

predictions about such behavior. For these reasons, the FCC aggregates all customers within a hypothetical product market facing the same competitive alternatives.

Within the Verizon California territory, MCI provides fiber-based special access services in the Los Angeles-Long Beach-Santa Ana MSA, Santa Barbara-Santa Maria MSA, and Oxnard-Thousand Oaks-Ventura MSA. An analysis of buildings served by MCI fiber in Verizon's California territory shows that as of June 30, 2005, approximately [ ] [Confidential] buildings were connected to MCI fiber in Verizon's in-state region.<sup>103</sup> At least [ ] [Confidential] of those [ ] [Confidential] buildings are "lit" by at least one competitor other than MCI; another [ ] [Confidential] of the remaining [ ] [Confidential] buildings are located within [ ] [Confidential] of fiber deployed by competitors other than MCI, or are buildings where known customer demand is at two DS3 levels or greater.<sup>104</sup> In addition, at least [ ] [Confidential] of the [ ] [Confidential] buildings served by MCI in Verizon's California territory are located within [ ] [Confidential] of fiber deployed by competitors other than MCI, or had customer demand of least two DS3 levels or greater.<sup>105</sup> Confirming that competition is adequate for buildings that demand two DS3 or higher capacity, various other data show that an average of 19 fiber rings have been deployed in each of the top 50 MSAs.<sup>106</sup> Thus, 17 fiber wholesalers – companies that have deployed fiber to serve other CLECs and ILECs – operate in the greater Los Angeles MSA, 14 do business in the greater San Francisco MSA, and 13 provide service in the greater San Diego MSA.<sup>107</sup>

Although the above analysis does not reveal number of buildings to which MCI provides DS1 and DS3 service over non-fiber lines<sup>108</sup> within the Verizon territory, the applicants have verbally revealed to this office that fewer than [ ] [Confidential] buildings are served by MCI with copper lines within Verizon's territory, in addition to the [ ] [Confidential] cited above.

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<sup>103</sup> Data presented by Verizon and MCI at September 7, 2005 meeting with Quyen Toland, Kathleen Foote, and Frank Wolak (via conference call) at the Office of the Attorney General, San Francisco.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* The revenues available from the "large enterprise customers" that demand fiber at OCn or "two DS3s" of capacity levels generally justify the investment necessary to overcome the sometimes "quite high" fixed and sunk costs of constructing new fiber. *TRRO*, at ¶154. Thus, the FCC has found that "it is generally feasible for a carrier to self-deploy its own high-capacity loops when demand nears two DS3s of capacity to a particular location." *TRRO*, at ¶177.

<sup>106</sup> UNE Fact Report 2004, at III-3, Appendix D.

<sup>107</sup> *Id.* at Appendix D.

<sup>108</sup> In contrast to OCn, DS1 level service can be provided over conventional copper lines if certain hardware is installed at the LEC's central office. See <http://www.supertrunk.com/>.

The data above lead to a number of conclusions regarding the competitive effect of this merger on special access services. First, the data reveals that only a very small number of buildings in Verizon's California territory served by MCI are subject to any potential reduction in competition. Second, the majority of the MCI-lit buildings are in Verizon's California service areas where other CLECs operate within close proximity; this facilitates the ability of other firms to replace MCI as a competitor in serving these buildings.

Under the Merger Guidelines, potential entry is deemed sufficient "to deter or counteract the competitive effects of concern" where such entry "can be achieved within two years from initial planning to significant market impact."<sup>109</sup> In evaluating the ability of competing carriers to deploy fiber to buildings that MCI serves, it should be recognized that the competing carriers would not need to deploy new fiber rings, but only need to connect fiber "laterals"<sup>110</sup> that connect the rings to the buildings themselves. When fiber is deployed, competing carriers typically "pre-install several break-out points...to give engineers access to fiber for future lateral connections" so that lateral extensions can be added later at lower cost.<sup>111</sup> [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]<sup>112</sup> [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] Thus, potential entry here should be sufficient within the Merger Guidelines to counteract any potential anticompetitive effects of the merger on special access DS1 and DS3 services.

#### F. Internet Backbone

Several parties challenge the integration of Verizon's Internet access services into MCI's Internet backbone without alleging specific competitive effects in markets for either of those services. We find that both of those markets are unconcentrated and will remain so after the completion of the merger.

The Internet combines three types of participants: end users, Internet service providers (ISPs), and Internet backbone providers (IBPs). "End users send and receive information; ISPs allow end users to access Internet backbone networks; and IBPs route traffic between ISPs and interconnect with other IBPs."<sup>113</sup>

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<sup>109</sup> Guidelines §§3.0, 3.2.

<sup>110</sup> A "lateral" is the "fiber-optic facility used to connect a fiber-optic ring to a particular customer location." *TRRO*, P.153, n.425.

<sup>111</sup> UNE Fact Report 2004, at III-16 [Footnotes omitted] Furthermore, "[t]he laterals themselves cost considerably less than the initial ring, because they can be buried just a few inches deep, rather than being laid in ducts." *Id.* [Footnote omitted].

<sup>112</sup> See Attachment 6, Special Access White Paper, submitted to the U.S. Department of Justice, dated July 29, 2005.

<sup>113</sup> *WorldCom/MCI*, ¶143.

Although they compete for ISP customers and larger business users, IBPs must also interconnect to offer their own end users access to other users and to websites and other content available through other IBPs.<sup>114</sup> Smaller IBPs pay other IBPs under "transit" agreements to carry their traffic, the amount depending upon the capacity of the connection. Traffic exchanged under the "peering" arrangements between larger, "Tier 1" Internet backbones, in contrast, is settlement-free; these networks do not charge each other for connectivity, but intermediate transit is not provided to non-Tier 1 IBPs.<sup>115</sup>

Verizon is a vertically-integrated ISP that also provides Internet backbone services. Its Internet backbone is used to carry traffic of Verizon's own end-user customers; it does not provide transit services to other backbone providers.<sup>116</sup> Verizon purchases transit service from Qwest and Level 3.<sup>117</sup> MCI is a Tier 1 Internet backbone service provider, but is not involved in the downstream retail broadband services market.<sup>118</sup>

In *WorldCom/MCI*, the FCC reviewed and approved a proposed divestiture of MCI's Internet backbone negotiated by the Department of Justice with the merging parties. The relevant market for assessing the effects of the divestiture was Internet backbone services, and the relevant geographic market was the United States.<sup>119</sup>

We accept the FCC's relevant market findings in this review and conclude that the backbone market will remain competitive following the completion of this merger. Employing various metrics, applicants' expert Dr. Kende showed that the post-merger market for Internet backbone will be highly unconcentrated. Revenue data indicates that MCI has a 9.1% market share while Verizon has a 5.2% share.<sup>120</sup> Measured in terms of traffic volume, MCI has approximately 7.4% share of Internet traffic in North America,

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<sup>114</sup> *Id.* at ¶144.

<sup>115</sup> *Id.* at ¶145.

<sup>116</sup> Response of Verizon to the Commission's May 5, 2005 Initial Information and Document Request, *In the Matter of Verizon Communications Inc. and MCI, Inc.* WC Docket No. 05-75 (FCC May 26, 2005), Response to Specification 8.a.5.

<sup>117</sup> *Id.*

<sup>118</sup> Reply Testimony of Lee L. Selwyn on Behalf of the Office of Ratepayer Advocates, *In the Matter of the Joint Application of Verizon Communications Inc. and MCI, Inc.*, A. No. 05-04-020 (PUC April 21, 2005) ("Selwyn Reply Test.") at p. 160.

<sup>119</sup> *Id.* at ¶148.

<sup>120</sup> Declaration of Michael Kende, attached to *In the Matter of Verizon Communications Inc. and MCI, Inc.* WC Docket No. 05-75 (F.C.C. May 24, 2005) ("Kende Decl.") at Annex A.

while Verizon has approximately 2% share.<sup>121</sup> Thus, post-merger the combined firm would account for at most only 9.5% of the total Internet traffic in North America. The combined Verizon-MCI would rank as the fourth largest Internet backbone in terms of traffic volume, with major competitors that include SBC-AT&T, Sprint, Level 3, Qwest, SAVVIS and AOL.<sup>122</sup> Furthermore, a combined Verizon-MCI together with SBC-AT&T will still have approximately 28% of Internet traffic, while the top seven backbones would carry about 65% of total Internet traffic.<sup>123</sup> Given these numbers, the combined Verizon-MCI would not have the market share necessary to successfully engage in anticompetitive activities in such an unconcentrated Internet backbone market.<sup>124</sup> We similarly find that the market for ISP services is highly unconcentrated and will remain so post-merger.

Nonetheless, several intervenors contend that combining Verizon with MCI, a Tier 1 peering provider, will raise prices for IP-based services<sup>125</sup> or induce degraded ISP access to the Internet backbone.<sup>126</sup> For example, ORA contends that after the merger, “Verizon will acquire the ability to access the Internet backbone on a peer-to-peer basis, and will avoid a significant cost that *every other retail ISP is forced to incur* [sic].”<sup>127</sup> ORA hypothesized that Verizon’s “considerable cost advantages” relative to its rivals—principally the cable companies—would allow it to engage in a predatory price squeeze that could eventually force competitors out of the market altogether.<sup>128</sup> However, ORA and the other intervenors do not explain how such an outcome is likely when both the Internet backbone and ISP markets are unconcentrated with low entry barriers.<sup>129</sup> Furthermore, the intervenors do not explain the mechanism by which many ISPs successfully competed against MCI and other vertically

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<sup>121</sup> Reply Declaration of Michael Kende, attached to Joint Opposition of Verizon Communications Inc. and MCI, Inc. to Petitions to Deny and Reply to Comments Before the FCC, *In the Matter of Verizon Communications Inc. and MCI, Inc.* WC Docket No. 05-75 (F.C.C. May 24, 2005) (“Kende Reply”) at ¶8.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Dr. Kende also pointed out that competition for backbone services is intensifying due to a number of different factors. They include the relatively low cost of fiber, routers and other inputs required to provide backbone services, along with the availability of efficient interconnection points with other networks. These trends have placed downward pressure on transit prices and total revenues in the Internet backbone market. *Id.* at ¶¶18-29.

<sup>125</sup> *Protest of Pac-West Telecomm, Inc. (“Pac-West”),* 15

<sup>126</sup> *Id.*

<sup>127</sup> Selwyn Reply Test., at 160.

<sup>128</sup> *Id.*

<sup>129</sup> See Reiffen and Vita, *Is There New Thinking on Vertical Mergers? A Comment*, 63 *Antitrust L.J.* 917, 919 (1995)(where both markets are competitive, “a unilateral reduction by the integrated firm would be offset fully by out expansions on the part of nonintegrated input suppliers.”)

integrated firms when the market was considerably more concentrated than it is today.

The hypothesized motivation for the surviving firm to predatorily degrade rivals' ISP service is also unclear. As explained in a slightly different context, a firm that raises a rival's costs may improve its competitive position relative to the victim, but dilute the quality of its own product in doing so (e.g., by reducing connectivity), and thereby suffer relative to the many other suppliers that remain.<sup>130</sup> As discussed above, Dr. Kende reported that post-merger Verizon and MCI will have a combine share of Internet traffic of at most only 9.5 percent.

#### **V. POST-MERGER TRANSACTIONS BETWEEN VERIZON AND NON-REGULATED AFFILIATES**

In this case, the Joint Applicants propose a merger of the parent companies of Verizon California and the MCI subsidiaries that provide service in California. Once the transaction is completed, the MCI subsidiaries in California will remain subsidiaries of MCI, some which may not be subject to CPUC jurisdiction. Furthermore, the Agreement does not call for the merger of any assets, operations, or facilities of the MCI subsidiaries with the assets, operations or facilities of any Verizon entity.<sup>131</sup> There are two concerns related to such an arrangement.

First, we are concerned that this arrangement could produce incentives for the two "independent" entities to engage in anticompetitive cross-subsidization between the MCI subsidiaries that will not be regulated by the CPUC and their CPUC-regulated parent company, Verizon. An example of an anticompetitive cross-subsidization that could occur is one in which Verizon ratepayers end up paying for purchases made by MCI at inflated prices. We advise that the CPUC use its regulatory mandate to scrutinize post-merger transactions between Verizon's regulated and non-regulated affiliates to make sure that such cross-subsidizations does not occur.

Second, we find it difficult to understand how any post-merger efficiencies can be realized if the facilities of the two companies remain separate and operated independently, rather than being combined and their capacities maximized. As this transaction is presently structured, the only change that would result from this merger is that MCI profits that once would have gone to MCI shareholders would now go to Verizon shareholders.

#### **VI. CONCLUSION**

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<sup>130</sup> Bamberger/Carlton Reply Decl. at ¶87.

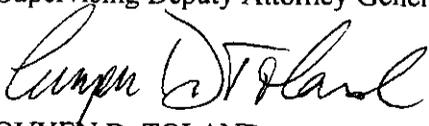
<sup>131</sup> PUC Application at 10-11.

We find that the parties do not compete in any meaningful sense in the relevant markets for facilities-based mass market services and that the merger will not significantly increase concentration levels in the competitive market for Internet backbone services. In addition, we find that the merger will not adversely affect competition in the special access services market. We are, however, concerned that the merger, as structured, may not yield the kind of efficiencies that Verizon and MCI touts in their Joint Application, and that there may be incentives for the companies to engage in post-merger transactions harmful to ratepayers absent CPUC scrutiny.

Dated: September 16, 2005

Respectfully submitted

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**DECLARATION OF SERVICE**

Case Name: In the Matter of the Joint Application of Verizon Communications Inc. ("Verizon") and MCI, Inc. ("MCI") to Transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI  
Application No.: 05-04-020

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause.

On September 16, 2005, I served the attached

**OPINION OF THE ATTORNEY GENERAL ON COMPETITIVE EFFECTS OF  
PROPOSED MERGER OF VERIZON COMMUNICATIONS, INC. AND MCI, INC. -  
PUBLIC VERSION**

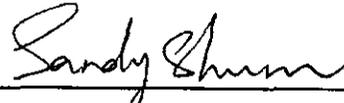
via e-mail to the addressees whose e-mail addresses are listed on the service list attached

via regular mail to the addressees as indicated on the service list attached.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 16, 2005, at San Francisco, California.

Sandy Shum

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Typed Name



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Signature

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