-2002-00089, Final Order (Jan. 31, 2003) at 2 (characterizing a dispute under an interconnection agreement as a contractual dispute).

[91] *Covad/XO Comments, Montgomery Testimony* at 77; *Cox Comments* at 22-25; *OAG Comments* at 9-10.

[92] In the same vein, NTELOS raises claims related to Verizon's wholesale billing, asking the Commission to condition the transaction on Verizon's guarantee that it will fix those problems before approving the transaction. *NTELOS Comments* at 3. NTELOs suggests these billing issues arose out of the BA/GTE merger. However, these billing issues actually arose out of CLEC's opting into the AT&T and MCI interconnection rates adopted by the FCC. Verizon has isolated the problem, and is working towards a solution. As mentioned above, the transaction does not involve the merger of either company's assets, lines, works, or systems, and therefore no new billing issues should arise as a result of the transaction.

Qwest recommends that the Commission order divestiture of MCI's overlapping facilities and customers in Virginia.[93] *Qwest Comments* at 18, 19-21.[94] Qwest contends such divestures are necessary to mitigate alleged harms to competition.[95] However, as demonstrated by Dr. Taylor, the transaction will not result in any harm to competition that needs to be "offset." Moreover, a government-mandated, forced reassignment of customers is not only unrealistic, but harmful to Virginia consumers for many reasons.

First, with respect to MCI's mass market customers, there is no harm to mass market competition resulting from this merger. MCI has explained at length the reasons that it chose—independently of and ***prior*** to the transaction to manage the decline of its mass market, and has given specific details regarding MCI's declining presence in the market, both nationally and in Virginia. *See Hallbach Statement* at ¶¶ 2, 12-32. Moreover, Dr. Taylor describes in detail why

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[93] This issue has been raised at the FCC in its review of the transaction. *See ACN FCC Comments* at 51.

[94] Similarly, Cavalier requests that the Commission require MCI to divest its UNE-P customers and dedicated transport facilities to a competitor. July 18, 2005 Cavalier Comments at 2, 5, 7. Despite Cavalier's claims that Virginia has only "a semblance of competition," *Cavalier Comments* at 5, as the Commission is aware, Cavalier has a strong facilities-based presence in Virginia and has been successful at capturing many residential and business customers. Indeed, Cavalier's marketplace success is evident by the fact that over two million calls from Verizon customers were blocked in the Metro-Washington area when Cavalier's switch serving Northern Virginia failed for a day on August 15, 2005. In addition, as discussed by Dr. Taylor, there is a substantial amount of intermodal competition. *Taylor Statement* at ¶¶ 50-89, 144-156, 176-191. Finally, as discussed by Ms. Hallbach, the acquisition of MCI will not harm competition due to MCI's continuing and irreversible decline in the telecommunications market that was occurring regardless of the transaction. *Hallbach Statement* at ¶ 2, 12-32.

[95] Qwest contends that the DOJ was prepared to enter into a consent decree requiring a similar condition in the would-be merger of Qwest and Allegiance. *Qwest Comments* at 19-20. However, it is by no means clear that the ill-fated transaction between Qwest and Allegiance was similar in any respect to the transaction at issue here. In any event, whatever action the DOJ was prepared to take in connection with Qwest's ultimately unsuccessful effort to merge with Allegiance, it should have no bearing here. The DOJ is also reviewing this transaction and will take whatever action it believes is appropriate. This Commission should not require divestiture here based on unsubstantiated and unsupported claims that a federal agency was going to require divestiture in another, completely unrelated transaction. Furthermore, the evidence here demonstrates that divestiture is neither necessary nor appropriate given the minimal overlap in facilities and customers and the existence of numerous other competitors in areas where overlap exists. While Qwest has made no pretense of the fact that its plan in the wake of its failure to acquire MCI is to force divestiture, the Commission should not allow itself to be used to further that business plan by taking such a drastic and unnecessary step.

the mass market segment is and will remain so after the transaction due to the wide availability and use of intermodal alternatives from cable, wireless, Internet, and broadband service, and VOIP providers. *Taylor Statement* at ¶¶ 151-156. Thus, there is no "harm" to remedy with a divestiture of MCImetro's mass market customers.

Second, such a requirement would be decidedly anti-consumer and unnecessary. MCImetro will remain as an affiliate of Verizon after the merger, and the companies plan no immediate changes to tariffs or services. Any MCImetro customer who does not want to remain as a customer today or after the merger has an opportunity without restriction to leave and take his or her service to a different carrier. It is not necessary for the Commission to force customers to do what they are free to do themselves.

With respect to MCI's dedicated transport and loop facilities, as explained by Dr. Taylor, the evidence of actual deployment of competitive fiber networks in Virginia demonstrates that this transaction will not result in any meaningful "increase in concentration" that needs to be "offset." *Taylor Statement* at ¶¶ 207-212. Therefore, there is no basis for considering the divestiture of MCI's facilities in Virginia. Such a divestiture would threaten serious disruption and interfere with the decision of enterprise customers to contract with MCI to provide the local component of their service over MCI's facilities, and likely their long distance and any global service as well. MCI's network is, in fact, constructed of fiber rings that are highly integrated with MCI's long distance, Internet, and data networks. These shared facilities, therefore, serve not only the Virginia customers that MCI serves entirely over its own facilities or in part using third-party facilities, but also those customers and their businesses outside of Virginia (and, indeed, outside of Verizon's territory). In addition, such divestiture would be a complex, costly, and disruptive process for MCI's Virginia customers served using the shared fiber transport facilities, whether those customers are served using MCI's self-deployed fiber loops or facilities obtained from other carriers. MCI's enterprise customers chose MCI because MCI offered a competitive combination of expertise, service, and price; there is no basis for the Commission to divest these sophisticated customers of their choice to remedy a non-existent problem and satisfy the desires of a thwarted suitor for MCI. Divestiture would increase, not decrease, customer disruption and potentially disadvantage Virginia-based enterprise customers to the detriment of the Virginia economy. Finally, divestiture of these facilities would substantially reduce efficiencies to be obtained through this transaction.

C. The Commission Should Reject The Proposed Stand-Alone DSL Condition.

Qwest recommends that the Commission condition approval of the transaction on Verizon's and MCI's agreement to provide stand alone DSL in all of its regions. *Qwest Comments* at 15-16, 19.[96] Qwest suggests that without such a requirement, "it will be difficult for certain VoIP providers to compete with the post-merger Verizon/MCI entity where those VoIP providers' services require a telecommunications broadband connection to the Internet." Qwest Comments at 15. Dr. Taylor demonstrates the fallacy of this claim. Taylor Statement at ¶ 89.

Qwest's suggestion is also largely moot because Verizon is already offering in Virginia several forms of "stand-alone DSL" services now and is working towards offering other varieties

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[96] Presumably, Qwest's proposal is for a retail stand-alone DSL service rather than a wholesale service. To the extent Qwest seeks a wholesale stand-alone DSL service, the Commission should note that the FCC has found a wholesale DSL UNE, defined as line sharing, to be inconsistent with the mandatory unbundling standards set out in the Telecom Act. *See Triennial Review Order* ¶¶ 258-60 (finding that CLECs are ***not*** impaired without access to the high frequency portion of the loop ("HFPL"), over which DSL is provided); *United State Telephone Ass'n v. FCC*, 359. F.3d 554, 585 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied.* (upholding the FCC's finding).

in Virginia once it has resolved certain technical issues.[97] Verizon realizes that offering such a product is imperative as a business matter, as customers are increasingly relying on broadband services to communicate and, in the process, are rapidly subscribing to VoIP services provisioned over broadband lines.[98] Verizon has moved to respond to this demand, currently providing stand alone DSL to some customers.

Nevertheless, even if Qwest's request were not largely moot, the Commission cannot require Verizon to offer stand-alone DSL service. Earlier this month, the FCC adopted an order declaring wireline broadband Internet access to be an unregulated information service.[99] This Commission has no jurisdiction to regulate the rates, terms, and conditions on which Verizon offers this *interstate* service, including regulation of whether Verizon offers this service separate from its retail voice product.[100]

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[97] In April 2005, Verizon VA began offering stand-alone DSL service to existing customers who port their voice line to a facilities-based carrier (including a VoIP provider) or wireless carrier but who want to retain their DSL service without the voice service. In June, Verizon VA expanded its offering to customers in who do not currently have voice service with Verizon. *See* FCC Tariff No. 1, Access Services, § 16.8(D)(4)(b); FCC Tariff No. 20, Communications Services, § 5.1.2(D)(2). Therefore, for example, Verizon's DSL customers can cancel voice service from Verizon, obtain voice service from an independent VoIP provider such as Vonage, and retain their DSL line provided by Verizon. New customers who do not currently have Verizon VA voice service can also purchase stand-alone DSL and, for example, obtain service from an independent VoIP provider. Verizon is working towards implementing stand-alone DSL service for additional customers and scenarios in the near future. Verizon must resolve operational and technical issues and perform extensive process and systems work before it can roll-out a broader stand-alone DSL offering.

[98] Thomson StreetEvents, VZ – Q2 2005 Verizon Earnings Conference Call, Final Transcript at 7 (July 26, 2005) ("In the next few months we will be more actively marketing 'DSL over dry loop,' or 'naked DSL.' We believe this presents a significant new opportunity for us to provide a data solution for the large number of wireless-only households.") (Statement of Doreen Toben, Verizon CFO).

[99] FCC News Release, FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access Services (Aug. 5, 2005), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260433A1.pdf.

[100] Finally, to the extent Qwest contemplates requiring Verizon to provide retail DSL service on the same line over which an end-user customer obtains voice service from a CLEC, such an obligation would be unlawful for still another reason. In the *BellSouth Preemption Declaratory Ruling*, the FCC explicitly held that states violate federal law to the extent they require incumbents to provide DSL service to customers that purchase voice service from CLECs that use unbundled loops. *See id.* ¶¶ 17, 25-26. That is because such a requirement would impose on

D. The Commission Should Reject The Proposed Conditions On Wholesale And Interconnection Relationships.

Qwest recommends that Verizon and MCI be required to offer its wholesale contract customers a "fresh look" right to terminate their contracts without termination liability. *Qwest Comments* at 19, 23-24. As noted, above, Virginia law clearly prohibits courts from re-writing valid, binding contracts. Moreover, Qwest's primary justification for this condition is its assertion that the merger has "profound implications" for current Verizon and MCI customers, but this contention ignores a critical fact—that the Verizon-MCI Agreement and Plan of Merger requires no change in the operations of the regulated subsidiaries of Verizon and MCI in Virginia. The transaction is a parent level stock transaction only. Verizon and MCI will continue, post-transaction, to honor the terms and conditions of those contracts, and any post-transaction modifications to the prices, terms, or availability of regulated services will occur in accordance with all applicable laws and regulatory approval requirements. The same is true of any post-transaction changes to MCI entities or assets. Given these facts, it is hard to see what the "profound implications" for customers are from a transaction that will be largely transparent to existing customers, and Qwest has failed to provide any meaningful details.

Qwest makes an additional observation that its recommended "fresh look" condition will add pressure on Verizon to offer competitive special access rates, terms and conditions. However, the special access market already is subject to sufficient competition, as demonstrated by Dr. Taylor. *Taylor Statement* at ¶¶ 204, 207-216. The Commission should ignore this unnecessary and counterproductive condition.

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incumbents an obligation to "do exactly what the [FCC] expressly determined was not required by the Act" – namely, to provide DSL service over the high-frequency *portion* of a loop – and is "therefore inconsistent with federal law. *Id.* ¶ 27.

V. CONCLUSION

For the reasons set forth in the Petition, this Response, and the attached statements, Verizon and MCI request that the Commission unconditionally approve the Petition.

Respectfully submitted,

Verizon Communications Inc.

Lydia R. Pulley
Vice President and General Counsel
Verizon Virginia
600 East Main Street, 11th Floor
Richmond, VA 23219
(804) 772-1547 (tel)
(804) 772-2143 (fax)
lydia.r.pulley@verizon.com

MCI, Inc.

Michelle Painter /erp
Senior Counsel
MCI, Inc.
22001 Loudoun County Parkway
Ashburn, VA 20147
(703) 886-5973 (tel)
(703) 886-0633 (fax)
michelle.painter@mci.com

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