050000

2005 Competitive Local Exchange Carrier (CLEC) Data Request
(Due by July 15, 2005)

Legal Company Name: XO Communications Services, Inc.

D/B/A: XO

FPSC Company Code (e.g., TX000): TX205

Contact name & title: Jennifer Martin, Lead Regulatory Analyst

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Stock Symbol (if company is publicly traded): XOCM.OB

Services Provided in Florida

1. Do you provide local telephone service in Florida? Circle your response: **Yes**

2. Please indicate which of the following services your company provides. Select all that apply.

__X__ Local telephone service
__X__ Private line/special access
_____ Wholesale loops
_____ Wholesale transport
__X__ Interexchange service
_____ Cellular/wireless service
_____ Paging service
_____ Prepaid service
__X__ VoIP
_____ Cable television
_____ Satellite television
__X__ Broadband Internet access

3. If your company provides **prepaid** local telephone service, is this the only service you currently provide in Florida? Circle your response: **NA (not applicable)**

Bundled Services

4. Please complete the following table. For each residential and business package of bundled services you sell, list its name (e.g., Sprint Solutions), mark the included services, and enter the price and take rate. The take rate is calculated by dividing the number of customers that have subscribed to the corresponding package by the number of customers that can obtain that package from your company.

Residential	Name of Package	Local	Long -Distance	Broadband	Wireless	Video Service	Price	Take Rate
	XO DOES NOT CURRENTLY PROVIDE RESIDENTIAL SERVICE IN FLORIDA							

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Business	Name of Package	Local	Long Distance	Broadband	Wireless	Video Service	Price	Take Rate
	True Business Total Communications	X	X				$131 to $160	(1)
	True Business LD	X					$10 to $100	(2)
	True Business Solutions	X					$117 to $141	(3)
	PRI package	X	X	X			$599 to $785	(4)
	Integrated Access Bundled Package		X				$385 to $810	(5)
	Business Plus	X	X				$0.05 per min.	

(1) Price varies by ILEC.
(2) Price varies according to the quantity of long distance minutes purchased.
(3) Price varies by ILEC region and term commitment.
(4) Price varies by ILEC region.
(5) Price varies by ILEC and quantity of voice channels.

VoIP

5. Indicate below whether you are offering or providing VoIP service to end-user customers in Florida. For purposes of this question, VoIP service is defined as IP-based voice service provided over a digital connection. VoIP calls under this definition may or may not terminate on the PSTN.

___ Not offering VoIP service in Florida.
X Offering business VoIP services.
___ Offering residential VoIP services.

If you are offering or providing VoIP service in Florida:

a. Provide the exchanges where you are offering VoIP service. – **See Attachment A**

b. Provide residential price(s) for VoIP service. – **XO is not providing residential service in Florida.**

c. Provide business price(s) for VoIP service. – **See Attachment A**

d. List all call features included with the service, e.g., call forwarding, caller ID, voice mail, etc.

e. Check all that apply to your VoIP service:

- ___ Offer wireless VoIP service.
- **X** Offer wireline VoIP service.
- **X** 911 (Location information not provided automatically to PSAP).
- ___ E911 (Location information provided automatically to PSAP).
- ___ CALEA (Communications Assistance for Law Enforcement Act).
- ___ Telephone Relay Service.
- ___ Power Backup (If so, identify time duration below, e.g., 4 hours, 8 hours).
- ___ Time duration of power backup (in hours).
- **X** Directory Assistance.
- **X** Operator Services.
- ___ Equal Access to long distance providers.
- **X** Local Number Portability.
- **X** Local Calling.
- **X** Long Distance Calling.
- **X** International Calling.
- **X** Contribute to Universal Service Fund.
- **X** Require VoIP subscriber to also purchase Broadband service.
- ___ Offered as primary line service.
- ___ Offered as secondary line service only.
- **X** Interconnected with PSTN.
- **X** Peer-to-Peer only (no interconnection with PSTN).
- ___ Use of public Internet.
- **X** Use of private IP network.
- ___ Call uptime 99.999%.
- **X** Use of numbers from the North American Numbering Plan Administrator.

f. If you are not offering or providing VoIP service to end-user customers in Florida, do you anticipate doing so? If yes, identify rollout month/year.

Broadband Internet Access

6. Information provided in your response to this question will be reported on an aggregate, statewide basis, not on a company-specific basis.

a. Please provide the percentage of residential households to which your broadband service is available in your service area. - **NONE**

b. Provide the total number of **residential** lines and wireless channels over which you or an affiliate are providing broadband service in your service area. - **NONE**

c. Provide the total number of **business** lines and wireless channels over which you or an affiliate are providing broadband service in your service area. - **See previous response and attachment B (FCC Form 477).**

d. What type(s) of broadband connection(s) do you provide?
_X_ xDSL
___ cable modem
___ satellite
_X_ fixed wireless
___ mobile wireless
___ Broadband over power line
_X_ Other (Specify) -

e. Please fill out the following table providing the downstream and upstream data transfer rates and the monthly price for each tier of broadband service you offer.

Data Transfer Rate – Broadband Service

Residential	**Downstream**	**Upstream**	**$ Price/month**
	N/A	N/A	N/A
Business	**Downstream**	**Upstream**	**$ Price/month**
	≤400Kbps		$820 to $2,160 *
	= 768Kbps w SLA		$1,130 to $1,470 *
	≤1.5Mbps		$1,030 to $4,980 *
	= 1.5Mbps		$1,840 to $5,545 *

*** All prices reflect XOption bundles comprised of local voice channels with features, domestic long distance usage options (ranging from 4,000 to 75,000 minutes per month), 256 kbps to 1.5 mbps shared or dedicated internet access (with or without service level agreement) and web hosting services including variable quantities of hosted storage, email accounts and web site development tools. All bundles are delivered over one or more DS1 facilities.**

FCC's Triennial Review Remand Order

7. The following questions relate to the FCC's Triennial Review Remand Order (TRRO), released on February 4, 2005.

a. Has your business plan in Florida changed as a result of the TRRO? If so, how? **XO is adjusting its rates and charges as needed to cover its increased network costs.**

b. If you are primarily a UNE-P provider do you expect to migrate to UNE-L, negotiate commercial agreements (to provide loop, switching, and transport), or change the focus of your business? **XO is primarily a facilities-based provider.**

c. Have you executed any commercially negotiated agreements with any carriers? If so, please identify the carriers. - **NO**

d. Is there any other information (or comments) that you wish to provide? - **NO**

Mergers

8. Several mergers have been announced in the past year, e.g., Sprint-Nextel, SBC-AT&T, and Verizon-MCI.

Do you anticipate more mergers? Why or why not? **Please see XO's attached oppositions filed at the FCC in both the SBC-AT&T and VZ-MCI dockets (Attachments C & D).**

What effects do you believe these mergers (if approved) will have on local competition in Florida? **Please see XO's attached oppositions filed at the FCC in both the SBC-AT&T and VZ-MCI dockets (Attachments C & D).**

Has your local competition strategy changed as a result of the merger announcements? If so, please explain how. **Please see XO's attached oppositions filed at the FCC in both the SBC-AT&T and VZ-MCI dockets (Attachments C & D).**

How will these mergers (if approved) affect your local competition strategy in Florida? **Please see XO's attached oppositions filed at the FCC in both the SBC-AT&T and VZ-MCI dockets (Attachments C & D).**

Miscellaneous

9. In 2004, how much money did you invest in your network directly serving Florida's local service customers? – **XO has invested in excess of [redacted] in its Florida network operations**

10. Are you currently operating under Chapter 7 or Chapter 11 protection? - **NO**

11. If you filed Form 477 with the FCC to include data as of December 31, 2004, please provide us with a copy. This form only applies to CLECs with a minimum of 10,000 access lines in Florida. – **See attached FCC Form 477**

Comments

12. Have you experienced any significant barriers in entering Florida's local exchange markets? Please list and describe any major obstacles or barriers encountered that you believe may be impeding the growth of local competition in the state, along with any suggestions as to how to remove such obstacles.

XO's experiences with anticompetitive conduct by ILECs in FL have been the subject of at least one complaint docket, and XO has, in the past, been forced to resort to arbitration in its negotiation of interconnection agreements. Although some of these issues have been resolved, XO relies on those past filings, as well as filings in currently active dockets, including but not limited to the ongoing generic change of law docket, for examples of both barriers encountered and relief sought by XO from the PSC to eliminate those barriers. In addition, XO has made numerous filings with the FCC regarding such issues, and asks that the PSC refer to such filings, including but not limited to the filings attached hereto, for additional examples of issues that may impede the growth of local competition on the state

of Florida.

13. Please provide any additional general comments or information you believe will assist staff in evaluating and reporting on the development of local exchange competition in Florida -
XO does not have any additional comments at this time.

TABLES 1, 2, AND 3

ARE

CONFIDENTIAL

AND

REDACTED IN THEIR ENTIRETY

ATTACHMENT A

ATTACHMENT A - XO Communications Services, Inc. 2005

XOptions Flex MRC	Florida (BS) - FTL	Florida (BS) - MIA	Florida (BS) - Vero Beach	Florida (Verizon) - TMP	Jacksonville	Sarasota	Tallahassee
	20	21	21	22	25	47	53
MRC Base Package							
1 Year	695	650	650	725	650	655	650
2 Year	595	585	585	625	585	590	585
3 Year	550	550	550	575	550	555	550
MRC Additional Line							
MRC	40	40	40	40	40	40	40
MRC High Speed Option							
1 Year	575	575	575	575	575	575	575
2 Year	500	500	500	500	500	500	500
3 Year	450	450	450	450	450	450	450
MRC Add-ons							
Auto Atten(	20	20	20	20	20	20	20
Call Centei	40	40	40	40	40	40	40
Voice VPN	0	0	0	0	0	0	0

XOptions Flex NRC	Florida (BS) - FTL	Florida (BS) - MIA	Florida (BS) - MIA	Florida (Verizon) - TMP	Jacksonville	Sarasota	Tallahassee
	20	21	21	22	25	47	53
NRC Base Package							
1 Year	1000	1000	1000	1000	1000	1000	1000
2 Year	500	500	500	500	500	500	500
3 Year	0	0	0	0	0	0	0
NRC Additional Line							
NRC -- initi	0	0	0	0	0	0	0
NRC -- suk	50	50	50	50	50	50	50
NRC High Speed Option							
1 Year	500	500	500	500	500	500	500
2 Year	500	500	500	500	500	500	500
3 Year	500	500	500	500	500	500	500
NRC Add-ons							
Auto Atten(	115	115	115	115	115	115	115
Call Centei	500	500	500	500	500	500	500
Voice VPN	100	100	100	100	100	100	100

ATTACHMENT B

ATTACHMENT B

IS

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REDACTED IN ITS ENTIRETY

ATTACHMENT C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
SBC Communications Inc. and	)	DA 05-656
AT&T Corp. Applications for	)	WC Docket No. 05-65
Approval of Transfer Of Control	)	
	)	

PETITION TO DENY OF CBEYOND COMMUNICATIONS, CONVERSENT COMMUNICATIONS, ESCHELON TELECOM, NUVOX COMMUNICATIONS, TDS METROCOM, XO COMMUNICATIONS AND XSPEDIUS COMMUNICATIONS

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XO Communications
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April 25, 2005

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
SBC Communications Inc. and	)	DA 05-656
AT&T Corp. Applications for	)	WC Docket No. 05-65
Approval of Transfer Of Control	)	
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PETITION TO DENY OF CBEYOND COMMUNICATIONS, CONVERSENT COMMUNICATIONS, ESCHELON TELECOM, NUVOX COMMUNICATIONS, TDS METROCOM, XO COMMUNICATIONS AND XSPEDIUS COMMUNICATIONS

For the reasons stated herein, Cbeyond Communications, Conversent Communications, Eschelon Telecom, Nuvox Communications, TDS Metrocom, XO Communications, and Xspedius Communications (collectively "Joint Petitioners"), through counsel, and in reliance on the attached Declaration of Simon Wilkie,[1] hereby urge the Commission to deny the pending Applications for Approval of the Transfer of Control (the "Application") of AT&T Corporation and its subsidiaries ("AT&T") to SBC Communications ("SBC") (AT&T and SBC together, the "Applicants").

I. INTRODUCTION AND SUMMARY

The Application for approval of the transfer of control of AT&T to SBC represents a true "gut check" for the new leadership of the FCC. The Applicants propose to consolidate the first and second largest providers of long distance telecommunications services in approximately 40

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[1] The Declaration of Simon Wilkie is attached hereto as Exhibit A (hereinafter "Wilkie Decl.").

percent of the nation, combine the first and second largest providers of retail local exchange services in the SBC region, and merge the telecom competitor with the largest and most ubiquitous competitive presence in the region with the incumbent. If the proposed merger were allowed, consumer welfare would likely be harmed in numerous and important ways. This petition focuses on two harms that are likely to be caused by the proposed merger: (1) a significant increase in the share of high-capacity local transmission inputs controlled by SBC and the consequent harm to competition in the provision of retail services to business customers; and (2) diminished retail competition in the provision of mass market retail circuit-switched telephone service. When considered in the broader context of the planned Verizon-MCI merger,[2] these harms are even more serious, as that second deal would result in the loss of the third largest competitor in SBC's region as well, with no other competitive service providers of sufficient size and scale available to replace MCI or AT&T in the marketplace. It is hard to imagine a transaction with more potential, indeed likely, anti-competitive effects. To approve such a deal, at least absent expansive and stringent conditions designed to remedy the anti-

[2] On March 24, 2005, the Commission issued a public notice seeking comment on the Verizon and MCI merger application. *See* FCC Public Notice, DA 05-762. Efforts by Qwest to acquire MCI continue, including a reported "best and final" offer that was ostensibly accepted by MCI over the April 23-24 weekend. Verizon, however, has generally been the frontrunner in the contest to acquire MCI, and this Petition assumes that the larger RBOC will prevail and the Verizon-MCI deal will be the one the Commission must ultimately rule on. Reports this morning in the press suggest that Verizon will continue the bidding war and top Qwest's latest offer. [*See, e.g.*, "*Verizon Likely to Increase MCI Offer*," WASHINGTON TIMES, April 25, 2005, Section C, p. 16.] The Joint Petitioners respectfully submit that the public interest requires that the proposed SBC-AT&T transaction not be evaluated in isolation given the active efforts of two other RBOCs to acquire MCI. However, should MCI ultimately accept an offer from Qwest, the Joint Petitioners will review an application for approval of a Qwest acquisition of MCI with interest and, if appropriate, supplement the record regarding potential coordinated efforts between the contemplated SBC/AT&T and a possible Qwest/MCI.

competitive effects, would render the transfer of control requirements of Sections 214(a) and 310(b)[3] meaningless.

A. The Harms to the Public Interest Caused by a SBC/AT&T Merger Would Likely be Enormous.

The Commission has made clear that no merger of telecommunications carriers can be in the public interest unless it enhances competition. The proposed SBC/AT&T combination is the antithesis of such a pro-competitive merger, and would actually undermine future competition in at least three important respects. *First*, the merger would substantially increase SBC's opportunities to engage in unilateral anti-competitive conduct by eliminating what is likely the most significant alternative provider of local transmission inputs needed to serve business customers. AT&T has one of the two most extensive CLEC networks of local transport and loop facilities in the SBC region. Competitors rely on the existence of the independent AT&T network both as an actual and potential source of alternative local network facilities. Indeed, the potential to purchase access to AT&T local network facilities is a critical assumption underlying the recent Commission determination to discontinue access to high capacity SBC UNEs in areas where wholesale competition appears likely. As important, the incomparable scale of AT&T enables it to negotiate discounted access to SBC's network and to provide the most significant alternative to SBC's excessively priced special access services.

Second, the merger would significantly reduce actual and potential competition in the market for the provision of circuit-switched telephone services to the mass market by eliminating the most likely and capable competitor in that market – AT&T. While Applicants make much of AT&T's recent announcement to cease marketing actively to certain mass market customers,

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[3] 47 U.S.C. §§ 214(a), 310(d); the Communications Act of 1934 and Telecommunications Act of 1996 hereafter are referred to as "the Act" and the "1996 Act" respectively.

there is no escaping the fact that AT&T continues to be the largest supplier of long distance and competitive local services to mass market customers, that its reason for scaling back its presence in the mass market, the elimination of unbundled switching, could easily be reversed, that its decision to abandon the mass market likely was timed to facilitate its plan to sell the company, and that in any event AT&T's market strategy simply is not static and has undergone an about face several times over the past decade. By merging, SBC would successfully lock in the current AT&T inclination (whatever its true cause) not to compete for the mass market, and reserve for itself an overwhelmingly dominant position in the mass market for both long distance and local circuit-switched telephone service in approximately 40 percent of the nation.

Third, when considered in tandem with the planned Verizon-MCI merger, the proposed SBC-AT&T merger would increase SBC's opportunities for coordinated anticompetitive conduct. The historical refusal of RBOCs to compete head to head, especially in the provision of local telecommunications services, is an established fact, and there is no significant evidence that their predilection to avoid competing with each other will change. Thus, if the Verizon transaction is completed, MCI is likely to be lost as a significant competitor in the provision of local transmission inputs in the SBC region, thereby making the loss of AT&T as a source of competitive local facilities even more acute. Similarly, the loss of MCI as a meaningful competitor for mass market long distance services reinforces the ability of SBC to establish an even more-dominant position in that market by leveraging its local services hegemony, and exploit its controlling position in the mass market to discriminate in the enterprise market.

These harms to competition are substantial, likely, and ignored by SBC and AT&T in their submission. Due to their likely harms to competition, the Commission formerly found unlawful (before attaching stringent remedial conditions) the proposed RBOC mergers of SBC-

Ameritech, NYNEX-Bell Atlantic, GTE-Bell Atlantic and Cingular-AT&T Wireless[4] – and it cannot depart from that well established precedent here.

B. Applicants Ignore the Likely Public Harms of their Merger, While Claiming Public Benefits That Are Insubstantial.

Despite the fact that they bear a heavy burden to prove that their merger is pro-competitive and thus in the public interest, Applicants have simply ignored the obvious threats to telecommunications competition enunciated above. Perhaps because they cannot, Applicants for example have virtually ignored the consequences of combining their overwhelming market share in the provision of local services with their combined dominance in the deployment of local network facilities. Both local market share and local facilities deployment are readily quantifiable with information in Applicants' possession, yet they choose not to include a scintilla of such critical data in their Application. Indeed, the Application can be fairly described as a virtual "fact free zone" in which Applicants chose to make sweeping and unsupported claims that

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[4] Application of GTE Corp. and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, *Memorandum Opinion and Order*, 15 FCC Rcd. 14032 (2000) ("*GTE/Bell Atlantic Merger Order*"); Applications of Ameritech Corp., and SBC Communications Inc., For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, *Memorandum Opinion and Order*, 14 FCC Rcd. 14712 (1999) ("*SBC/Ameritech Merger Order*"), *vacated in part sub nom, Ass'n of Communications Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (vacating part of order allowing SBC to avoid statutory resale obligations by providing advanced telecommunications services through an affiliate), *amended in part*, 16 FCC Rcd. 5714 (2001) (modifying merger conditions to require payments for violations to be paid to the U.S. Treasury); Applications of NYNEX Corp. and Bell Atlantic Corp. For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, *Memorandum Opinion and Order*, 12 FCC Rcd. 19985 (1997) ("*NYNEX/Bell Atlantic Merger Order*"); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. For Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion & Order*, 19 FCC Rcd. 21522 (2004) (the RBOC wireless joint venture of Cingular, SBC owning 60% and BellSouth owning 40%) ("*Cingular/AT&T Wireless Merger Order*").

telecommunications competition is universal and irreversible regardless of what future anti-competitive actions Applicants may take.

The same failing befalls Applicants' broad but extraordinarily vague claims of meaningful public benefits from their merger. Through hundreds of pages of largely empty rhetoric, Applicants claim that the merger will make SBC a world leader in communications, while ignoring that AT&T already holds that status. They claim that the combination will enable SBC to provide national security services to the federal government, while ignoring that AT&T has done and continues to do so without any evident problem. They claim that eliminating AT&T will enable SBC to develop new services, while the overwhelming market evidence is that new products and services are first deployed by competitors (such as a pre-merger AT&T) and that firms with market power (such as the pre- and post-merger SBC) are less inclined to innovate. And they make highly speculative and questionable assertions of increased efficiency, without ever demonstrating with data how that could occur in ways consistent with SBC's legal obligation not to discriminate against competitors. The private benefits to SBC and AT&T of wielding the considerable market power that will be created by the merger are clear, while the alleged public benefits of the merger are make-weight.

C. The Commission Must Deny the Applications, or at a Minimum Require the Applicants to Remedy the Public Harms Posed by Their Merger.

Since their Application is largely devoid of any real evidence, the Commission must first require that Applicants supply the extensive data needed to evaluate the likely public harms, and give the public an opportunity to review and comment on it. The Joint Petitioners are confident that the data the Commission has recently requested will help form the foundation for confirming that the proposed merger poses a grave threat to the markets and consumer welfare, and the Commission then will be required to either deny the Application outright, or attempt to create

and enforce a set of remedial conditions required to prevent a combined SBC-AT&T from abusing its market power. The proposed SBC-AT&T merger is truly an industry-transforming event, and the Commission must disregard Applicants' pleas to rubber-stamp their re-monopolization plan to reinforce SBC's dominance. A misstep on this Application would unravel overnight a decade of progress in opening telecommunications markets to competition pursuant to the 1996 Act.

II. APPLICANTS BEAR THE BURDEN OF PROVING THAT THEIR MERGER WOULD ENHANCE COMPETITION.

Pursuant to Sections 214(a) and 310(d) of the Act, the Commission may not approve the proposed transfer of control of AT&T's licenses to SBC unless it is persuaded that the transaction is in the public interest, convenience and necessity.[5] Applicants bear the burden of proving that the proposed transaction, on balance, furthers the public interest.[6] The Commission's review of a proposed merger under the public interest standard includes consideration of the competition policies underlying the Sherman and Clayton Acts, but the public interest standard necessarily "subsumes and extends" beyond the traditional scope of antitrust review.[7]

The likely effect of a proposed merger on the development of competition in telecommunications markets is the primary touchstone by which proposed mergers are judged. In performing its review, the Commission must consider whether the merger will "accelerate the decline of market power by dominant firms" in the relevant communications market and its

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[5] 47 U.S.C. §§ 214(a), 310(d); *NYNEX/Bell Atlantic Merger Order* ¶ 2.

[6] *Cingular/AT&T Wireless Merger Order* ¶ 40.

[7] *NYNEX/Bell Atlantic Merger Order* ¶ 2.

"effect on future competition."[8] In order to find that a merger is in the public interest, the Commission has emphasized that it "must be convinced that it will enhance competition."[9] A merger will be pro-competitive if the "harms to competition are outweighed by the benefits that enhance competition."[10] Applicants carry the burden of showing that the proposed merger will not eliminate potentially significant sources of competition that the 1996 Act sought to create.[11] The Commission has observed that "[w]hen facing a changing regulatory environment that reduces barriers to entry, firms that otherwise would compete directly may, as one possible strategic response, seek to cooperate through merger."[12] Consequently, Applicants must prove that, on balance, the merger will "enhance and promote, rather than eliminate or retard, competition."[13] This is equally true of competition in local telephone services, related interstate access services and interstate long distance services.[14] If Applicants cannot carry this burden, their Application must be denied.[15]

A common circumstance is that the same consequences of a proposed merger that may be beneficial in one sense will be harmful in another. Even if Applicants could show that combining assets may allow the merged entity to reduce transaction costs or introduce new products, the combination may also enhance market power, barriers to entry by potential

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8 *Cingular/AT&T Wireless Merger Order* ¶ 42.

9 *NYNEX/Bell Atlantic Merger Order* ¶ 2.

10 *Id.*

11 *Id.* ¶ 3.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* ¶ 2.

competitors, or opportunities to disadvantage rivals in anticompetitive ways.[16] Applicants bear the burden of overcoming such anticompetitive effects. In considering whether Applicants have made such a showing, the Commission has stated that the unilateral and coordinated effects of a proposed merger are mitigated by competitive forces only to the extent that barriers to entry or expansion are sufficiently low that competitors would "expand or enter with sufficient strength, likelihood and timeliness to render unprofitable an attempted exercise of market power resulting from the merger."[17] It is not enough for Applicants to show that the anti-competitive effects of a merger are counterbalanced in part by potential pro-competitive effects; their burden is to show that their transaction has the ultimate effect of "affirmatively advancing competition throughout the region."[18]

Given that Commission precedent is clear that evaluation of a proposed merger's effect on competition is central to the Commission's review, it is curious in the extreme that the word "competition" is never once mentioned in the Standard of Review section of the SBC/AT&T Application.[19] Applicants' failure to properly enunciate the primary criterion by which their Application must be judged is a telling admission of the weakness of the submission that follows. Confessing that consideration of the likely impact on competition is central to the Commission's public interest determination presents a serious problem for a combination that raises such significant anti-competitive concerns.

Finally, as a pre-condition to approval of any proposed merger, Section 214(c) of the Act authorizes the Commission to impose "such terms and conditions as in its judgment the public

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16 *Cingular/AT&T Wireless Merger Order* ¶ 42.

17 *NYNEX/Bell Atlantic Merger Order* ¶ 11.

18 *Id.* ¶ 14.

19 Application at 11-13.

convenience and necessity may require."[20] This enables the Commission to impose and enforce transaction-specific conditions on its approval of any such transaction.[21] Indeed, the Commission has recognized that its regulatory and enforcement experience positions it uniquely and appropriately to "impose and enforce conditions to ensure that the merger will yield overall public interest benefits."[22] It is noteworthy that nearly every proposed RBOC acquisition of another major carrier since the 1996 Act was enacted has been found to be unlawful due to their likely anti-competitive effects,[23] and that the Commission has permitted these mergers to go forward only after attaching conditions that were carefully designed to remedy the perceived anti-competitive effects.

III. THE COMMISSION MUST CONSIDER SBC'S DEMONSTRATED PROPENSITY TO ENGAGE IN PREDATORY ANTI-COMPETITIVE BEHAVIOR WHENEVER IT HAS THE OPPORTUNITY.

In order to effectively weigh potential anti-competitive effects against purported public interest benefits of a proposed transaction, the Commission considers evidence of whether the transferee "has the requisite qualifications to hold Commission licenses,"[24] in addition to hard market data. Thus, using "the Commission's character policy initially developed in the broadcast area as guidance in resolving similar questions on common carrier license transfer

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20 47 U.S.C. § 214(c).

21 *Cingular/AT&T Wireless Merger Order* ¶ 43.

22 *Id.*

23 *See generally*, *GTE/Bell Atlantic Merger Order*, 15 FCC Rcd. 14032; *SBC/Ameritech Merger Order*, 14 FCC Rcd. 14712; *NYNEX/Bell Atlantic Merger Order*, 12 FCC Rcd. 1985; *Cingular/AT&T Wireless Merger Order*, 19 FCC Rcd. 21522.

24 *Cingular/AT&T Wireless Merger Order* ¶ 56; *see also* Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C. 2d 1179 (1986) ("*Character Policy Statement*"), *modified*, 5 FCC Rcd. 3252 (1990), *recon. granted in part*, 6 FCC Rcd. 3448 (1991), *modified in part*, 7 FCC Rcd. 6564 (1992).

proceedings,"[25] the Commission should here "review allegations of misconduct directly before it, as well as conduct that takes place outside the Commission."[26]

SBC's track record of non-compliance is particularly relevant here because, "as the Commission long ago observed, licensing 'enables future conduct.'"[27] The standard by which the proposed merger must be judged is whether it will be unduly injurious to competition. [*See Sec. II infra.*] As described in *Section IV* hereafter, there is no question that the proposed merger will both increase SBC's incentives to discriminate against competitors, *and* create or preserve market power that will enable SBC to inflict damage on competition in new and formidable ways. SBC undoubtedly will argue that it has no plans to engage in anti-competitive behavior, and that regulatory requirements would prevent the company from doing so in any event. Unfortunately, overwhelming market evidence exists that shows that is not the case.

SBC has an unparalleled record of seizing every opportunity to engage in anti-competitive activity. Importantly, attempts to control SBC's behavior through regulation have failed. As the events cited hereafter make clear, SBC has demonstrated repeatedly that it will use every weapon in its arsenal to undermine competitors, regardless of legal requirements to the contrary, and is content to pay any fines for breaching applicable rules as an acceptable cost of

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25 *Cingular/AT&T Wireless Merger Order* ¶ 47 (citing WorldCom, Inc. and its Subsidiaries, Transferor, and MCI, Inc., Transferee, Applications for Consent to Transfer and/or Assign Section 214 Authorizations, Section 310 Licenses, and Submarine Cable Landing Licenses, *Memorandum Opinion and Order*, 18 FCC Rcd. 26484, ¶ 13 (2003) ("*WorldCom Bankruptcy Order*")).

26 *Cingular/AT&T Wireless Merger Order* ¶ 47 (citing *GM-News Corp. Order*, 19 FCC Rcd. at 486, ¶ 23; EchoStar Communications Corp, General Motors Corp, and Hughes Electronics Corp., Transferors, and EchoStar Communications Corp, *Hearing Designation Order*, 17 FCC Rcd. 20559, 20576, ¶ 28 (2002) ("*EchoStar/DirecTV HDO*"); *GTE/Bell Atlantic Merger Order* ¶ 429).

27 *Character Policy Statement* ¶ 21 (1986).

doing business. The unfortunate fact is that the amount of such fines is dwarfed by the benefit derived by SBC from preventing competition from taking hold in its operating region. As Merrill Lynch analyst Ken Hoexter, who has tracked SBC, has explained, "[a]s long as the cost of violating merger agreements is below the cost of allowing competitors to enter the market, it continues to be cheaper to pay the government for violating certain performance targets versus completely opening up the markets to competitors."[28]

The Commission cannot ignore SBC's past record and unmistakable predilection to act anti-competitively despite Commission orders and rules designed to prevent such behavior when evaluating the potential harms and putative benefits of combining AT&T with SBC. This Application is where the proverbial "chickens come home to roost." Given its horrid record, SBC's assertion that it has no intention to use the advantages gleaned from an AT&T acquisition in an anti-competitive fashion simply cannot be taken at face value. As importantly, the Commission must accept that the mere existence of its regulatory oversight has proven woefully insufficient to constrain SBC's penchant for undermining competition in unlawful ways. In view of SBC's performance to date, the Commission must assume that wherever the proposed merger results in increased market power for SBC, the company will employ that power to unfairly reduce competition in precisely the ways expressed in *Section IV* below.

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28 Press Release, Michigan Alliance for Competitive Telecomms., *Fined Again – SBC Ameritech Sees It as the Cost of Doing Business, Federal and State will Collect Over $67.8 Million from SBC for Anti-competitive Conduct* (June 22, 2002).

A. SBC has been Penalized Repeatedly for Engaging in Anti-Competitive Conduct.

By Joint Petitioners' count, in the last ten years, and particularly in the nine short years since the passage of the 1996 Act, SBC has been subject to one *Order to Show Cause*;[29] entered into five *Consent Decrees* with the Commission;[30] been the recipients of four *Forfeiture Orders*;[31] been found liable for one Section 271 violation;[32] garnered six *Notices of Apparent Liability*;[33] violated merger conditions causing damages to CLECs;[34] and been found the culprit

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[29] The Ameritech Telephone Operating Companies, *Order to Show Cause*, 10 FCC Rcd. 5606 (1995).

[30] Ameritech Corporation Apparent Liability for Forfeiture, *Consent Decree*, 11 FCC Rcd. 15476 (1996); The Ameritech Telephone Operating Companies, *Consent Decree Order*, 11 FCC Rcd. 14831 (1996); SBC Communications Inc., *Order and Consent Decree*, 14 FCC Rcd. 12741 (1999); SBC Communications, Inc., *Order and Consent Decree*, 17 FCC Rcd. 10780 (2002); SBC Communications Inc., *Order and Consent Decree*, 18 FCC Rcd. 19880 (2003).

[31] SBC Communications Inc., Apparent Liability for Forfeiture, *Order of Forfeiture*, 16 FCC Rcd. 5535 (2001); SBC Communications Inc., Apparent Liability for Forfeiture, *Order of Forfeiture*, 16 FCC Rcd. 10963 (2001); SBC Communications, Inc., Apparent Liability for Forfeiture, *Forfeiture Order*, 17 FCC Rcd. 7589 (2002); SBC Communications, Inc., Apparent Liability for Forfeiture, *Forfeiture Order*, 17 FCC Rcd. 19,923 (2002); SBC Communications Inc., Apparent Liability for Forfeiture, *Order on Review*, 17 FCC Rcd. 4043 (2002).

[32] AT&T Corp. vs. Ameritech Corporation, v. U S WEST Communications, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd. 21438 (1998) ("We conclude, based on this record, that, although certain limited marketing arrangements are permissible under the Act, Ameritech and U S WEST are providing in-region, interLATA service without authorization, in violation of section 271 of the Act. We further conclude that, as discussed below, although the underlying arrangements raise considerable concerns that Ameritech and U S WEST may have violated their equal access and nondiscrimination obligations under section 251(g) of the Act, we need not reach the issue because we have found that the arrangements violate section 271." (internal citation omitted)).

[33] Ameritech Corporation, Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 10 FCC Rcd. 10559 (1995); SBC Communications, Inc., Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, 16 FCC Rcd. 1140 (2000); SBC Communications, Inc., Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, 16 FCC Rcd. 1012 (2001); SBC Communications, Inc., Apparent Liability for Forfeiture, *Notice of Apparent Liability for*

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of an array of other incidents within the purview of the courts and other agencies, including a critical DOJ Evaluation in SBC's Michigan 271 application[35] and an Illinois appeals court finding that SBC violated the collocation requirements of Illinois law.[36]

Importantly, SBC has shown no recent inclination to abandon its anti-competitive ways. Within only the past two years:

> April 17, 2003: The Commission found that SBC "violated paragraph 56 of the SBC/Ameritech Merger Order Conditions, and, in this regard, section 201(b) of the Act" causing damages to CLECs.[37]
>
> July 16, 2003: The DOJ did not support SBC's 271 Application in Michigan because of deficiencies in its wholesale billing. DOJ found that SBC had trouble generating accurate bills, and that CLECs spend great resources auditing SBC's bills.[38]

Forfeiture and Order, 16 FCC Rcd. 19091 (2001); SBC Communications, Inc., Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, 16 FCC Rcd. 19370 (2001); SBC Communications, Inc., Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, 17 FCC Rcd. 1397 (2002); SBC Communications, Inc., Apparent Liability for Forfeiture, *Forfeiture Order*, 17 FCC Rcd. 7589 (2002); SBC Communications, Inc., Apparent Liability for Forfeiture, *Forfeiture Order*, 17 FCC Rcd. 19923 (2003).

34 Core Communications, Inc. and Z-Tel Communications, Inc. v. SBC, *Memorandum Opinion and Order*, 18 FCC Rcd. 7568, at ¶ 3 (2003) (finding that SBC "violated paragraph 56 of the SBC/Ameritech Merger Order Conditions, and, in this regard, section 201(b) of the Act") ("*SBC CLEC Damages Order*").

35 Press Release, U.S. Dep't of Justice, *Justice Department Advises FCC of Concerns About SBC's Application to Provide Long Distance Services in Michigan, Department Raises Questions about Change Management, Line Loss Notification, Billing Errors, and Reliability of Reported Performance Data*, Feb. 26, 2003, *available at* http://www.usdoj.gov/atr/public/press_releases/2003/200803.htm.

36 *GlobalCom, Inc. v. Illinois Commerce Comm'n*, No. 1-02-3605, 2004 WL 487948 (Ill. App. Ct. Mar. 21, 2004).

37 *SBC CLEC Damages Order*, 18 FCC Rcd. 7568.

38 Press Release, U.S. Dep't of Justice, *Justice Department Advises FCC of Concerns About SBC's Application to Provide Long Distance Services in Michigan, Department Reiterates Concerns About Billing Accuracy*, Jul. 16, 2003, *available at* http://www.usdoj.gov/atr/public/press_releases/2003/201173.htm.

February 26, 2003: The DOJ questioned SBC's provision of line loss notification procedures, billing errors, and the reliability of its reported performance data, noting that "[s]erious concerns remain in several areas that may affect whether the current state of competition is irreversible...and these concerns merit the FCC's careful attention."[39]

August 26, 2003: The DOJ did not support SBC's application to provide long distance services in Illinois, Indiana, Ohio and Wisconsin due to poor SBC wholesale billing accuracy, as well as issues related to line-splitting, data integrity, manual handling and pricing.[40]

October 1, 2003: SBC and Commission entered into an agreement that effectively terminated the Commission's investigation (commenced March 10, 2003) into whether SBC marketed and/or sold in-region long distance services prior to receiving Section 271 authorization. SBC agreed to contribute $1.35 million to U.S. Treasury.[41]

March 11, 2004: GlobalCom filed suit in Illinois state court alleging that Illinois Bell Telephone Company, now SBC, knowingly engaged in anticompetitive conduct. Specifically, GlobalCom alleged that SBC unlawfully (1) charged early termination fees for the premature cancellation of contracts for certain services and (2) required GlobalCom to pay rent to store its equipment in an SBC facility as a condition for obtaining a new service. The Court concluded that the early termination fees were lawful, but that the collocation requirements violated Illinois law.[42]

March 31, 2005: SBC refuses to cooperate with Internet telephone providers, such as Vonage, to resolve issues regarding subscribers' access to the 911 emergency network.[43]

Since September 1998, the Commission, state commissions and courts have assessed

fines and settlements of over *$1 billion* against SBC for failure to meet performance criteria;

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39 Press Release, U.S. Dep't of Justice, *Justice Department Advises FCC of Concerns About SBC's Application to Provide Long Distance Services in Michigan, Department Raises Questions about Change Management, Line Loss Notification, Billing Errors, and Reliability of Reported Performance Data*, Feb. 26, 2003, *available at* http://www.usdoj.gov/atr/public/press_releases/2003/200803.htm.

40 Press Release, U.S. Dep't of Justice, *Justice Department Advises FCC of Concerns About SBC's Application to Provide Long Distance Services in Illinois, Indiana, Ohio and Wisconsin, Department Reiterates Concerns about Billing Accuracy*, Aug. 26, 2003, *available at* http://www.usdoj.gov/atr/public/press_releases/2003/201248.htm.

41 *See* SBC Communications Inc., *Order and Consent Decree*, 18 FCC Rcd. 19800 (2003).

42 *GlobalCom, Inc. v. Illinois Commerce Comm'n*, No. 1-02-3605, 2004 WL 487948 (Ill. App. Ct. Mar. 21, 2004).

43 *Internet Provider May Seek Federal Help in 911 Dispute*, CNET News, Mar. 31, 2005, *available at* http://www.news.com.

failure to meet merger commitments; failure to meet wholesale service standards; violation of Section 271; provision of substandard service; and other violations and omissions.[44] Since SBC has a clear record of non-compliance with rules intended to prevent anti-competitive behavior, the Company's application to increase its market power through merger should be denied. However, if the Application is approved subject to remedied conditions, then the Commission must take special care to craft conditions that are clear, tough and easily enforceable.

B. SBC has Routinely Violated Prior Merger Conditions Intended to Minimize Anti-Competitive Effects.

SBC's proven disregard for the conditions attached by the Commission to prior mergers should be of particular concern. Recall that the Commission first determined that SBC's proposed acquisition of Ameritech was unlawful, and made its consent to proceed expressly conditional on SBC's acceptance and adherence to a set of carefully crafted conditions intended to ameliorate the obviously anti-competitive effects of the combination.[45] Unfortunately, the ink on the order had barely dried before SBC reneged on its end of the deal, and began blatantly ignoring the conditions imposed upon it.

As a condition of the deal, for example, the Commission required SBC to report certain performance data in accordance with the published business rules adopted in a carrier-to-carrier performance plan, in order to enable competitors and the Commission to ensure that the merged RBOCs were not discriminating against competitors in the provisioning of wholesale facilities. The FCC had determined that the carrier-to-carrier performance plan was "central to achieving

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44 Joshua E. Barbach, *AT&T Wireless – Cingular: Revealing a Lack of Regulatory Progress*, Pipeline, May 2004 ("SBC has been fined more than $1 billion by state and federal regulators for wholesale performance standards violations."); Alex Goldman, *Voices for Choices Wins Two vs. SBC*, ISP-Planet, June 13, 2003 ("SBC is by far the most fined, and has managed to be fined in almost every month since January, 2000.").

45 *SBC/Ameritech Merger Order* ¶¶ 354-62.

the public interest goals enumerated in the *SBC/Ameritech Merger Order*, including that of ensuring open local markets by monitoring the quality of SBC's service to other telecommunications carriers."[46] But within months of the closing SBC began a practice of failing to report and incorrectly reporting the required performance data, and the Commission later found that SBC "willfully and repeatedly violated the Merger Conditions" in 17 different respects for more than a year -- indeed until the noncompliance was detected by the FCC.[47]

Similarly, in the *SBC/Ameritech Merger Order*, the Commission required SBC to provide shared transport on the same terms available in the State of Texas at that time.[48] But from the date of merger, SBC refused to provide shared transport for intraLATA toll calls despite the fact that shared transport was undeniably available for use in routing intraLATA toll calls in Texas at that time, presumably in an effort to retain and leverage their legacy market power in the intraLATA toll market. Again the Commission found that SBC "willfully and repeatedly" violated the merger conditions that were the critical underpinning of its consent to the SBC/Ameritech merger, and imposed a $6 million fine.[49] Even then, SBC elected to thumb its nose at the Commission and its remedial conditions by continuing to refuse CLEC requests to obtain shared transport to transport intraLATA toll traffic. A year later the Commission was forced to intervene once again and find SBC liable for refusing to provide shared transport to CLECs.[50]

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[46] SBC Communications, Inc., *Notice of Apparent Liability for Forfeiture*, 16 FCC Rcd. 1140 (2000).

[47] SBC Communications, Inc., *Order of Forfeiture*, 16 FCC Rcd. 5535, 5542 (2001).

[48] *See SBC/Ameritech Merger Order* ¶ 425.

[49] SBC Communications, Inc., *Forfeiture Order*, 17 FCC Rcd. 19923 (2002), *aff'd*, 373 F.3d 140 (D.C. Cir. 2004).

[50] *See SBC CLEC Damages Order* ¶¶ 53-56.

Indeed, as discussed more fully in *Section IV.D* hereof, the Commission painstakingly negotiated an agreement whereby SBC agreed to invest in local telecom facilities and compete as a CLEC out-of-region as a partial offset to the anti-competitive effects of a SBC-Ameritech merger – the so-called "National-Local Plan."[51] SBC deployed minimal local network facilities in approximately ten out-of-region markets. But with few exceptions, SBC never took the next step of actually marketing competitive local services in those areas. Thus, SBC arguably adhered to the letter of the condition, but certainly did not honor the spirit of it. The complete failure of the "National-Local Plan" condition is starkly illustrative of SBC's disdain for remedial conditions, and its determination not to compete with other RBOCs out-of-region.

These and other instances[52] reveal a shocking disregard by SBC for clear Commission rules intended to rein in potential anti-competitive conduct. More particularly, they show a disturbing SBC inclination to pull a "bait and switch" with the Commission on its merger applications – *i.e.*, accepting pro-competitive remedial conditions to obtain approval, and then intentionally violating them once their deal is closed. While the Commission recently determined that SBC's history of non-compliance with the Ameritech merger conditions was not determinative in the context of the proposed merger of Cingular Wireless and AT&T Wireless,[53] SBC's behavior clearly is highly relevant in connection with the Commission's review of the instant Application. Here we are dealing with SBC alone (as opposed to a joint venture involving SBC), we are concerned with SBC's market power over in-region wireline operations (as opposed to its national wireless business) and SBC is seeking to merge with the largest

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[51] *See SBC/Ameritech Merger Order* ¶ 421.

[52] *See*, *e.g.*, SBC Communications, Inc., *Forfeiture Order*, 16 FCC Rcd. 10963 (2002) (imposing forfeiture for violating collocation rules).

[53] *Cingular/AT&T Wireless Merger Order* ¶¶ 53-56.

competitor in its region and the former parent company from which it was once forced to separate under an antitrust consent decree. Thus, SBC's pattern of non-compliance with prior merger conditions is highly predictive and directly relevant to the present Application.

IV. APPLICANTS HAVE FAILED TO ADDRESS THE LIKELY ANTICOMPETITIVE CONSEQUENCES OF THE MERGER.

A. Applicants Have Failed to Analyze the Consequences of the Increased Concentration in Local Transmission Inputs that Would be Caused by the Proposed Merger.

Of all the markets affected by the proposed merger, none is more important or as likely to experience severe harm as the business markets. The transmission inputs needed to serve business customers are a critical part of this country's telecommunications infrastructure. Unfortunately, as the Commission has repeatedly held, there is a severe shortage of loop and, with rare exceptions, local transport facilities needed to transmit telecommunications and information services to and from business customers. The local transmission capacity upon which this country's commerce depends is controlled by a small number of carriers, of which SBC is overwhelmingly the dominant market leader in its region. Moreover, capacity removed from the market through mergers of CLECs into the incumbents is unlikely to be replaced any time soon because the entry barriers to deploying local fiber and other facilities are extremely high. Yet, amazingly, Applicants have now blithely asked, without any supporting analysis and without providing any data regarding the effect of the merger in this market, for approval to allow SBC to acquire one of the two largest competitors in this market. If allowed, SBC's already predominant position as a wholesale supplier of transmission facilities will be significantly strengthened in those unfortunately already few areas and in those buildings where competition exists, and especially where AT&T functions as one of the actual or potential suppliers of these wholesale inputs. This result is unacceptable.

There should be no dispute that it makes sense to focus on the effect of the proposed merger on the availability of local transmission facilities used to serve business customers. Local transmission inputs are "a distinct and essential ingredient for providing" service to all types of business end-users.[54] SBC has itself argued that any CLEC that, like AT&T, has deployed local fiber facilities can "channelize" the capacity of those facilities to provide any level of capacity to other carriers or end user customers.[55] The Commission has found that, once a carrier has deployed a fiber facility, "that carrier can then add electronics to channelize or otherwise serve smaller capacity services using existing facilities."[56] The conclusion applies equally to loops, for which the "incremental costs of providing channelized capacity . . . are minimal," and to transport facilities.[57] The Commission has held that such high levels of "production substitution" among a set of downstream services justifies focusing the examination of competitive harm caused by the merger on the necessary upstream input facilities.[58] The Commission has also held that the analysis is the same (that the "competitive analysis would be

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54 Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd. 18025, 18041, ¶ 28 (1998) ("*MCI/WorldCom Merger Order*").

55 "[T]he state records make clear that, once a carrier deploys fiber (whether in a transport network or as a last-mile facility), the facility can be (and routinely is) used to provide service at any level of capacity, simply by adjusting the electronics on either end. Those electronics allow fiber to be 'channelized' – so that a fiber lit at the OCn level can be used to provide services at single DS1 and DS3 levels as well – and the Commission has already recognized them to be readily available to competing carriers." *SBC Reply Comments*, WC Docket No. 04-313 *et al.*, Declaration of Alexander/Sparks at 11 (describing channelization); *id.* at 12 (asserting that AT&T channelizes down to the DS1 level).

56 In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Order on Remand*, 20 FCC Rcd. 2533, ¶ 86 (2005) ("*TRRO*").

57 *See id.* ¶ 154.

58 *See MCI/WorldCom Merger Order* ¶ 27.

logically equivalent"), regardless of whether the transmission inputs are treated as a distinct product market or the focus is on the effect on the downstream retail markets of increased concentration in the provision of inputs.[59] Finally, the Commission has held that, when examining the effect of a proposed merger on the availability of inputs, it is appropriate to focus on the capacity of available inputs, rather than the number of customers served by such facilities.[60]

Regardless of the geographic market definition used, whether it be wire centers, density zones or some other appropriate geographic unit, it is clear that ownership of local transmission capacity along the individual routes and to the individual buildings needed to serve business customers is highly concentrated in the SBC region. Applicants offer no data and no analysis of the local transmission input markets in the SBC region, and such data and analysis are, as discussed further below, necessary for any serious review of the proposed merger. Even without the requisite data at hand, national figures regarding market concentration provide a helpful indication that the level of concentration is already dangerously high. For example, the record in the Triennial Review proceeding showed that only "3% to 5% of the nation's commercial office buildings are served by competitor-owned fiber loops."[61] This indicates that an incumbent such as SBC controls the vast majority of the loop facilities needed to serve business customers in its region. Moreover, the Commission has held that cable transmission facilities are not used to

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59 *See id.* ¶ 28.

60 *See id.* ¶¶ 43-50.

61 In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978 at n.856 (2003) ("*TRO*").

serve business customers to any significant degree[62] and that fixed wireless and satellite do not offer a viable mode of local transmission for business customers.[63]

Loop facilities are the most critical transmission facilities for competition. It is clear that MCI and AT&T are currently the largest, or close to the largest, wholesalers of transmission capacity. AT&T appears to have constructed loop facilities to more buildings than any other non-ILEC with the possible exception of MCI. According to the UNE Fact Report submitted by SBC and other ILECs in the record of the Triennial Review Remand proceeding, in 2001/2002, the last year relevant data was made public, MCI had the largest volume of fiber loop capacity on its own of any competitor with 76.4 million business voice grade equivalents, and AT&T had the second largest volume of fiber loop capacity among competitors with 40 million business voice grade equivalents.[64] Furthermore, as SBC has itself strenuously asserted, AT&T makes its transmission facilities (including loops) available at wholesale.[65] But even if AT&T does not make its local transmission facilities available at wholesale in some cases, it must be considered one of the few potential entrants into the wholesale market.[66] The elimination of one of the

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62 *TRRO* ¶ 193.

63 *Id.* n.508

64 UNE Fact Report, Prepared and Submitted by BellSouth, SBC, Qwest and Verizon, WC Docket No. 04-313 *et al.*, Table 6 (filed Oct. 4, 2004) ("*UNE Fact Report*").

65 SBC asserted that, in state *Triennial Review Order* implementation proceedings, "AT&T ultimately conceded that it does provide wholesale 'service' – 'service,' it so happens that consists of high-capacity transmission over AT&T's last-mile facilities." *SBC Reply Comments*, WC Docket No. 04-313 *et al.* at 33. *See also SBC Reply Comments*, Declaration of Alexander/Sparks at 16-18, 28 (explaining that AT&T makes loops available at wholesale to other carriers); *id.* at 25 (same for transport).

66 Indeed, SBC has strongly implied that the availability of UNEs at TELRIC-based prices prevents competitors that have deployed their own facilities from making those facilities available at wholesale. *See, e.g.*, *SBC Reply Comments*, CC Docket No. 01-338 *et al.* (filed Apr. 5, 2002) at 36-37 ("the Commission should avoid an excessive unbundling regime that undermines (and devalues) the investments made by facilities-based

. . .*Continued*

largest non-ILEC wholesalers (or potential wholesalers) of local transmission capacity in the SBC region raises obvious risks of harm to consumer welfare that must be carefully examined.

There is no reason to believe that competitors will deploy significant local transmission capacity in the foreseeable future because the entry barriers to such deployment are extremely high. Competitors seeking to construct local transmission facilities face "steep economic barriers."[67] For example, "most of the costs of constructing loops are sunk costs."[68] The largest portion of the sunk "costs incurred in building a fiber loop results from deploying the physical fiber infrastructure into the underground conduit to a particular location."[69] Entities seeking to deploy fiber loops must overcome the "inability to obtain reasonable and timely access to the customer's premises both in laying the fiber to the location and getting it into the building thereafter, as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop facilities."[70] Construction of transport facilities that do not connect to particular end users is also characterized by extremely high entry barriers.[71]

The acquisition of the network with at least the third largest local transmission capacity by the firm that controls the vast majority of local transmission capacity in the SBC region raises serious risks to competition where there is little chance that much capacity will be added anytime

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competitors. By making UNEs both ubiquitous and cheap, the Commission effectively 'wrote down' the value of these investments, subjecting them to competition from carriers that had built nothing of their own.") If this is correct, one would expect AT&T to increase the extent to which it makes local transmission facilities available at wholesale in the wake of the *Triennial Review Remand Order*.

67 *TRO* ¶ 199.

68 *Id.* ¶ 205; *see also TRRO* ¶ 150.

69 *TRRO* ¶ 150.

70 *TRO* ¶ 312.

71 *See TRRO* ¶¶ 74-77.

soon.[72] But even on transport routes and at buildings where SBC holds a monopoly over local transmission, the proposed merger raises serious concerns. SBC and other ILECs have argued repeatedly that they make special access inputs available at discounted rates to competitors willing to make large volume and term commitments.[73] Given the enormous volume of special access that it apparently purchases (and perhaps the fact that its scale economies make it a more credible threat than other CLECs to construct transmission facilities where special access rates are too high), it seems likely that AT&T could obtain a steeper discount off of the monthly tariffed special access rates than any other competitor. Moreover, AT&T appears to make transmission facilities it acquires under its unique special access discounts available at wholesale in response to RFPs.[74] These leased facilities appear to be combined with AT&T's own fiber facilities to offer comprehensive local transmission solutions to wholesale customers. It seems unlikely that other competitors would be able to obtain the level of discounts AT&T likely receives today off of SBC's month-to-month tariffed prices. If this is so, the elimination of AT&T as a reseller of SBC local transmission inputs would likely harm competition.

The consequences of increased concentration in local transmission facilities for competition in downstream service markets are well-understood. A competitor in downstream markets that holds market power over upstream inputs needed to provide such downstream

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[72] Further, as discussed in Section IV.D.4 *infra*, if the proposed merger with Verizon is allowed, it is unlikely to expand its facilities further in the SBC regions, and is not likely to market the transmission facilities it does not have with any vigor.

[73] *See SBC Reply Comments*, WC Docket No. 04-313 *et al.* at 46-48. SBC notes that the largest discounts are "tied to historical volumes of special access use." *Id.* at 48. *See also* Wilkie Decl. ¶ 11.

[74] Wilkie Decl. ¶ 13. Indeed, wholesale transmission contracts bid on and won by MCI and AT&T are priced 50 to 60 percent below the ILEC's special access rates. Wilkie Decl. ¶ 26. The only conclusion must be that these two companies are using their volume discount leverage to undercut SBC at retail.

services has powerful incentives to raise rivals' costs.[75] By increasing the share of scarce local transmission capacity under its control, SBC's incentive to engage in this kind of behavior would increase. It is hard to think of an outcome more antithetical to the pro-competition policies embodied in the Act generally and the 1996 Act more specifically.

Applicants have offered no analysis or data regarding this obvious threat to consumer welfare. In their 119 page public interest statement, Applicants dedicate just a single footnote to this issue.[76] There, Applicants state only that there are no "significant competitive issues raised by AT&T's limited ownership of local facilities in SBC's territories." This is allegedly because

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[75] *See SBC/Ameritech Merger Order* ¶ 107 ("In addition, incumbent LECs, which are both competitors and suppliers to new entrants, have strong economic incentive, to preserve their traditional monopolies over local telephone service and to resist the introduction of competition that is required by the 1996 Act. More specifically, an incumbent LEC has an incentive to: (1) delay interconnection negotiations and resolution of interconnection disputes; (2) limit both the methods and points of interconnection and the facilities and services to which entrants are provided access; (3) raise entrants' costs by charging high prices for interconnection, network elements and services, and by delaying the provisioning of, and degrading the quality of, the interconnection, services, and elements it provides. An incumbent LEC has similar, and probably greater, incentive to deny special accommodations required by competitive LECs seeking to offer innovative advanced services that the incumbent may not even offer. As noted at the outset, this view of the incumbent LECs' incentives and abilities is the fundamental postulate of the basic cornerstones of modern telecommunications law – the MFJ and the 1996 Act.") *GTE/Bell Atlantic Merger Order* ¶ 188 ("given their monopoly control over exchange access services, each Applicant currently has the ability to discriminate against rivals providing interexchange services, in favor of its own interexchange operations, by denying, degrading, or delaying access on the originating and terminating ends."); Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order*, 12 FCC Rcd. 15756, ¶ 111 (1997) ("there are various ways in which a BOC could attempt to discriminate against unaffiliated interLATA carriers, such as through poorer quality interconnection arrangements or unnecessary delays in satisfying its competitors' requests to connect to the BOC's network.") (footnote omitted).

[76] *See* Public Interest Statement n.347.

those facilities have "very limited coverage," and there are "numerous other competitive carriers that have deployed" similar facilities.[77]

Applicants make no attempt to substantiate these claims, and the available evidence indicates that they are inaccurate. For example, the parties to this filing have obtained data from GeoResults regarding the number of commercial buildings served by competitors and SBC in the Cleveland and Milwaukee MSAs.[78] This data is far from ideal, because it does not distinguish between buildings served by resold special access and buildings served by a carrier's own fiber loops (both categories are included in the GeoResults data), and GeoResults relies on Telecordia data which is itself imperfect. Nevertheless, it is instructive to compare the number of commercial buildings served by competitors, including AT&T, with the number of commercial buildings served by competitors, excluding AT&T. The results of this simple exercise indicate the potential consequences of the merger. According to the GeoResults data, in the Cleveland MSA, the number of commercial buildings served by a competitor dropped by over 53 percent when AT&T is removed from the calculation. In Milwaukee, the corresponding drop was 64 percent. The survey offers an important indication that a detailed analysis of the AT&T local transmission facilities in the SBC region as compared to other CLEC local transmission networks in that region is critically important. The available data indicate that any such analysis will reveal that the proposed merger will be extremely harmful to competition in the business markets. Moreover, this analysis does not even account for the impact of MCI scaling back its

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77 *See id.*

78 Cleveland and Milwaukee were chosen for the study because they are both in the SBC region, AT&T is known to have deployed local transmission facilities in those markets, and data regarding other competitors' facilities in those markets was readily available.

competitive presence in the SBC region as would likely be the case if it were acquired by Verizon.[79]

Applicants' expert economists offer nothing to assuage this concern. Messrs. Carlton and Sider offer only a "brief overview" of the impact of the proposed merger on the markets for business service.[80] They vaguely mention the fact that some CLECs have deployed "networks" in metropolitan areas,[81] but they concede that they have made no attempt to analyze "the extent to which CLECs' facilities in a given MSA serve the same areas."[82] As even SBC has recognized in the past, the highly localized nature of transmission facility deployment decisions demands an inquiry as to whether there is competition in specific areas.[83] That analysis appears nowhere in the Applicants' filing.

The other reasons offered by Carlton and Sider for discounting the threat posed by the merger to business customers are easily rejected. Carlton and Sider state that competitors "can" deploy facilities in response to demand,[84] but the Commission's own assessment of the entry barriers associated with loops and, to a lesser degree transport, refute this assertion. Carlton and

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79 According to Dr. Wilkie, the removal of MCI and AT&T would result in a 61.5 percent decline in the number of commercial buildings served by a competitor in Cleveland. *See* Wilkie Decl. ¶ 19. *See* Section IV.C., *infra*, for a discussion of potential tacit collusion between SBC and Verizon following their contemplated acquisitions of AT&T and MCI, respectively, so as to eliminate effectively both AT&T and MCI as competitors throughout the combined SBC and Verizon footprints.

80 *See* Carlton & Sider Decl. ¶ 31.

81 *See id.* ¶ 35-36.

82 *See id.* ¶ 35.

83 In proposing a route-by-route test for transport impairment in the Triennial Review Remand proceeding, SBC essentially conceded the need for a highly localized inquiry regarding the extent to which competitors have deployed transmission capacity. *See SBC Comments*, WC Docket No. 04-313 *et al.* (filed Oct. 4, 2004) at 78-79.

84 *See* Carlton & Sider Decl. ¶ 35.

Sider cite to the wide variety of firms competing to serve business customers, including carriers, systems integrators, equipment manufacturers, value-added resellers and cable companies.[85] But all of these firms (except cable companies, which do not serve the relevant market to any significant degree) would become victims of SBC's increased power to raise rivals' costs if it were to gain control over AT&T's local transmission capacity. The number of resellers in a market has no bearing on the extent to which they are vulnerable to anticompetitive conduct by the firm that controls upstream inputs. Carlton and Sider also point to the fact that businesses purchasing telecommunications service are "highly heterogeneous."[86] Yet, this too is a red herring. Regardless of the differences in applications demanded by business customers, all such services must ride over the same underlying transmission facilities. Again, control over the transmission facilities yields control over the market and harm to consumers.

It is clear therefore that the threat that the proposed merger poses to the business market requires a detailed analysis of the transport routes and building connections that AT&T owns. Applicants must then assess whether several other competitors besides AT&T have deployed transmission facilities along the specific transport routes and to the specific buildings where AT&T has built fiber in a relevant geographic area (wire center, density zone, or other). In those cases where only AT&T and SBC have deployed facilities to a particular building, the merged firm would obviously obtain a monopoly over local transmission serving that building. It is hard to conceive of a clearer example of competitive harm caused by a merger. Where the number of providers of transmission inputs would drop from three (SBC, AT&T and one other competitor) to two as a result of the proposed merger, substantial competitive harm will result from the

85 *See id.* ¶ 38.

86 *See id.* ¶ 41-43.

creation of a duopoly. This is precisely the holding of the Commission's order blocking the proposed merger of DirecTV and EchoStar.[87] Finally, even where the number of competitors drops from four to three, significant harm is likely.[88] The DOJ-FTC Merger guidelines support this conclusion, since a market with equal market share held by three competitors is deemed highly concentrated (with an HHI of 3267).[89]

But the relevant inquiry does not end at an analysis of fiber facilities deployed by AT&T. As mentioned, AT&T likely obtains a steeper discount for special access local transport from SBC than any other competitor since it is unlikely that any other competitor purchases special access in the volumes needed to obtain such discounts.[90] Thus, the proposed merger would remove a critical source of discounted transmission inputs that competitors cannot duplicate. The public interest harms of the loss of these discounts is enormous. Dr. Wilkie's study of

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87 *See EchoStar/DirecTV HDO* ¶ 275 ("The Applicants have failed to meet their burden of proof to show that, on balance, the proposed merger is in the public interest . . . The record before us irrefutably demonstrates that the proposed transaction would eliminate a current viable competitor from every market in the country, whether those markets are currently served by cable systems or are markets in which no cable systems exist, at best resulting in a merger to duopoly . . .").

88 *See also*, Section IV.D.4. *infra*, discussing the probability that where MCI is the other supplier or one of two alternative suppliers, the practical effect will be to go from three suppliers to one in buildings with three suppliers (SBC, AT&T, and MCI) and from four suppliers to two in buildings where there are four suppliers (including SBC, AT&T and MCI).

89 *See* US DOJ Antitrust Div. and Federal Trade Comm'n 1992 Horizontal Merger Guidelines, 57 FR 41552 (1992); US DOJ and Federal Trade Comm'n Revision to the Horizontal Merger Guidelines § 1.51 (Apr. 8, 1997). The HHI calculation here assumes an equal market share for all competitors, including SBC, that have constructed facilities in a particular location. Given SBC's ability to raise its rivals' costs in obtaining inputs needed to compete and SBC's superior economies of scale, this is a highly conservative assumption.

90 Wilkie Decl. ¶ 11, 17.

wholesale transmission bids indicates that if AT&T is removed from the market for wholesale transmission, wholesale prices will likely increase 100%.[91]

To assess the extent of this risk, Applicants must disclose the extent of the special access discount SBC provides to AT&T, how it compares with the discounts SBC offers to other carriers, and the extent to which AT&T has or has planned to share some portion of its special access discount with other carriers by reselling SBC's special access facilities (by themselves or bundled with AT&T's facilities). AT&T's plans for wholesale offerings in the future are especially pertinent in light of recent analyst reports that AT&T has planned to focus more than in the past on selling service at wholesale.[92]

B. Applicants have Failed to Analyze the Consequences of the Proposed Merger for Mass Market Telephone Service.

The proposed transaction also raises serious concerns regarding increased concentration in the market for landline circuit-switched voice services demanded by mass market customers. SBC is the dominant provider of these services within its region. Moreover, AT&T, with its powerful brand and obvious expertise born of long experience in selling voice services to the mass market, remains a substantial presence in the mass market with the highest market share, next to the RBOCs, of bundled local and long distance voice services.[93] The magnitude of SBC's dominance over such a large region only increases the possible harms from merger since

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[91] Wilkie Decl. ¶ 27.

[92] *See* Jeffrey Halperin, *U.S. Telecom: Superior Growth Prospects Make Enterprise Market a Key Battleground for U.S. Service Providers*, Bernstein Research Call (Jan. 6, 2005) at 6 (noting that AT&T's "services mix is shifting increasingly towards wholesale. . . AT&T should be able to make up for some of the lost retail revenues by selling wholesale capacity to the RBOCs (and other carriers).").

[93] *See* Taylor, Nelson, Sofres PLC, *Combined SBC and AT&T Represents 28% of Wired Line Telecom Market, 10% of Total Telecom Spending*, Jan. 31, 2005, *available at* http://www.tnstelecoms.com/press-1-31-05.html.

a relatively small increase in price for mass market services will result in billions of dollars of consumer harm.[94]

Even if AT&T were to exit the market (which it has not), AT&T would be almost uniquely positioned as a potential competitor, whose very existence as an independent company would discipline the prices SBC charges for mass market voice services.[95] Indeed, there is every indication that AT&T could reenter the voice mass market quickly and with little capital investment. Accordingly, if SBC were permitted to acquire AT&T, there is real and substantial risk that SBC's ability to raise prices for mass market voice services would increase substantially. The Applicants have proffered virtually no economic analysis and submitted no data in the record to explain why this outcome is unlikely.

Regardless of whether the Commission considers the relevant product market to be stand-alone local service (*i.e.*, local exchange and exchange access service), stand-alone long distance service or "all distance voice" bundles, it is clear that the market for landline circuit switched voice service demanded by mass market customers (*i.e.*, residential and very small businesses) constitutes a separate product market. Although the Applicants make much of wireless and VoIP as competitors to traditional voice service, the Commission has made clear that these services are, at most, complements to circuit switched voice service.

For example, in its recent order approving the merger of AT&T Wireless and Cingular, the Commission noted that it had "previously found that consumers tend to use wireless and wireline services in a complementary manner and view the services as distinct because of

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94 Wilkie Decl. ¶ 46.

95 Wilkie Decl. ¶ 41 (reduction in consumer long distance prices of 8 to 11 percent with RBOC entry).

differences in functionality."[96] Accordingly, the Commission concluded that, "while there is some evidence of a small, but growing number of consumers that have chosen to cut the cord and use wireless services in lieu of wireline service, this trend is a relatively recent phenomenon."[97] It is instructive that huge decreases in wireless pricing have not induced large numbers of wireline consumers to "cut the cord"; this lack of cross elasticity demonstrates that wireless and wireline services are in different product markets.[98] For these reasons, CMRS simply cannot be considered a substitute for mass market voice service.[99]

The same is true of mass market VoIP. As the Commission has found, to receive VoIP service, a customer must first subscribe to broadband (most likely cable or DSL), a service which many potential customers cannot afford[100] or choose not to take and which greatly increases the price of VoIP service over existing circuit-switched voice rates.[101] Because of the need to subscribe to broadband service, the theoretically addressable market for VoIP only consists of the 32.5 million "high speed" cable and DSL lines in service as of June 2004,[102] as compared to

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96 *Cingular/AT&T Wireless Merger Order* ¶ 239 (citing *TRO* ¶ 230).

97 *Id.* ¶ 242.

98 Wilkie Decl. ¶ 43.

99 *Id.*

100 *See TRRO* n.118.

101 For example, SBC's circuit switched local phone service with caller ID and two enhanced services costs $21.95 per month and its unlimited long distance calling plan costs $15 per month, yielding a total cost of $36.95 per month for circuit-switched voice service. In contrast, SBC's 3MB/1.5MB xDSL service costs $29.95 per month and Vonage's unlimited all distance plan costs $24.99 per month for a total cost of $54.94. Thus, VoIP service from Vonage (and likely other similar VoIP offerings) combined with broadband service costs nearly $20 more (more than 60 percent) per month than stand-alone circuit switched service. *See* http://www.sbc.com/gen/landing-pages?pid=3310; http://www.vonage.com/products_premium.php.

102 *See TRRO* n.118.

114.5 million mass market switched voice lines.[103] Moreover, the ILECs themselves, including SBC,[104] have essentially ensured that the 17.4 million xDSL subscribers[105] – over half the theoretically addressable market – could not substitute a third party VoIP provider for the ILECs' own circuit-switched voice service because xDSL is generally only available as part of a bundled offering that includes ILEC circuit-switched voice service.[106]

The RBOCs themselves have admitted that their own VoIP service is unlikely to compete with their traditional voice service. For example, Verizon's CFO Doreen Toben explained that "[t]he marketing research suggest[s]. . .[VoIP] is for the 'single geeky guys' who are basically OK having one phone in the house they can use this way . . . .If you have three phones, it doesn't

[103] *See* FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2004, Table 2 (Dec. 2004) ("*Local Competition Report*").

[104] While this policy does not seem to be described on SBC's website, SBC service representatives inform prospective customers that they must order circuit-switched voice service along with xDSL.

[105] Matt Friedman, *DSL Growth Skyrocketed in 1004: Report*, NETWORKING PIPELINE, Feb. 24, 2005, *available at* http://www.networkingpipeline.com/showArticle.jhtml?articleID =60403146.

[106] *See TRRO* n.118. This practice is currently the subject of a Commission NOI. *See* BellSouth Telecommunications Inc. Request for Declaratory Ruling that State Commissions May not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers, *Memorandum Opinion and Order and Notice of Inquiry*, FCC 05-78, ¶ 37 (released Mar. 25, 2005) ("In this Notice of Inquiry, we seek to examine the competitive consequences when providers bundle their legacy services with new services, or 'tie' such services together such that the services are not available independent from one another to end users . . . Several commenters in this and other proceedings have raised the possibility that bundling services potentially harms competition because consumers have to purchase redundant or unwanted services.").

really work."[107] Indeed, Verizon is not "worried about VoIP service cannibalizing traditional wireline offerings, but instead sees the technology as an alternative for . . .college students, as well as 'win-back' for customers who have switched carriers."[108] Moreover, SBC has admitted that VoIP's appeal is limited, estimating that, at most, there will only be approximately 15 million non-RBOC VoIP customers by the end of 2008.[109] In light of these facts, it is unsurprising that the Commission recently concluded that "VoIP is purchased as a supplement to, rather than a substitute for, traditional local exchange service."[110]

Moreover, regardless of the geographic market definition used, the discrete product market for circuit-switched voice service demanded by mass market customers in SBC's region is highly concentrated. The Applicants submit precious little data on this subject, but there is no doubt that SBC provides local exchange service to the overwhelming majority, approximately 90 percent, of the residential local exchange customers throughout its region.[111] SBC also serves 20 million long distance lines[112] (the overwhelming majority of which are within its region[113]). This represents 44 percent of the company's local service customers.[114]

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[107] Justin Hyde, *Verizon Says Internet Phones a Niche Product*, REUTERS, Jul. 27, 2004, *available at* http://investor.news.com/Engine?Account=cnet&PageName=NEWSREAD&ID=1214380&Ticker=T&SOURCE=N27181390.

[108] Kelly M. Teal, *Verizon Enters VoIP Market*, XCHANGE, Jul. 22, 2004, *available at* http://www.x-changemag.com/hotnews/47h22124954.html.

[109] *See* UNE Fact Report, Table 9.

[110] *See TRRO* n.118.

[111] *See* Mark Cooper, *Remonopolizing Local Telephone Markets: Is Wireless Next?*, Jul. 7, 2004, at 7, *available at* http://www.consumerfed.org/localwireless.pdf (citing UBS Investment Research, Wireline Postgame Analysis, 7.0, Jun. 1, 2004; local data base).

[112] *See* SBC SEC Form10-K for fiscal year ending Dec. 31, 2004 at exhibit 13.

[113] *See id.* at Part 1, Item 1.

[114] *See* Carlton & Sider Decl. ¶ 10.

AT&T is one of the few major competitors in this market. As of the end of 2004, AT&T had over 20 million stand-alone mass market long distance customers nationwide and 4.2 million mass market customers receiving bundled local and long distance services nationwide.[115] This represents over 20 percent of all CLEC mass market local customers nationwide.[116] AT&T is a larger competitor in this market than either MCI or the cable companies. Indeed, cable companies have only a limited presence in the market for circuit switched mass market voice service.[117]

Moreover, the Commission has long held that the barriers to entry into the local voice market are high. New entrants must "attract capital, and amass and retain the technical, operational, financial and marketing skills necessary to operate . . . entrants will have to invest in establishing brand name recognition and, even more important, a mass market reputation for

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115 *See* AT&T SEC Form 10-K for fiscal year ending Dec. 31, 2004 at 8.

116 *See Local Competition Report*, Table 2 (noting that there are 20,824,618 switched access lines provided by CLECs to residential and small business customers). At the end of 2004, MCI had 7 million long distance customers and 3 million local customers. *See* MCI SEC Form 10-K for fiscal year ending Dec. 31, 2004, at 10.

117 The RBOCs estimate that all of the cable companies combined only provide service to 3.2 million circuit switched voice customers. *See UNE Fact Report*, Table 1. This presence is unlikely to grow because of their decision to transition to VoIP. *See* Ben Charney, *Cable Raises Its Voice*, NEWS.COM, Mar. 3, 2005, *available at* http://news.com.com/Cable+raises+its+voice+-+page+3/2100-7352_3-5597111-3.html?tag=st.next (noting that at first, cable companies relied upon circuit switches to provide phone service, but now they are beginning to transition to VoIP). For example, Cox is planning to immediately begin migrating its circuit-switched phone networks to VoIP. See Carol Wilson, VON: Cox Announces VoIP Plans, TELEPHONE ONLINE, Mar. 7, 2005, *available at* http://telephonyonline.com/voip/news/cox_voip_nortel_030705/index.html (noting that while existing TDM customers will be supported, new telephony adds will be VoIP based). There is every reason to think that the cable companies' VoIP offerings will resemble other mass market VoIP offerings and will thus not constitute a substitute for circuit switched phone service. Therefore, cable companies should not be considered significant participants in the market for mass market voice services.

providing high quality telecommunications services."[118] AT&T is one of the very small number of competitors that can clear these entry barriers. Its powerful brand and long experience in serving mass market customers has made it almost uniquely suited to competing in the local voice market.[119] SBC itself has indicated that AT&T's brand is so powerful nationwide that it will likely survive the merger.[120] This is not surprising since the value of AT&T's brand name alone has been estimated at between $5 and $10 billion.[121] Moreover, AT&T's reputation for service quality is second to none. Its mass market voice service has been rated well above average by third parties in terms of customer satisfaction.[122] It took years of experience and billions of dollars for AT&T to build up these competencies. Indeed, in order to achieve its

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118 *NYNEX/Bell Atlantic Merger Order* ¶ 6.

119 *Cf. GTE/Bell Atlantic Merger Order* ¶ 119 ("Finally, as in previous merger orders, we conclude that other firms currently serving or planning to serve the mass market for local exchange and exchange access services out-of-region are not yet included in the list of most significant market participants. Competitive LECs have begun serving residential markets but do not yet have the existing customer base and brand name that enable AT&T, MCI Worldcom, and Sprint, as well as certain incumbent LECs, to become most significant competitors.").

120 Said SBC's Chairman, Ed Whitacre "We value the heritage and strength of the AT&T brand, which is one of the most widely recognized and respected names throughout the world, and it will certainly be part of the new company's future." Press Release, AT&T, *SBC to Acquire AT&T*, Jan. 30, 2005, *available at* http://www.sbc.com/gen/pressroom ?pid=5097&cdvn=news&newsarticleid=21566.

121 *See* Ben McClure, *SBC's AT&T Buy No Blunder*, MOTLEY FOOL, Feb. 1, 2005, *available at* http://www.fool.com/news/mft/2005/mft05020112.htm.

122 For example, JD Power Ranked AT&T highest for customer satisfaction among local telephone service providers. *See* Press Release, AT&T, *AT&T Now Serves 3 Million Residential Local Service Customers*, Jun. 3, 2003, *available at* http://www.att.com/ news/2003/06/03-11759. Moreover, AT&T's local and long distance service was recently rated first in customer satisfaction by ACSI, a third party rating group. *See* Press Release, AT&T, *AT&T Leads Rivals in Customer Satisfaction*, Jun. 3, 2004, *available at* http://www.att.com/news/2004/06/03-13099.

presence in the local phone market, AT&T spent over $15 billion from 1998 to 2002;[123] a sum that could be matched by few other potential entrants, yet is likely necessary for entry in local markets on a national scale.

All of these factors demonstrate that the proposed merger poses a major threat to consumers of mass market circuit-switched voice service. The acquisition of the largest competitor by the firm with an overwhelmingly dominant position in an already highly concentrated market characterized by high entry barriers is likely to increase opportunities for the combined company to increase prices in the relevant market. Astonishingly (and tellingly) Applicants have offered no economic analysis of this important issue. They have also failed to submit the data interested parties and the Commission need to conduct such an analysis.

Rather than analyze the problem, Applicants instead claim that AT&T's decision to stop vigorously marketing its voice service to the mass market shows that AT&T's present market share is essentially irrelevant and that the merger will not eliminate a key competitor in that market. But AT&T's motivation for scaling back its mass market service activities must be closely scrutinized. The Commission has repeatedly discounted the stated intentions or market strategy of merger Applicants to exit a market when such a position was taken to limit government scrutiny of a transaction. For example, in blocking the merger of EchoStar and DirecTV, the Commission found "self-serving" EchoStar's announcement that it would no longer fund Starband, a residential satellite internet service, simply because EchoStar claimed the service was not viable.[124] The Commission analyzed the merger as if EchoStar were still in the market and held that the merger would "harm existing competition in the Ku-band internet

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[123] *See* Press Release, AT&T, *AT&T Now Serves 2 Million Residential Local Service Customers*, Oct. 16, 2002, *available at* http://www.att.com/news/2002/10/16-10938.

[124] *EchoStar/DirecTV HDO* ¶ 239.

access market."[125] Similarly, in analyzing the SBC-Ameritech merger, the Commission found "self-serving" Ameritech's explanation for its abandonment of its "Project Gateway" to enter the St. Louis residential market.[126] Because the Commission believed Ameritech's actions were simply a way to gain merger approval, it treated Ameritech as "a significant market participant in the mass market for local [service] in St. Louis."[127] A similar inquiry is warranted here.

Even if AT&T's decision to scale back its mass market operations were entirely unrelated to its desire to secure an offer of acquisition from an RBOC (a dubious proposition), AT&T would remain a formidable threat to SBC in the mass market. Of course, AT&T continues to have a significant market presence in both the local and long-distance market. Simply because AT&T is no longer actively marketing its service does not mean that AT&T does not continue to compete in the market. Notably, AT&T continues to take orders for local and long-distance mass market circuit switched voice service.[128] In all events, AT&T remains and would remain a powerful potential competitor whose very existence as an independent company places some discipline on SBC in the mass market.

Applicants also claim that AT&T is no longer able to serve the mass market going forward in large part because of the elimination of UNE-P. Yet SBC has consistently trumpeted the ability of carriers to serve mass market customers without unbundled switching,[129] and SBC and other RBOCs have signed multiple commercial agreements with CLECs to transition their

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[125] *Id.* ¶ 240.

[126] *SBC/Ameritech Merger Order* ¶ 80.

[127] *Id.* ¶ 81.

[128] On its website, AT&T offers numerous circuit switched long distance plans and continues to offer circuit switched local service in certain areas. *See* http://www.shop.att.com/plancomparison/

[129] *See, e.g., SBC Reply Comments*, WC Docket No. 04-313 *et al.* at 67-73.

customer base from UNE-P to other wholesale arrangements. For example, on January 3, 2005, SBC and Granite Communications signed a 5 year agreement with SBC for its "UNE-P replacement program."[130] Granite's deal with SBC was only one of 3 other similar deals it had struck with other ILECs.[131] Sage Telecom, the "third-largest competitive local exchange carrier in SBC's territory, serving more than one-half million local service customers" has signed a similar agreement to "replace the regulatory mandated UNE-P with a private commercial agreement."[132] BellSouth has "signed 100 commercial wholesale local voice platform agreements" with CLECs covering 530,000 formerly UNE-P access lines.[133]

There is every reason to think that AT&T could rely on similar arrangements to provide mass market circuit-switched voice service. The Applicants assert that AT&T would remain an "active competitor in the residential and small business market only if it could find a viable and profitable means [of providing] 'all distance' offerings."[134] Yet the Applicants have presented no evidence indicating why a wholesale alternative to UNE-P that was sufficient for AT&T's less robust competitors is not a viable option for AT&T. For example, the Applicants do not show how a move away from UNE-P would suddenly make provisioning local service to the mass market unprofitable. Absent such evidence, there is no reason to believe that AT&T could

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130 Press Release, Granite Telecommunications and SBC, *SBC and Granite Telecommunications Sign Long-Term Commercial Agreement*, Jan. 3, 2005, *available at* http://www.granitenet.com/documents/SBC-GranitereleaseFINAL010305.doc.

131 *See id.*

132 Press Release, Sage Telecom, *Sage Telecom and SBC Reach Wholesale Telecom Services Agreement: Nation's First Commercially Negotiated Agreement Ensures Healthy Phone Competition*, Apr. 5, 2004, *available at* http://www.sagetelecom.net/ViewNews.asp?NEWSID=73.

133 *See id.*

134 *See* Polumbo Decl. ¶ 6.

not reenter that market on short notice at minimal cost.[135] As the Applicants seem to admit, the only thing that AT&T would need to reconstitute in order to quickly become a full competitor once again is its marketing and customer care infrastructure.[136] Despite AT&T's recent reduction in headcount, there is no reason to believe that its expertise in these areas does not remain intact.

Moreover, contrary to its current position, AT&T seemed to believe for a long period of time following *USTA II* that entry was possible absent the availability of switching at TELRIC-based prices. In 2004, AT&T offered to negotiate an increase in UNE-P rates in the wake of the *USTA II* decision,[137] and recently signed a wholesale agreement with Qwest to ensure that its existing mass market voice customers will not be cut-off when UNE-P is no longer available.[138] In light of these offers and agreements, the Applicants offer no explanation or analysis as to why it is not "viable and profitable" for AT&T to compete for mass market customers, given that other CLECs, with fewer advantages and smaller market share, continue to compete. Moreover, the decision of the Commission on remand to eliminate mass market switching will likely be appealed to the courts. Therefore, it is entirely possible that the key reason proffered by the Applicants for why AT&T allegedly exited the mass market will soon disappear. Because the Applicants bear the burden of proving the transaction serves the public interest, the Applicants' application must fail on this point. Therefore, absent further information from the Applicants,

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[135] *See* Wilkie Decl. ¶ 49.

[136] *See* Polumbo Decl. ¶¶ 14-30.

[137] *See* Press Release, AT&T, *AT&T Proposes Roadmap to Facilities-based Local Telecom Competition*, Apr. 29, 2004, *available at* http://www.att.com/news/2004/04/29-13042 (AT&T's proposal "provides for increases in the price of UNE-P by at least $3 in phases over the next 2 ½ years so as to impose a financial penalty on competitors that continue to rely on UNE-P.").

[138] *See* Polumbo Decl. ¶ 11.

AT&T must be considered a key potential market competitor for mass market voice services, and the elimination of AT&T in this market must be considered a substantial public interest harm.

C. Applicants Have Failed to Address the Fact that a Combined SBC-AT&T Will Likely have a Powerful Incentive to Engage in Tacit Collusion with a Combined Verizon-MCI.[139]

In two linked markets, *i.e.*, adjacent geographic markets for similar products, of which there is a separate dominant firm in each market, the two dependent firms have incentives to engage in a form of interdependent behavior whereby they refrain from competing with each other.[140] This behavior may arise from no apparent agreement or even direct contact among the two firms. However, each recognizes that it is to its individual benefit to do so. Yet the result is the same: a significant potential competitor in each market is lost and consumers, as a consequence, suffer.

"Tacit collusion," sometimes called "conscious parallelism" or "coordinated efforts," describes a policy of firms that otherwise would be expected to compete acting for mutual, rather than individual, advantage.[141] For example, firms dominating in adjacent markets for similar products may refuse to take advantage of potentially profitable market opportunities in the others' area of operation in implicit reliance on an expectation that potential competitors will act similarly, thereby preserving the dominance of each firm in its own market.[142] Tacit collusion

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139 *See* fn. 2, *supra* (discussing the current bids by Verizon and Qwest to acquire MCI, and the assumptions underlying these comments on that subject).

140 *See* Wilkie Decl. ¶ 28.

141 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 at 227 (1993).

142 *See* Phillip E. Areeda & Herbert Hovenkamp, *V Antitrust Law, An Analysis of Antitrust Principles and Their Application* ¶ 1141a (2nd ed. 2003) ("[there is] a possible additional deterrent effect when several firms confront each other in several different markets. Firm A may hesitate to reduce price in market # 1 when it fears that rival B may not only retaliate in that market but also retaliate to A's detriment in market # 2. That is, each

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thus can support the ability of multiple firms to exercise market power in multiple markets without the aid of an explicit agreement to do so.

Instances in which competing firms embark upon similar courses of conduct may suggest that the firms have agreed to manipulate the market in some way. However, because direct evidence of such an agreement is often impossible to obtain, under antitrust law an illegal agreement must often be inferred from circumstantial evidence, including the public conduct and "business behavior" of competitors, as well as market realities.[143] A distinction is made between parallel but independently determined behavior and conduct based on an agreement, which need not be explicit.[144] While instances in which competing firms embark on similar courses of conduct may suggest that the firms have agreed to manipulate the market in some way, proof of parallel business behavior alone does not establish agreement for antitrust purposes.[145] Requisite agreement can be inferred by the existence of additional circumstances, often referred to as "plus factors," which, when viewed in conjunction with the parallel acts, tend to exclude independent self-interested conduct as an explanation for the parallel behavior (*i.e.*, conduct that was against the firm's economic self-interest).[146] Examples of "plus factors" from which courts have found that an agreement can be inferred with or without direct evidence of communication among the

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firm may forbear from upsetting noncompetitive oligopolistic pricing in one market whenever it fears detrimental retaliation either in that market . . . Thus, competition might be diminished in one market when the same firms inhabit a second market where they compete.").

143 *See Theater Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954).

144 *See Modern Home Inst., Inc. v. Hartford Accident & Indem. Co.*, 513 F.2d 102, 108-09 (2d Cir. 1975) (The crucial question is whether conduct "stemmed from independent decision or from an agreement, tacit or otherwise.").

145 *See Theater Enters.*, 346 U.S. at 541.

146 *See Interstate Circuit v. United States*, 306 U.S. 208, 222-23 (1939).

parties include the opportunity for collusion; a common motive to enter into a conspiracy; a high level of inter-firm communications; acts contrary to a firm's economic interest, but rational if the alleged agreement existed; and a departure from normal business practices.

The Commission's inquiry into potential tacit collusion or coordinated efforts between SBC and Verizon should not be limited to whether there is an actual antitrust statute violation.[147] The Commission's broader mandate "to make an independent public interest determination"[148] requires it to consider whether RBOC tacit collusion would be anti-competitive even if not strictly violative of the antitrust laws. For example, in the Bell Atlantic/NYNEX merger and the proposed British Telecom/MCI merger, the Commission analyzed whether a merger between actual or potential horizontal rivals could depress competition indirectly by making it easier for a diminished number of competitors to exercise market power through coordinated interaction.[149] While the DOJ's analysis, for example, focuses solely on whether the effect of the proposed merger would be substantially to lessen competition, the Commission's public interest authority enables it to rely upon its extensive regulatory and enforcement experience to find a merger unlawful unless it imposes and enforces certain types of conditions that serve to "tip the

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147 The Commission has repeatedly stated that its analysis of the competitive effects of a proposed transaction is informed by antitrust principles, but not limited by the antitrust laws. *See* Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer of Control of Corporation Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services, *Memorandum Opinion and Order*, 13 FCC Rcd. 15236, 15243-44, ¶ 12 (1998) (citing *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (stating FCC is not "strictly bound by the dictates of [the antitrust]laws" (internal citations omitted)); *see also NYNEX/Bell Atlantic Merger Order* ¶ 32.

148 *SBC/Ameritech Merger Order* ¶ 49.

149 *See NYNEX/Bell Atlantic Merger Order* ¶¶ 121-24, 144; The Merger of MCI Communications Corporation and British Telecommunications plc, *Memorandum Opinion and Order*, 12 FCC Rcd. 15351, 15398, ¶ 125 (1997); *Cingular/AT&T Wireless Merger Order* ¶ 150; *EchoStar/DirecTV HDO* ¶ 280.

balance" and result in a merger yielding net public interest benefits.[150] To conclude that a merger is in the public interest, "the Commission must 'be convinced that it will enhance competition.'"[151]

The consequence of RBOC tacit collusion not to compete is especially dire in the context of this Application. The likelihood is not just that SBC and Verizon will continue their past predilection to steer clear of each other in over two-thirds of the country, as detailed below.[152] The even more damaging probable consequence is that the inclination of SBC and Verizon not to compete head-on will affect their newly acquired AT&T and MCI units, and those two critical existing competitors will be effectively lost as meaningful out-of-region market participants.

1. *SBC-AT&T and Verizon-MCI Each have Strong Incentives not to Compete Aggressively in the Other's In-Region Territories.*

When two firms that compete or could compete in multiple markets, each in which one of the firms has a significant cost advantage over the other, the two firms have mutual incentives to engage in tacit collusion to avoid competing in the market in which the other has a cost advantage.[153] If one firm attempted to compete in the market in which the other has the dominant cost advantage, the second firm is likely to respond in kind in the first firm's "territory." The result is a net loss to both firms, as prices are forced down while average costs increase.

The proposed mergers of SBC/AT&T and Verizon/MCI create fertile ground for tacit collusion. Their legacy monopoly status affords both SBC and Verizon large and indisputable

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150 *SBC/Ameritech Merger Order* ¶ 52.

151 *Id.* ¶ 49 (quoting *NYNEX/Bell Atlantic Merger Order* ¶ 2).

152 The states in which SBC and Verizon are the predominant ILECs account for over 65% of the United States population.

153 Wilkie Decl. ¶¶ 34-38.

cost advantages over new entrants in their respective operating regions. Their network cost advantages over rivals will only improve should SBC and Verizon succeed in acquiring AT&T and MCI as planned. This cost structure creates the classic set of conditions which are likely to produce collusive activity.

The fact that an independent MCI already operates in the SBC region cannot be relied upon to establish that it will continue to be an aggressive competitor after being absorbed by Verizon. Although MCI currently has a presence in SBC's territory, it has achieved only a nominal market penetration, and possesses notable cost disadvantages relative to the much larger SBC. While this is not a particularly favorable state of affairs for MCI pre-merger, it is simply the environment in which it competes, not only with SBC, but with the other RBOCs. Should Verizon be allowed to acquire MCI, the attractions to a post-merger Verizon/MCI of trying to expand MCI's foothold in SBC territory and invite reciprocal activity by SBC in Verizon's territory would be minimal. It is far more likely, post-merger, that MCI (then Verizon) would decline to market MCI's services aggressively which will consequently be allowed to wither on the vine until they all but evaporate.

In short, the Commission should be concerned that the proposed SBC/AT&T and Verizon/MCI mergers in tandem will create powerful incentives for a combined SBC-AT&T to tacitly collude with a combined Verizon-MCI. Like AT&T, MCI's presence creates both real and potential alternatives to SBC's excessive wholesale transmission prices. However, post-mergers, there would be a strong disincentive for the combined Verizon-MCI entity to continue bidding aggressively to provide wholesale services to other carriers in the SBC region, and certainly to invest in new facilities there. Simply put, such conduct likely would spark the combined SBC-AT&T entity to retaliate by competing for wholesale services in the Verizon

territory. In other words, the market environment is so defined that each dominant player, acting rationally given its experience with rivals' reactions, chooses the same course of geographically partitioned action. In addition, the two newly-merged entities are likely to forego discriminatory conduct against any residual operations of the other in-region, and instead target discrimination against all other competitors. The end result will be more concentrated markets that are *ever more conducive* to facilitating tacit collusion among the RBOCs.

Similarly, in mass market voice services, both local and long distance, the combination of these two proposed transactions is likely to result in each carrier pulling back and refusing to market aggressively to business and residential users in the other's territory. The consequence would be, over a relatively short period, a dissipation and practical elimination of market shares for mass market voice services in the case of both MCI and AT&T in the SBC and Verizon territories, respectively.

2. *There Is a History of Tacit Collusion between SBC and Verizon – i.e. They Have Had the Opportunity to Compete with Each Other for Years, but Have Chosen Not to Do So.*

When enacting the 1996 Act, Congress anticipated that the RBOCs would offer each other significant competition, particularly in neighboring service territories. Congress intended that the implementation of the 1996 Act would achieve the full benefits of meaningful local competition in a very short period of time by "get[ting] everybody into everybody else's business."[154] Indeed, the 1996 Act specifically authorized the RBOCs immediately to compete

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[154] 143 CONG. REC. S686 (daily ed. Feb. 1, 1996) (statement of Sen. Pressler).

for *local and long distance* telecommunications services outside their region where they could take advantage of the Act's provisions that give them access to other incumbent's facilities.[155]

However, SBC and Verizon have made virtually no effort to enter each other's service territories in any significant way. While this failure to compete directly has been characteristic of ILECs, and especially the RBOCs, the absence of competition between SBC and Verizon is particularly conspicuous for two reasons. First, each of these companies, as a means of securing earlier merger approvals from the Commission – SBC with Ameritech and Verizon with GTE, obliged themselves to enter more than twenty major markets in competition with other ILECs. Each company has fallen woefully short of what was promised. Second, SBC and Verizon serve contiguous and extensively intermingled markets (*e.g.*, Connecticut, on the one hand, and in California, Texas, and the old Ameritech region, on the other), yet there has been negligible competitive overlap over the past decade as each company has steered clear of the other.

The failure of SBC and Verizon to become a CLEC in an adjacent market, areas that afford an opportunity for the most significant potential local competition, is indicative that something other than pursuit of the individual ILEC's competitive interest is at play. The unfortunate explanation has been made by the former CEO of Ameritech (now part of SBC) and current CEO of Qwest who declared on October 31, 2002, that "[e]ven though his company could use a new revenue stream . . . he would not consider competing against his old firm for

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155 *See* 47 U.S.C. §§ 271(b)(2), 271(j). The RBOCs were required to comply with the unbundling and resale conditions mandated in the 1996 Telecom Act before they would be granted relief from the line-of-business restrictions that precluded their participation in in-region interLATA service markets. However, the RBOCs were prohibited only from providing interLATA service within their service regions. They were not precluded from participating in out-of-region interLATA services or local services. Indeed, the Act permits an RBOC to offer interLATA services originating in states where it does not offer local service as an incumbent.

phone customers in the Chicago area" and that "it would be fundamentally wrong to compete for Ameritech's residential customers even though Qwest could profit from the service."[156] His view recently was echoed by another former ILEC CEO who stated that "I also feel that the [ILECs] don't want to start a cross-border war. If ILEC A buys long-haul company B, then ILEC B is going to have to go after that. I think they feel that they have won the battle. They have beaten back the [CLECs]. Why would they want to start a cross-border battle?"[157]

a. To secure approval for earlier mergers, SBC and Verizon both promised to expand into other ILECs' local markets, but later reneged on those obligations.

The reluctance of SBC and Verizon to compete with each other runs so deep that even express Commission conditions requiring them to invade each other's territories have failed. After agreeing to compete out-of-region as pre-conditions to the approval of prior merger requests, both SBC and Verizon backed away from their commitments soon after the requirements sunsetted.[158]

In granting the SBC/Ameritech merger in 1999, the Commission insisted that, without conditions, the merger posed significant potential harm to the public interest.[159] To gain approval for its merger with Ameritech, SBC promised in the merger application to implement

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156 Jon Van, *Ameritech Customers Off Limits: Notebaert*, CHICAGO TRIBUNE, Oct. 31, 2002, at Business, p. 1 (stating that "it might be a good way to turn a quick dollar but that doesn't make it right").

157 *See* Chris Nolter, *Taking the Local*, 28 THE DEAL 9, June 2, 2003, at 22 (quoting Kevin Mooney, ex-CEO of Cincinnati Bell).

158 *See, e.g.*, David Rohde, *Bells are Failing to Compete as They Promised*, NETWORK WORLD FUSION, Mar. 5, 2001, *available at* http://www.nwfusion.com/news/2001/0305 bellcomp.html; *see also* Elizabeth Douglass, *Verizon to Pull Plug on OneSource Service Plan; Telecom: Subscribers of Money-Losing All-in-One Program Would be Forced to Find Other Local, Long Distance Options*, LOS ANGELES TIMES, Feb. 26, 2001, at C-1.

159 *See SBC/Ameritech Merger Order* ¶ 348.

its so-called "National-Local" strategy wherein it would compete for local customers in 30 additional major markets outside of its region within 30 months of the merger. This was transformed into a formal commitment, and SBC further agreed to pay fines up to $1.2 billion if it failed to reach the out-of-region competition targets it had committed to achieve on the promised timetable.[160] SBC claimed that it needed additional capital from the merger in order to enter other local markets and compete against the other RBOCs, including Verizon,[161] and that its merger with Ameritech would ignite new local services competition by creating companies with the experience, financial means, and geographic positioning to succeed where other carriers had failed.[162]

The Commission adopted SBC's National-Local strategy as a condition to the merger to "ensure that residential consumers and business customers outside of [the SBC territory] benefit from facilities-based competitive service by a major incumbent LEC."[163] The Commission noted that the condition effectively required SBC and Ameritech to "redeem their promise that their merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier."[164] The merger was consummated in October 1999 and the first three cities in the National-Local strategy were promised to be operational "within a year" of

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160 *See SBC/Ameritech Merger Order* ¶¶ 398-99.

161 *See* Tim Greene, *Critics Blast SBC Mega-Deal*, NETWORK WORLD, May 18, 1998, *available at* http://www.findarticles.com/p/articles/mi_qa3649/is_199805/ai_n8802174/print; *see also SBC May Accelerate Its 3-Year Expansion Plan*, FORTH WORTH STAR-TELEGRAM, Dec. 1, 1998 ("Stephen Carter, president of strategic markets, said the plan is contingent on regulatory approval for SBC's $77.4 billion purchase of Ameritech Corp., expected to be completed in the middle of next year.").

162 *See, e.g.*, *SBC Communications and Ameritech to Merge*, PR NEWSWIRE, May 11, 1998, *available at* http://www.prnewswire.co.uk/cgi/news/release?id=44254.

163 *SBC/Ameritech Merger Order* ¶ 398.

164 *Id.*

closing.[165] In late 2000, SBC began its out-of-territory initiative by ostensibly offering high-end voice and data services to the enterprise market and targeting the mass market with switched voice in only a handful of the thirty out-of-region markets.[166] SBC also announced that it had entered into long term lease agreements for facilities to serve the markets.[167]

However, SBC fundamentally changed course in early 2001, when it declared that it was scaling back marketing efforts in the out-of-region areas and that it only would offer switched voice service pending changes in the regulatory and economic climate.[168] SBC admitted that it would continue serving only *existing* customers in the initial six out-of-region cities where it already had began to offer trifling amounts of service.[169] With regard to the other 24 markets, SBC stated that it would only maintain the minimum "network presence" that it believed was required under its commitment to the Commission.[170] A spokesperson for SBC subsequently admitted that its marketing effort in the out-of-region areas is limited to Yellow Pages

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165 *See* ST. LOUIS POST-DISPATCH, Feb. 5, 1999 ("The three cities named will be the first targets, with service available within a year of the purchase, SBC said").

166 *See* SBC Communications Inc. Form 10-K for the fiscal year ended December 31, 2000 under the heading "National Expansion"; *see also* SBC Communications Inc. 2000 Annual Report to Shareholders under the heading "Regulatory Environment" at p. 12 (service introduced in Boston, Fort Lauderdale, Miami, New York and Seattle in 2000).

167 For example, SBC announced that it had entered into two separate lease agreements, with terms of 20 and 21 years, respectively, to provide dark fiber to reach customers in 30 markets. *See* Press Release, SBC Communications, Inc., SBC to Expand with Coast-to-Coast Network Agreements (May 30, 2000).

168 *See, e.g.*, Patricia Horn, *SBC Trims Plans for Expansion*, PHILADELPHIA INQUIRER, Mar. 3, 2001; David Rohde, *Bells are Failing to Compete as They Promised*, NETWORK WORLD FUSION, Mar. 5, 2001, *available at* http://www.nwfusion.com/news/2001/0305 bellcomp.html.

169 Patricia Horn, *SBC Trims Plans for Expansion*, THE PHILADELPHIA INQUIRER, Mar. 3, 2001.

170 *Id.*

advertising and "promotion" of services via SBC's website.[171] In short, SBC abandoned all credible efforts to make the vision of vibrant local competition underlying the National-Local Plan a reality.

Just as it had with the SBC/Ameritech merger, the Commission determined that the proposed GTE/Bell Atlantic merger posed significant potential harm to the public interest.[172] To mitigate potential public interest harms, Verizon proposed a set of voluntary commitments as conditions of approval of the proposed merger, including a promise to target 21 cities for out-of-region expansion and local competition with SBC, Ameritech, BellSouth and Qwest within 18 months of closing.[173] Verizon proclaimed that the merger would offer "a broad-scale attack on the local markets of the other RBOCs across the country" and "makes meaningful entry possible where the separate companies alone could not succeed."[174] Verizon claimed that the merger would enable the combined company to enter a large number of new local markets by allowing it to leverage Bell Atlantic's existing large business customer relationships.[175] Verizon also claimed that it needed a large customer base because its out-of-region expansion plan involved a facilities-based entry strategy that required a broad base of customer relationship to support the large capital investment required.[176]

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171 Fred Dawson, *The Real Story on Bell Out-of-Region Competition*, XCHANGE MAGAZINE, Sept. 1, 2002, *available at* http://www.xchangemag.com/articles/291feat1.html.

172 *GTE/Bell Atlantic Merger Order* ¶ 3.

173 *GTE/Bell Atlantic Joint Reply Comments*, CC Docket No. 98-184, at 18 (Dec. 23, 1998); *see also* GTE Corp. and Bell Atlantic Corp. Application for Commission Consent to Transfer Control, CC Docket No. 98-184, at 6 (filed Oct. 2, 1998).

174 *Id.*

175 *GTE/Bell Atlantic Merger Order* ¶ 222.

176 *Id.* ¶ 223.

Verizon's commitment was formalized into a condition that within 36 months from the merger closing – by 2003 – it would spend a minimum of $500 million to provide competitive local service outside its region or provide competitive local service to at least 250,000 out-of-region customer lines.[177] Verizon further agreed to pay fines up to $750 million if it failed to reach the out-of-region competition commitments.[178]

In granting the merger application, the Commission determined that, in the context of Verizon's out-of-region expansion strategy, *the single primary benefit* of the merger was that the 21 targeted markets would receive the benefits of competition more rapidly as a result of the merger than without.[179] But like SBC before it, Verizon's promise to invest in competitive telecom facilities was little more than a sleight-of-hand intended to obtain approval for their merger of ILECs.[180] For example, Verizon counted $90 million of a $150 million preliminary investment in DSL provider NorthPoint Communications Group, Inc. toward satisfaction of its commitment to spend $500 million on out-of-territory services, even though the NorthPoint

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177 *Id.* ¶ 43.

178 *Id.* ¶ 46.

179 *Id.* ¶ 225.

180 Even before beginning its expansion, in December 2000, Verizon announced it was discontinuing its bundled local and long distance service offered by GTE, which had been designed to compete against local carriers such as Pacific Bell and BellSouth for business and residential customers. This forced 370,000 customers in nine states to switch their local and long distance service to the incumbents or other options, if available. Elizabeth Douglass, *Verizon to Pull Plug on OneSource Service Plan; Telecom: Subscribers of Money-Losing All-in-One Program Would be Forced to Find Other Local, Long Distance Options,* LOS ANGELES TIMES, C-1 (Feb. 26, 2001). The affected customers were located in California, Florida, Texas, Washington, Oregon, Illinois, Tennessee, Indiana and Kentucky.

acquisition was never completed.[181] Verizon made the investment as part of an intended acquisition but subsequently backed away from the buyout. Verizon's ultimate decision against acquiring NorthPoint arguably contributed to, if not caused, NorthPoint's demise, which eliminated a major potential RBOC competitor.[182] While Verizon reportedly extended its high-speed data transport services to large business customers in select portions of the greater Los Angeles metropolitan area the following year,[183] it soon scaled back its competitive efforts against SBC, efforts which it has not subsequently sought to revive.[184] In short, despite minimal competitive presences in some of the twenty-one markets targeted by Verizon, the "broad scale attack on local markets" of other ILECs promised by Verizon has not come to pass.

To more fully understand the extent of and the reasons for the failure of SBC and Verizon to fulfill commitments or announcements made in conjunction with the foregoing previous mergers, the Commission should supplement its initial requests for information in this docket and seek from SBC copies of all internal business plans, marketing plans, analyses, and other

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[181] *See, e.g.*, Fred Dawson, *The Real Story on Bell Out-of-Region Competition*, XCHANGE MAGAZINE, Sept. 1, 2002, *available at* http://www.xchangemag.com/articles/291feat1.html.

[182] *See, e.g.*, Reply Comments of the Association for Local Telecommunications Services, CC Docket No. 98-184 (filed Mar. 22, 2002).

[183] *See* Press Release, Verizon Communications Inc., Verizon Heralds New Era of Communications Competition in Los Angeles (June 27, 2002), *available at* http://newscenter.verizon.com.

[184] *See, e.g.*, Fred Dawson, *The Real Story on Bell Out-of-Region Competition*, XCHANGE MAGAZINE, Sept. 1, 2002, *available at* http://www.xchangemag.com/articles/291feat1.html; *see also* David Rohde, *Bells are Failing to Compete as They Promised*, NETWORK WORLD FUSION, Mar. 5, 2001, *available at* http://www.nwfusion.com/news/2001/0305bellcomp.html; *see also* Elizabeth Douglass, *Verizon to Pull Plug on OneSource Service Plan; Telecom: Subscribers of Money-Losing All-in-One Program Would be Forced to Find Other Local, Long Distance Options*, LOS ANGELES TIMES, Feb. 26, 2001 at C-1.

documents prepared expressly by or for SBC (whether prepared internally or by outside advisors) that discuss SBC's implementation of its "National Local" strategy.

b. Even where they have adjacent ILEC service territories, SBC and Verizon rarely cross historic borders to compete with each other.

If SBC and Verizon had any serious intention to compete with each other in the provision of local telecommunications services, it is reasonable to expect that they would establish CLEC operations in areas adjacent to their ILEC monopoly service territories. However, a decade after they received the green light to compete beyond their historic borders, and five years after their prior, conditioned mergers, neither RBOC has chosen to do so in a significant way.

This is very peculiar given the significant extent to which the two operate in contiguous territory, in many cases one surrounding the other.[185] The maps in the attached Exhibit B demonstrate this failure to cross-over in several key markets where Verizon and SBC share extensive borders – California, Connecticut, and Texas.[186] For example, Verizon has not expanded its out-of-region reach in any meaningful way in California since the GTE/Bell Atlantic merger in 2000. Verizon provides local service in California in approximately 260 exchanges and local calling areas.[187] The current Verizon service area mirrors, with few

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185 *See, e.g.,* David Rohde, *Bells are Failing to Compete as They Promised,* Network World Fusion, Mar. 5, 2001, *available at* http://www.nwfusion.com/news/2001/0305bellcomp.html. ("Nearly halfway into the three-year period the government defined for SBC Communications to compete locally with the three other Bells, users and independent competitive local exchange carriers (CLEC) call SBC's effort virtually invisible").

186 *See* Exhibit B.

187 Verizon California Inc. Tariff, Schedule Cal. P.U.C. No. AB; Schedule Cal. P.U.C. No. A-28.

exceptions, the pre-merger GTE service areas.[188] In fact, the lists of extended area exchanges and district areas by zone in Verizon's current tariff appear to come directly from the pre-merger GTE tariff.[189] While SBC and Verizon serve many of the same areas nominally, there actually is minimal overlap in terms of offering individual consumers choice between the two.[190] The websites for both SBC and Verizon contain maps that illustrate the location of each company's wireline customer locations.[191] These maps clearly show that neither SBC nor Verizon provides service throughout the State of California. Moreover, the maps plainly show that both companies purposely avoid serving the same areas.[192]

Similarly there is very little overlap between the Verizon and SBC service areas in and around Connecticut, despite the carriers sharing a long border in this densely populated area of the country. SBC provides service to most of the State of Connecticut. Verizon provides service in the southwest extremity of Connecticut and in contiguous states, *i.e.*, New York, Massachusetts, and Rhode Island. Verizon's dominance in the surrounding territories provides it with an extraordinary opportunity to compete aggressively and successfully in the adjacent Connecticut territory. However, Verizon has not sought to compete in any meaningful way in

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188 GTE California Incorporated [pre-merger] Tariff, Schedule Cal. P.U.C. No. AB, Schedule Cal. P.U.C. No. A-28.

189 Verizon California Inc., Schedule Cal. P.U.C. No. A-28, sheets 7-26. The pages date back to 1991 and use the GTE name in the header.

190 *See* Wilkie Decl. ¶ 39.

191 *See* http://investor.verizon.com/business/wireline.html (Verizon wireline map) and http://www.sbc.com/gen/investor-relations?pid=5708 (SBC wireline map).

192 *See* Exhibit B; Although certain SBC exchanges are listed as part of Verizon's local calling area extended area exchanges to which Verizon customers can call, they are not included in Verizon's list of local exchanges from which customers may be served. Verizon California Inc. Tariff, Schedule Cal. P.U.C. No. A-28.

Connecticut.[193] Operating as SNET, SBC provides local exchange and toll service in 86 exchanges in Connecticut,[194] which encompass at least 101 service areas.[195] In contrast, Verizon's local exchange tariff lists only two exchanges in that state, which encompass 11 local service areas.[196] These are the exact same exchanges in which GTE provided service before it merged with Verizon in 2000. Just as Verizon has not ventured into traditional SBC territory, SBC has not ventured beyond the Connecticut border to compete with Verizon in New York, Massachusetts, or Rhode Island.

Texas provides another significant example where Verizon and SBC steadfastly refuse to cross swords despite being in each others' back yards. SBC has operated as the regional incumbent in Texas since divestiture. SBC currently provides local service in approximately 650 exchanges and calling areas in Texas.[197] Verizon currently provides local service in approximately 490 exchanges in Texas. While there is incidental overlap between the SBC and Verizon service areas in Texas when examined under a microscope, for all practical purposes, *no competition between the two exists*. For example, the Verizon tariff includes the Irving exchange

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[193] Verizon is the incumbent local exchange provider in only two Connecticut communities, Greenwich and Byran, which adjoin Verizon's service area in New York. These two communities are part of the New York Metropolitan Area and are wholly located within the local access and transport area that includes New York City, Long Island, and Westchester County, New York.

[194] SNET America, Inc. Tariff, D.P.U.C. No. 1, § 4.2.2; The Southern New England Telephone Company, Local Exchange Tariff, Part X, § 1.B.

[195] SNET America, Inc. Tariff, D.P.U.C. No. 1, § 4.3.1; The Southern New England Telephone Company, Local Exchange Tariff, Part X, § 1.B.

[196] Verizon New York Inc., State of Connecticut No. 3, Telephone, § 1.B.

[197] SBC Texas, Local Exchange Tariff, § 1.4; Southwestern Bell Telephone Company, Texas Local Exchange Tariff, § 1.2. This count of exchanges includes both SBC exchanges and exchanges associated with other telephone companies, but included in SBC's calling area.

(which encompasses the DFW Airport area and certain suburban areas north of Dallas, including the cities of Euless, Grapevine, Coppell and Irving), but the SBC tariff does not. Similarly, while the Houston and Corpus Christi metropolitan exchanges are included in SBC's tariffs, they are not included in the Verizon tariff. The SBC and Verizon wireline maps for Texas also show that while nominal overlapping coverage exists, it appears that the companies purposely avoid serving the same areas in virtually all other parts of the state, despite the two ILEC's service territories being intermingled throughout.[198] In general, the Verizon customers are concentrated in central Texas, with a scattering of customers in the eastern part of the state. The SBC map shows that it does not serve customers in the central Texas area served by Verizon.[199]

As for the future, there is no reason for the Commission to anticipate anything other than similar behavior by SBC in Verizon's and other ILEC markets, and the same by Verizon in SBC markets. Certainly, SBC and AT&T in their Application offer no basis for concluding things will be different after the proposed mergers. Indeed, with the elimination in each case of the two principal competitors – AT&T and MCI – the meager prospects for cross-border competition only diminish further.

Post-mergers, SBC and Verizon are unlikely to compete in the consumer long-distance segment either, although this segment was long the concentration of both of their acquisition targets, AT&T and MCI. Currently, both SBC and Verizon, despite having the ability to compete for long-distance customers out-of-region since 1996, have essentially entered the long-

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[198] *See* Exhibit B.

[199] Similarly, there are many distinct areas within the states of Illinois, Michigan, Ohio, Wisconsin, and Indiana, to name the principal additional examples, that are served by Verizon and around which SBC provides service. *See* http://www.sbc.com/gen/investor-relations?pid=5708; http://investor.verizon.com/business/wireline.html. SBC has not sought to compete in Verizon markets in these states by extending its network from its secure and historical base, and *vice versa*.

distance fray only recently and in-region after receiving Section 271 approval to offer in-region interLATA services under the Communications Act. Exacerbating the unlikelihood that SBC's acquisition of AT&T and Verizon's purchase of MCI would change this fact is that both RBOCs are currently marketing long-distance service principally in bundled fashion with local service. So, except where SBC and Verizon provide local service – meaning within their historic home territories – they are extremely unlikely to compete against each other for long-distance customers.

SBC is now authorized to offer interstate long distance services nationwide. But SBC effectively only provides long distance service to persons residing in the SBC thirteen state home territory, who have chosen SBC as their local service provider.[200] Indeed, persons residing outside the thirteen-state SBC home territory apparently cannot obtain interstate long distance services from SBC.[201] Similarly, Verizon is authorized to offer interstate long distance services nationwide, except Alaska.[202] However, Verizon provides service primarily to its local telephone service customers located in 29 states and the District of Columbia.[203] Its efforts to market long-distance service have historically been linked to areas where it might gain or retain local customers through a bundled offering.

In order to examine the potential for tacit collusion and its ramifications fully before it renders any decision on the SBC/AT&T merger Application (or the Verizon/MCI merger Application), the Commission must have more information from the Applicants at its disposal.

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200 *See* http://www02.sbc.com/Products_Services/Residential/Catalog; *see also* SBC SEC Form 10-K for fiscal year ended Dec. 31, 2004, Item 1. *InterLATA Long-Distance*.

201 *See* http://www.sbc.com/gen/general?pid=1106.

202 *See* http://www22.verizon.com/ForYourHome/sas/sas_LongDistance.aspx?ViewTab=LD.

203 *See* Verizon Communications 2004 Annual Report at 13.

The Application filed by SBC and AT&T utterly fails to demonstrate that the surviving entity will compete in adjacent ILEC territories. The Joint Petitioners welcome the Commission's requests for information dated April 15, 2005, seeking data and documents that will shed further light on the potential for public interest harm as a result of tacit collusion. In addition to the information already solicited by the Commission, the Commission should supplement its original requests and require SBC and AT&T to provide (i) copies of all analyses or studies prepared expressly by or for SBC (whether prepared internally or by outside advisors) in the last five years that discuss SBC's entry (potential or actual) into other ILEC territories; and (ii) to the extent that SBC has purchased facilities and equipment to provide services out-of-region, identify the vendor, the facilities and equipment purchased, and the terms and conditions of the transaction.

V. APPLICANTS' CLAIMS REGARDING INCREASED EFFICIENCIES ARE HIGHLY SPECULATIVE, MOSTLY SUSPECT AND CANNOT POSSIBLY OUTWEIGH THE LIKELY HARMS CAUSED BY THE MERGER.

The Commission's task in reviewing the Application is to evaluate the proposed merger in light of the public benefits and public harms.[204] The Application identifies several benefits to the public that are little more than fanciful claims that Applicants can make a silk purse from a sow's ear. The truth is that it is impossible to achieve meaningful public benefit through the merger when it, among other public harms, removes a significant facilities-based competitor from the marketplace, concentrates in SBC significant in-region market power on both a vertical and horizontal basis, and eliminates at least 13,000 U.S. jobs.[205]

No matter what the Application says, to the consumer, the proposed merger will mean less choice and higher prices with a corresponding diminishment in investment and deployment

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[204] *See generally* 47 U.S.C. §§ 214(a), 310(d).

[205] Leslie Cauley, *SBC, AT&T Merger to Cut 13,000 Jobs*, USA TODAY, Feb. 2, 2005.

of new and innovative services and products. This hurts consumers directly, but will also have a substantial negative impact on the nation's economy, not only through the loss of jobs, but through forgone investment and innovation.

One thing that is clear from the Application is that SBC has much to gain from acquiring AT&T. What is not clear is how the merger will benefit the public. The Application makes sweeping claims regarding public benefits such as the merger will "enhance and not reduce competition,"[206] "renew American leadership in communications,"[207] "enhance service to the U.S. government customers and strengthen U.S. national security,"[208] and "benefit customers through increased research, development, and innovation and other significant synergies,"[209] but these unsupported claims cannot, and do not, stand up to simple scrutiny.

The truth is that:

- large carriers dominating the market do not "enhance" competition;
- SBC's desire to be the dominant world carrier does not benefit the American public and is not relevant to the Commission's analysis of the proposed merger;
- if national security is an issue and AT&T is somehow in jeopardy of not being able to fulfill all its contractual obligations to the government save for the merger, this issue needs to be addressed by the government agencies that oversee AT&T's government contracts; and
- firms that hold dominant positions in the marketplace are far less likely to innovate than firms facing effective competition.

This means that the combination of AT&T and SBC will have the opposite effect of what Applicants claim in their submission.

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206 Application at 5.

207 Application at 13.

208 Application at 17.

209 Application at 21.

A. AT&T is Not a "Failing Company."

There is an undercurrent in the Application that leads to the conclusion that somehow AT&T is not a viable company.[210] This notion is certainly the basis for the Application arguments that, if the merger is permitted, the combined company will be a "world leader in communications" and that the merger will "strengthen U.S. national security."[211] AT&T simply does not require a merger with SBC to become a global leader in telecommunications, which is what AT&T has always been from the day it was incorporated in 1885.

AT&T is among the premier voice, video and data communications companies in the world. They tout themselves as "one of the nation's largest business communications providers" in the U.S. AT&T owns and operates the largest and most sophisticated telecommunications network in the U.S. and provides services in 60 countries and 850 cities worldwide.[212] With revenues in excess of $30 billion in 2004,[213] AT&T also provides domestic and international long distance and transaction-based communications services to over 24 million residential customers in the U.S.[214] With operating income of over $3.2 billion for 2004, and projected operating income of nearly $2.7 billion for 2005, the truth is that AT&T's financial strength is unmatched in the wireline telecom industry by anyone other than the monopoly RBOCs.[215]

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210 *See, e.g.*, Carlton & Sider Decl. ¶ 7.

211 *See, e.g.*, Application at 14, 17.

212 *See* AT&T SEC Form 10-K for fiscal year ending Dec. 31, 2004, Part I, item 1, page 1.

213 Application at 9.

214 *See* AT&T SEC Form 10-K for fiscal year ending Dec. 31, 2004, Part I, item 1, page 1. Transaction-based customers are those using AT&T's long distance services on other than a presubscribed basis.

215 Bernstein Research Call, *SBC, AT&T: Though Combination Makes Long Term Strategic Sense, Why Now?*, Exhibit 2- "AT&T Baseline Summary Income Statement," Jan. 31, 2005.

By any measure, AT&T is the most significant telecommunications company that has ever operated and it is disingenuous to imply that AT&T needs to merge with SBC to conduct its global business. Any notion that AT&T is a "one trick pony" that cannot flourish in the wake of lower long distance revenues fails to recognize the 125 year history of this company. It also fails to recognize AT&T's efforts to evolve its business strategy, as all companies in time must do, to take advantage of the ever changing telecommunications marketplace.

In its 2003 Annual Report, AT&T stated that it had "transformed itself in many ways, successfully positioning the company as the leading 'provider of choice' in a complex new age of networking and communications." Reflecting the company's desire and ability to change with the marketplace, the Report went on to state that AT&T was "delivering an increasingly robust mix of domestic residential services and sophisticated business networking solutions to customers around the globe." Touting its success, AT&T noted that its customer satisfaction was high, its balance sheet was strong, and that AT&T was poised to "lead the industry into a powerful new era of communications capability and performance."[216]

The 2003 Annual Report also informed shareholders that AT&T was "committed to grow [its] business in such emerging areas as Internet Protocol (IP) and bundled services . . . ."[217] AT&T has succeeded in that AT&T's Internet Protocol Network is considered to be first rate and

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216 AT&T 2004 Annual Report, Letter from David Dorman, Chairman and Chief Executive Officer to Fellow Shareholders; *see also* Colin C. Haley, *AT&T Tests WiMax Gear*, INTERNETNEWS.COM, Mar. 22, 2005, *available at http://www.internetnews.com/wireless/article.php/3492026;* Press Release, AT&T Labs Research, *AT&T LEARNs to Profit*, Dec. 2001, *available at* http://www.research.att.com/news/2001/December/Profit.html (AT&T describing the LEARN (Local Entry Action and Results Network) initiative: "In a more generic sense, vendors could sell against incumbent telecom carriers on cost, comparing their services with T-1 and other traditional business services.").

217 *Id.*

is "treasured by big global customers."[218] Continuing its focus on the future, among other initiatives, AT&T is testing a WiMax high-speed wireless technology for business applications.[219]

AT&T is neither down nor out. With benefits running directly to consumers and the U.S. economy, AT&T has proven that it can innovate and change when it must. It must because AT&T operates in a competitive marketplace where invention, innovation, rational pricing and customer service are the hallmarks of survival. Having to compete, losing market share in one area of the industry, gaining market share in another area of the industry, having to innovate, trim costs, and invest in your infrastructure, provide better customer service and pricing are not reasons to throw in the towel or reasons to justify a merger of two of the most significant players in the telecommunications industry. In the final analysis, these truths of competition are not measures of whether a company is failing, but as AT&T clearly understands, a roadmap to success.

B. SBC Adds Nothing to AT&T's National Security Business.

In the Application, the merger parties advance the unsupported argument that the transaction will benefit government customers and will strengthen U.S. national security.[220] The Application states that the combined company will be "well managed" with the resources to make "capital investment in facilities and networks" along with other purported benefits that relate more to SBC's ambitions for the merged company, rather than any benefit to the

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[218] Ben McClure, *SBC's AT&T Buy No Blunder*, THE MOTLEY FOOL, Feb. 1, 2005.

[219] *AT&T to Test WiMax High-Speed Wireless Technology*, REUTERS, Mar. 14, 2005.

[220] Application at 17-21.

government or the public.[221] Upon even a cursory review, the supposed benefits are nothing more than what AT&T already provides to the government today.

It is beyond dispute that AT&T is perfectly capable of conducting its government services business without any help from SBC. For example, just a few months ago, in December of 2004, AT&T announced that it had won a $1 billion contract to build the Treasury Department's enterprise-wide network.[222] This network will be the largest civilian agency network, serving 1,000 domestic locations and tens of thousands of users in the U.S. and abroad.[223]

The Commission should consider that another important aspect of security is redundancy. Just as in the private sector, when purchasing communication services, the government selects from several qualified providers. This is important because different providers have different strengths, and the government cannot be in the position of putting all of its eggs in one basket.[224] The reduction in the number of qualified providers for the government becomes a national security issue because as the field of qualified carriers diminish, all of the services provided to the government will be from a very small number of providers. On this basis, there is no question that the proposed merger actually is contrary to the public interest.

It also is unclear how SBC's control of AT&T would enhance national security. What this would mean is that the entity that the government selected to contract with for these vital

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221 Application at 21.

222 Press Release, AT&T, AT&T Government Solutions Team Wins $1 Billion Contract To Build Treasury's Enterprise-Wide Network (Dec. 7, 2004).

223 *Id.*

224 Of the 13,000 AT&T jobs that will be lost as a result of the merger, Applicants have not identified how many lost jobs will relate to supporting U.S. government communications services and networks.

national security and other communications services is no longer the entity responsible to the government. Rather than enhancing national security, the fact that a company that the government did *not* select will now be responsible for these contracts detracts from national security because it overrides the government's selection process.

Another aspect of the Application that is unclear is how the two "*complementary*" networks of SBC and AT&T "will have added diversity and redundancy, producing greater reliability, and recoverability."[225] This argument appears to be yet another example of the say-anything aspect of the Application. For the purposes of the Commission's competitive and economic analysis, Applicants state that their networks are "complementary and not overlapping." Yet for the purposes of arguing the merger will enhance national security government services, the networks are redundant. Obviously, before the Commission could credit the Application with any public benefit on this point, it would need to understand if the networks are in fact "redundant" or "complementary."

C. SBC Adds Nothing to AT&T's Global Competitiveness.

The Application laments that the United States was "once the undisputed world leader in communications" and that the nation has "lost ground over the past decade."[226] Since SBC is an almost exclusively domestic carrier, the once communications world leader that allegedly has lost ground presumably is AT&T.[227] According to Applicants, the cure for this lost point of

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225 Application at 20.

226 Application at 14.

227 AT&T began to lose ground as the dominant international communication carrier when it was broken up into the post-1984 AT&T and the Regional Bell Operating Companies. Once a dominant entity is removed from its position of dominance, by operation of the law that entity must necessarily lose ground as compared to the position it once held.

national pride is to permit the combination of SBC and AT&T to "restore the United States' preeminence in communications."[228]

First, it is not a goal of the Communications Act, nor is it a public interest benefit, that a U.S. carrier be viewed as the "undisputed world leader in communications."[229] Rather, it is the stated goal of the Communications Act, as reflected in the preamble to the 1996 Act, that competition be assured in the communications marketplace.[230] The preamble makes it clear that competition, not combination, is in the public interest.[231]

Second, recapturing the past glory of AT&T is not in the public interest. We can all pretend, as the Application does, that AT&T's preeminence was not the result of its dominant monopoly position, but that would not be true. Therefore, the preeminence promised by the Application could only be achieved if SBC were able to gain the advantages that dominance and market power provide in the marketplace. When the pre-1984 AT&T held that position in the global telecommunications marketplace, the U.S. government acted to break AT&T of its dominance by divestiture.[232] It certainly is not a public interest benefit to put SBC in the position to regain this unlawful dominance.

Boiled down, the Application's claims of future glory apparently equate to the notion that the merged entity will be better able to compete in the global marketplace. The Application does not, however, inform the Commission as to how or why the merger would allow the merged

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228 Application at 15.

229 *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 447 (3rd Cir. 2004) (citation omitted).

230 1996 Act, preamble, 110 Stat. 56.

231 1996 Act, preamble, 110 Stat. 56.

232 *See United States v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982).

company to be a more effective global competitor. While the Application makes clear that AT&T remains, despite the ravages of the past two decades, the envy of all the world's carriers,[233] the Application provides scant evidence to support how SBC will add to AT&T's network, expertise or otherwise provide real synergies or other benefits for global customers.

The Application reflects the fact that SBC adds little to nothing to AT&T's global competitiveness by emphasizing that SBC and AT&T have complementary businesses, rather than overlapping businesses.[234] As a U.S. domestic carrier, SBC does not have the experience or international networks to assist AT&T in the global marketplace.[235] In fact, the Application acknowledges that SBC does not even effectively compete on the national level[236] and that "SBC focuses on customers with a predominate in-region presence."[237] Therefore, SBC has little if anything to offer in the global arena.

The Application may only be granted if the merger is found to be in the public interest.[238] It should be emphasized that there is a difference between what is beneficial for the merging companies versus what beneficial to the public. The "public interest" means that the merger is actually beneficial and not harmful to the public. The problem is that other than stating its desire to become the world's leading carrier, the Application does not explain how SBC will succeed

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233 Application at 9, 97-98, A-1 – A-3.

234 *See, e.g.*, Application at iii, 1, 6, 13, 15, 16, 24, 30, 31, 34, 36, 68, 96, 98, 101.

235 Application at 40, 101.

236 *See* Application at 101 ("Whatever ability SBC might have in the future to compete for national customers, it plainly would have no unique advantages in that regard.").

237 *Id.* at 100.

238 *See generally* 47 U.S.C. §§ 214(a), 310(d).

where, according to the Application, AT&T has failed.[239] More problematic is that the Application fails to show how its position as a world leader would benefit the American public.

In the end, separating rhetoric from the facts, the Commission must decide whether SBC's ambition to become "preeminent" carrier has any true benefit for the United States of America or American consumers. Bragging rights for SBC that it is the world communications leader is not a public interest benefit. Rather, consumers enjoying the choice of several carriers, a variety of services and features, competitive pricing, and rapid innovation, the hallmarks and public interest benefits of a competitive marketplace.[240]

D. The Merger Would Reduce Innovation, Not Increase It.

Applicants make the unsubstantiated claim that their proposed merger will enable them to develop and deploy a wave of new products.[241] The argument is, of course, counter-intuitive since it is well-established that innovation is the result of competition, not market power. New entrants that seek to unseat a dominant firm must innovate to obtain a toehold in the market; companies with dominant positions in the market feel no urgency to take such risks to retain their captive customer base.[242] Indeed, dominant firms are often reluctant to accept change, because it

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239 *See, e.g.*, Application at 53.

240 The Commission has recognized that "[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products." General Motors Corp. and Hughes Electronics Corp., and The News Corp., *Memorandum Opinion and Order*, 19 FCC Rcd. 473, ¶ 316 (2004) (citing *EchoStar/DirecTV HDO* ¶ 188); *NYNEX/Bell Atlantic Merger Order* ¶ 158; *see also* DOJ/FTC Guidelines § 4.

241 Application at 21-33.

242 Michael K. Powell, Commissioner, Federal Communications Commission, Before the Legg Mason Investor Workshop (Mar. 13, 1998), *Technology and Regulatory Thinking Albert Einstein's Warning* ("Innovation breeds new markets, and shatters the entrenched advantages of incumbency, as the recent history of telecommunications has shown. As

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threatens to strand existing investment, erode revenue from existing services, or provide opportunities for competitors.[243] A review of the major technical advancements in telecommunications of the past 20 years makes clear that new entrants develop and deploy new technologies as a means to enter markets, and the RBOCs, such as SBC, then respond by adopting the same technologies as a defensive measure. Witness for example:

- *Mobile Wireless.* Cellular technology languished until myriad entrepreneurs such as McCaw Cellular spurred the deployment of systems designed from the outset to provide mobile telephony to the mass market. Until then, the RBOCs were perfectly satisfied providing expensive and bulky radio-phone services for a handful of elite users. SBC and the other RBOCs invested in cellular only after the pioneering entrepreneurs proved the existence of a market, and created possible threats to their wireline monopoly. Even now, it is the competitive carriers that lead the way in deploying new mobile telephony technologies. Nextel, for example, introduced ground-breaking "push-to-talk" technology and Sprint brought the mobile picture-phone to market, and in both cases the RBOCs simply responded with mimic offerings after consumer demand was proven by the risk taking entrepreneurs.

- *Fiber Optics.* Sprint was the first to invest in all fiber optic networks, and set the market with its "pin drop" marketing campaign. WilTel and MCI soon followed. Again RBOCs responded *after* competitive carriers impressed their customers with superior technology.[244] The recent RBOC proposals to deploy fiber to the home are

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such, policymakers must work to avoid (1) slowing the pace of innovation in technology and service offerings and (2) inadvertently picking or conferring advantage to a particular technology or service."). *See also*, Edward J. Markey, Preface, 10 COMMLAW CONSPECTUS 1-2 (2001) (explaining that AT&T Labs "because of its monopoly status, kept innovation in the labs and out of the marketplace. Introduction of new services and products rarely occurred, as AT&T was financially content because its service was profitable and regulated to be so.").

243 Barnett, Jonathan M., *Private Protection of Patentable Goods*, 25 CARDOZO L. REV. 1251, 1290-91 (2004) (explaining that "a large firm that has a dominant market share may be reluctant to undertake or accelerate development projects that may generate radical innovations that could cannibalize the existing profit stream of current products. Instead, it will prefer to devote R&D resources to less risky development of incremental innovations that complement its existing and profitable product line.")

244 *See*, *e.g.*, Edward J. Markey, Preface, 10 COMMLAW CONSPECTUS 2 (2001) ("AT&T sat on its monopoly for years, seeing no reason to invest in, for example, fiber optics. . . . [a]fter Sprint placed a significant order of glass fiber from Corning that AT&T finally 'heard the pin drop' and began to move to the new technology and make real investments in innovation.")

largely a belated response to the cable companies' own offerings of voice, video and data.

- *DSL.* Virtually no one outside of the engineering community had heard of DSL until data-CLECs such as Northpoint and Rhythms appeared on the scene. Indeed, the RBOCs sat on DSL and related technologies for over 20 years and had no incentive to roll out the service until cable modem providers and DLECs began to offer consumer broadband. It was these so-called DLECs that first deployed DSL, and educated consumers to its advantages. RBOCs such as SBC rolled out DSL, too, but only after they became concerned that they would lose the IP origination market to the DLECs and cable modem providers. Until then, RBOCs were content to sell T1 circuits at much higher prices.

- *Internet.* The RBOCs were late-comers to Internet technology as well. Companies such as BBN (later Genuity), UUNet (later MFS/MCI), Cable & Wireless, Sprint, AT&T and Level 3 led the way in deploying true IP backbone networks. Only after these carriers established IP transport as the wave of the future did SBC and other RBOCs respond by investing as required to upgrade their legacy networks.

The list goes on. The truth is that the proposed merger of the Applicants would eliminate a key existing innovator, not create a new one. The fate of the Applicants' respective research labs is a case in point. By merging the two labs, the Applicants claim that somehow two minus one will equal three, and the single lab of the combined firm will be more productive than the two labs operating today. Of course, two minus one in fact equals one, and hence the Applicants' plan results in the net loss of critical research and development efforts and represents a harm, not a benefit, of merger. The Commission has repeatedly come to this conclusion in its analysis of RBOC mergers. As the Commission explained, "[i]n the Bell Atlantic/NYNEX and SBC/Ameritech Orders, for instance, the Commission concluded that the elimination of parallel research and development efforts would eliminate a form of non-price competition in which firms attempt to differentiate products in either function or quality. As was the case with those transactions, both Bell Atlantic and GTE engage in research and development, and the merger's

consolidation of functions could result in a reduction in competitive differentiation."[245] It follows that the elimination of one or both of the Applicants' labs similarly will likely result in affirmative harm.

AT&T Labs is an acknowledged world leader in the development of alternative access technologies required to avoid or minimize reliance on the RBOC loop bottleneck.[246] It strains credulity to assert that those efforts will continue once the lab is controlled by the largest ILEC whose network would be bypassed by the new technology. It is telling that the Application ticks through eight examples of successful development efforts by AT&T Labs, but can come up with only two accomplishments by SBC Labs. Clearly a competitive AT&T feels a need to invest in cutting edge new products, while a monopoly SBC does not. With SBC in control post-merger, the combination could in fact result in a net loss of research, development and innovation.

Struggling to rationalize how the loss of AT&T Labs could enhance innovation as they suggest, Applicants contend that additional financial resources and access to a broader base of customers will enable them to simply do more. They offer no details, evidence or examples of what new products would be so enabled. That is not surprising, as it is hard to imagine what service the nation's largest ILEC and world's largest IXC could develop together that they could not develop apart. Thus, it is evident that the proposed merger will not accelerate research, development and innovation as Applicants' suggest, but in fact, as the Commission has

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245 *GTE/Bell Atlantic Merger Order* ¶ 242.

246 Rich Duprey, *Waiting for WiMax*, THE MOTLEY FOOL, Apr. 20, 2005 ("carriers like AT&T (NYSE: T) are investigating WiMax as way of getting around paying local carriers – currently a $10 billion expense, the company says – for last-mile access to customers."); *see also* Michael Singer, *AT&T Looks to Intel for VoIP*, OPTICALLY NETWORKED.COM, Dec. 14, 2004, *available at* http://www.opticallynetworked.com/news/article.php/3447511 ("Miller said AT&T does not own any last mile access and that WiMAX is a possible way for AT&T to get back in the game.").

previously held, will reduce all three to the detriment of telecommunications consumers and contrary to the public interest.

E. A Unified SBC-AT&T IP Network Confers No New Public Benefit.

Applicants also tout their plans to combine their IP networks.[247] While IP networks clearly are in the public interest, there must be material new or increased functionality in order to confer a public benefit for purposes of the Commission's public interest analysis. Applicants did not and cannot make any such showing. Indeed, Applicants concede in their submission that "AT&T's and SBC's respective networks meet current needs efficiently" *and* that "both networks will be transformed over periods of years into unified IP-based networks."[248] The plans of both companies to create these unified IP networks is independent of the proposed merger, and therefore the merger cannot be said to benefit the public in that regard. While SBC suggests that its resources can assist AT&T to develop new applications for its IP network, it does not suggest any specific improvement that will occur, and offers nothing more than vague and sweeping generalizations about how SBC's involvement might help.[249] Such unsubstantiated and unspecific claims can be afforded no weight. On the contrary, AT&T already is a proven leader in the deployment of IP-based advanced services, and a host of other carriers such as Level 3, XO and Broadwing have introduced an array of IP-based service enhancements without any such ILEC backing. It is clear that the continued deployment of IP-based services by AT&T will not be helped by SBC, and is at least as likely to be hindered by SBC's meddling.

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[247] Application at 33-36.

[248] *Id. at* 33.

[249] *Id. at* 33-35.

F. Any Network Cost Savings Attributable to the Merger Are Insignificant.

Applicants use a lot of words in their submission to describe network cost savings that might be achieved through merger.[250] But the reader must reach the final two sentences of this protracted discussion to discover that the anticipated cost savings quantitatively are immaterial. Applicants confess that the network savings ramp up over time to a maximum of $2 billion annually by 2008.[251] Moreover, half of the potential savings claimed are attributable to AT&T cost-cutting measures already underway, and are not resultant of the merger.[252] In other words, even if everything goes as hoped and planned – as such things rarely do – they will yield savings equivalent to only approximately one percent of gross revenues of the merged company. Of course, there can be no assurance that such savings will be passed along to consumers as opposed to simply increasing the profits of SBC. But in any event, such a minor potential savings cannot be regarded as a significant public benefit.

Notably, the savings alleged by Applicants involve reductions in fixed or overhead costs.[253] For example, Applicants propose eliminating such fixed costs as facilities, staff and duplicative IT systems.[254] As Applicants note, "nearly 60 percent of the synergies are headcount related."[255] The elimination of such fixed costs has been rejected by the Commission as a benefit of merger, "in the absence of explicit pass-throughs [to end users] which are publicly committed

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250 Application at 39-44.

251 *Id.* at 44.

252 Citigroup Smith Barney, *SBC Circles The Globe with Planned Purchase of AT&T*, p. 2 (Jan. 31, 2005).

253 Application at 43 ("The merger of SBC and AT&T will result in savings in both the fixed and variable costs of operations.").

254 *Id.*

255 AT&T-SBC Analyst Meeting, *available at* http://www.sec.gov/Archives/edgar/data/5907/000104746905002185/a2150866z425.htm.

to by the applicants."[256] Applicants have made no such showing of consumer benefits. Even the stated reductions in marginal costs that might otherwise be cognizable, such as business process improvements or reductions in procurement, have not been broken out by Applicants, so it is impossible for the Commission to know what the true benefits of the merger, if any, might be.

Nor do Applicants state what investments must be made in order to obtain the stated cost savings. For example, the Commission has held that any savings obtained in business process improvements must be netted against the cost of training employees or updating systems to take advantage of those new processes.[257] There is no indication that Applicants have even attempted to proffer this sort of net-cost information for any of the items which they describe, except to note that all of the synergies that they describe are "net of costs."[258] Again, without knowing the savings ascribed to each item, and then discarding those items involving reductions in fixed costs, there is not way to measure the alleged benefits of the merger. For all these reasons, Applicants' description of merger savings is woefully deficient and cannot be taken into account in the Commission's balancing of the public interest harms against the benefits.

VI. CONCLUSION

The SBC/AT&T merger Application, in combination with the Verizon/MCI merger application also under consideration, places the Commission at a critical crossroad. Approving the two applications effectively would be throwing in the towel on both the 1983 AT&T divestiture and 1996 Telecom Act. By allowing the two largest domestic telecom monopolists to swallow whole the two most meaningful competitive carriers by far, the Commission would be

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256 *SBC/Ameritech Merger Order* ¶ 332.

257 *SBC/Ameritech Merger Order* ¶ 336.

258 Application at 43.

establishing a pathway for a return to the yesteryear of vertically integrated wireline BOC monopolies. This is an outcome which simply is antithetical to the express pro-competitive purposes of Congress in enacting the 1996 Act. It also is a result that runs afoul of clear Commission precedent requiring RBOCs to prove that their proposed acquisitions would actually enhance telecommunications competition rather than degrade it. Consequently, the Commission must either deny the SBC/AT&T Application outright, or work with affected parties such as the Joint Petitioners to craft stringent and enforceable remedial conditions designed to off-set the likely anti-competitive effects of the proposed merger.

Respectfully submitted,

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April 25, 2005

CERTIFICATE OF SERVICE

I, Courtenay P. Adams, hereby certify that a true and correct copy of the foregoing Petition to Deny, was sent, this 25th day of April 2005, electronically, by hand, and/or by first class mail, postage prepaid, to the following:

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ATTACHMENT D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Verizon Communications, Inc. and MCI Corp.	)	DA 05-762
	)	WC Docket No. 05-75
Applications for Approval of Transfer Of Control	)	
	)	

PETITION TO DENY OF CBEYOND COMMUNICATIONS, CONVERSENT COMMUNICATIONS, ESCHELON TELECOM, TDS METROCOM, NUVOX COMMUNICATIONS, AND XO COMMUNICATIONS

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May 9, 2005

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Verizon Communications, Inc. and	)	
MCI Inc.	)	DA 05-762
	)	WC Docket No. 05-75
Applications for Approval of	)	
Transfer Of Control	)	

PETITION TO DENY OF CBEYOND COMMUNICATIONS, CONVERSENT COMMUNICATIONS, ESCHELON TELECOM, NUVOX COMMUNICATIONS, TDS METROCOM, AND XO COMMUNICATIONS

For the reasons stated herein, Cbeyond Communications, Conversent Communications, Eschelon Telecom, NuVox Communications, TDS Metrocom, and XO Communications (collectively "Joint Petitioners"), through counsel, and in reliance on the attached Declaration of Simon Wilkie,[1] hereby urge the Commission to deny the pending Applications for Approval of the Transfer of Control (the "Application") of MCI Inc. and its subsidiaries ("MCI") to Verizon Communications, Inc. ("Verizon") (MCI and Verizon together, the "Applicants").

I. INTRODUCTION AND SUMMARY

The Application for approval of the transfer of control of MCI to Verizon represents a true "gut check" for the new leadership of the FCC. The Applicants propose to consolidate the first and third largest providers of long distance telecommunications services in approximately 23 percent of the nation, combine the first and second or third largest providers of retail local

[1] The Declaration of Simon Wilkie is attached hereto as Exhibit A (hereinafter "Wilkie Decl.").

exchange services in the Verizon region, and merge the telecom competitor with the second or third largest and most ubiquitous competitive presence in the region with the incumbent. If the proposed merger were allowed, consumer welfare would likely be harmed in numerous and important ways. This petition focuses on two harms that are likely to be caused by the proposed merger: (1) a significant increase in the share of high-capacity local transmission inputs controlled by Verizon and the consequent harm to competition in the provision of retail services to business customers; and (2) diminished retail competition in the provision of mass market retail circuit-switched telephone service. When considered in the broader context of the planned SBC-AT&T merger, these harms are even more serious, as that second deal would result in the loss of the second largest competitor in Verizon's region as well, with no other competitive service providers of sufficient size and scale available to replace MCI or AT&T in the marketplace. It is hard to imagine a transaction with more potential, indeed likely, anti-competitive effects. To approve such a deal, at least absent expansive and stringent conditions designed to remedy the anti-competitive effects, would render the transfer of control requirements of Sections 214(a) and 310(d) of the Act[2] meaningless.

A. The Harms to the Public Interest Caused by a Verizon/MCI Merger Would Likely be Enormous.

The Commission has made clear that no merger of telecommunications carriers can be in the public interest unless it enhances competition. The proposed Verizon/MCI combination is the antithesis of such a pro-competitive merger, and would actually undermine future competition in at least three important respects. *First*, the merger would substantially increase Verizon's opportunities to engage in unilateral anti-competitive conduct by eliminating what is

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2 47 U.S.C. §§ 214(a), 310(d); the Communications Act of 1934 and Telecommunications

. . .*Continued*

likely the most significant alternative provider of local transmission inputs needed to serve business customers. MCI has one of the two most extensive CLEC networks of local transport and loop facilities in the Verizon region. Competitors rely on the existence of the independent MCI network both as an actual and potential source of alternative local network facilities. Indeed, the potential to purchase access to MCI local network facilities is a critical assumption underlying the recent Commission determination to discontinue access to high capacity Verizon UNEs in areas where wholesale competition appears likely. As important, the incomparable scale of MCI enables it to negotiate discounted access to Verizon's network and to provide the most significant alternative to Verizon's excessively priced special access services.

Second, the merger would significantly reduce actual and potential competition in the market for the provision of circuit-switched telephone services to the mass market by eliminating one of the most likely and capable competitors in that market – MCI. While Applicants make much of MCI's recent announcement to cease marketing actively to certain mass market customers, there is no escaping the fact that MCI continues to be the second or third largest supplier of long distance and competitive local services to mass market customers, that its reason for scaling back its presence in the mass market, the elimination of unbundled switching, could easily be reversed, that its decision to abandon the mass market likely was timed to facilitate its plan to sell the company, and that in any event MCI's market strategy simply is not static and has undergone an about face several times over the past decade. By merging, Verizon would successfully lock in the current MCI inclination (whatever its true cause) not to compete for the mass market, and reserve for itself an overwhelmingly dominant position in the mass market for

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Act of 1996 hereafter are referred to as "the Act" and the "1996 Act" respectively.

both long distance and local circuit-switched telephone service in approximately 23 percent of the nation.

Third, when considered in tandem with the planned SBC/AT&T merger, the proposed Verizon-MCI merger would increase Verizon's opportunities for coordinated anticompetitive conduct. The historical refusal of RBOCs to compete head to head, especially in the provision of local telecommunications services, is an established fact, and there is no significant evidence that their predilection to avoid competing with each other will change. Thus, if the SBC transaction is completed, AT&T also is likely to be lost as a significant competitor in the provision of local transmission inputs in the Verizon region, thereby making the loss of MCI as a source of competitive local facilities even more acute. Similarly, the loss of AT&T as a meaningful competitor for mass market long distance services reinforces the ability of Verizon to establish an even more-dominant position in that market by leveraging its local services hegemony, and exploit its controlling position in the mass market to discriminate in the enterprise market.

These harms to competition are substantial, likely, and largely ignored by Verizon and MCI in their submission. Due to their likely harms to competition, the Commission formerly found unlawful (before attaching stringent remedial conditions) the proposed RBOC mergers of SBC/Ameritech, NYNEX/Bell Atlantic, GTE/Bell Atlantic and Cingular/AT&T Wireless[3] – and it cannot depart from that well established precedent here.

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3 Application of GTE Corp. and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, *Memorandum Opinion and Order*, 15 FCC Rcd. 14032 (2000) ("*GTE/Bell Atlantic Merger Order*"); Applications of Ameritech Corp., and SBC Communications Inc., For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, *Memorandum Opinion and Order*, 14 FCC Rcd. 14712 (1999)

. . .*Continued*

B. Applicants Ignore the Likely Public Harms of Their Merger, While Claiming Public Benefits That Are Insubstantial.

Despite the fact that they bear a heavy burden to prove that their merger is pro-competitive, and thus in the public interest, Applicants have largely ignored the obvious threats to telecommunications competition enunciated above. In a remarkable example of hoping that "saying it will make it so," Applicants contend that the absorption of MCI's competitive local network will not retard competition. But Applicants virtually ignore the fact that the MCI and AT&T local networks dwarf those deployed by all other competitive carriers, and fail to analyze the likely effect of *both* MCI and AT&T being swallowed whole by the two largest RBOCs. Indeed, perhaps because the obvious answer is too uncomfortable for them to deal with, Applicants ignore the countless instances where *only* MCI and AT&T offer competitive interoffice transport or loop facilities on a wholesale basis, the elimination of price competition where MCI is lost as a competitor, and the likelihood that tacit collusion between Verizon and SBC will lead to the coordinated withdrawal of both primary competitive wholesale carriers from the market at the very moment that their services are most required to fill the void left by the withdrawal of Verizon's high capacity loop and transport UNEs in many areas.

("*SBC/Ameritech Merger Order*"), *vacated in part sub nom, Ass'n of Communications Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (vacating part of order allowing SBC to avoid statutory resale obligations by providing advanced telecommunications services through an affiliate), *amended in part*, 16 FCC Rcd. 5714 (2001) (modifying merger conditions to require payments for violations to be paid to the U.S. Treasury); Applications of NYNEX Corp. and Bell Atlantic Corp. For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, *Memorandum Opinion and Order*, 12 FCC Rcd. 19985 (1997) ("*NYNEX/Bell Atlantic Merger Order*"); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. For Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion & Order*, 19 FCC Rcd. 21522 (2004) (the RBOC wireless joint venture of Cingular, SBC owning 60% and BellSouth owning 40%) ("*Cingular/AT&T Wireless Merger Order*").

The same failing befalls Applicants' broad but extraordinarily vague claims of meaningful public benefits from their merger. Through hundreds of pages of largely empty rhetoric, Applicants claim that the merger will make Verizon a world leader in communications, while ignoring that MCI already holds that status. They claim that the combination will enable Verizon to provide national security services to the federal government, while ignoring that MCI has done and continues to do so without any evident problem. They claim that eliminating MCI will enable Verizon to develop new services, while the overwhelming market evidence is that new products and services are first deployed by competitors (such as a pre-merger MCI) and that firms with market power (such as the pre- and post-merger Verizon) are less inclined to innovate. And they make highly speculative and questionable assertions of increased efficiency, without ever demonstrating with data how that could occur in ways consistent with Verizon's legal obligation not to discriminate against competitors. The private benefits to Verizon and MCI of wielding the considerable market power that will be created by the merger are clear, while the alleged public benefits of the merger are make-weight.

C. The Commission Must Deny the Applications, or at a Minimum Require the Applicants to Remedy the Public Harms Posed by Their Merger.

Since their Application is largely devoid of any real evidence, the Commission must first require that Applicants supply the extensive data needed to evaluate the likely public harms, and give the public an opportunity to review and comment on it. The Joint Petitioners are confident such data will form the foundation for confirming that the proposed merger poses a grave threat to the markets and consumer welfare, and the Commission then will be required to either deny the Application outright, or attempt to create and enforce a set of remedial conditions required to prevent a combined Verizon/MCI from abusing its market power. The proposed Verizon/MCI merger is truly an industry-transforming event, and the Commission must disregard Applicants'

pleas to rubber-stamp their re-monopolization plan to reinforce Verizon's dominance. A misstep on this Application would unravel overnight a decade of progress in opening telecommunications markets to competition pursuant to the 1996 Act.

II. APPLICANTS BEAR THE BURDEN OF PROVING THAT THEIR MERGER WOULD ENHANCE COMPETITION.

Pursuant to Sections 214(a) and 310(d) of the Act, the Commission may not approve the proposed transfer of control of MCI's licenses to Verizon unless it is persuaded that the transaction is in the public interest, convenience and necessity.[4] Applicants bear the burden of proving that the proposed transaction, on balance, furthers the public interest.[5] The Commission's review of a proposed merger under the public interest standard includes consideration of the competition policies underlying the Sherman and Clayton Acts, but the public interest standard necessarily "subsumes and extends" beyond the traditional scope of antitrust review.[6]

The likely effect of a proposed merger on the development of competition in telecommunications markets is the primary touchstone by which proposed mergers are judged. In performing its review, the Commission must consider whether the merger will "accelerate the decline of market power by dominant firms" in the relevant communications market and its "effect on future competition."[7] In order to find that a merger is in the public interest, the Commission has emphasized that it "must be convinced that it will enhance competition."[8] A

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4 47 U.S.C. §§ 214(a), 310(d); *NYNEX/Bell Atlantic Merger Order* ¶ 2.

5 *Cingular/AT&T Wireless Merger Order* ¶ 40.

6 *NYNEX/Bell Atlantic Merger Order* ¶ 2.

7 *Cingular/AT&T Wireless Merger Order* ¶ 42.

8 *NYNEX/Bell Atlantic Merger Order* ¶ 2.

merger will be pro-competitive if the "harms to competition are outweighed by the benefits that enhance competition."[9] Applicants carry the burden of showing that the proposed merger will not eliminate potentially significant sources of competition that the 1996 Act sought to create.[10] The Commission has observed that "[w]hen facing a changing regulatory environment that reduces barriers to entry, firms that otherwise would compete directly may, as one possible strategic response, seek to cooperate through merger."[11] Consequently, Applicants must prove that, on balance, the merger will "enhance and promote, rather than eliminate or retard, competition."[12] This is equally true of competition in local telephone services, related interstate access services and interstate long distance services.[13] If Applicants cannot carry this burden, their Application must be denied.[14]

A common circumstance is that the same consequences of a proposed merger that may be beneficial in one sense will be harmful in another. Even if Applicants could show that combining assets may allow the merged entity to reduce transaction costs or introduce new products, the combination may also enhance market power, barriers to entry by potential competitors, or opportunities to disadvantage rivals in anticompetitive ways.[15] Applicants bear the burden of overcoming such anticompetitive effects. In considering whether Applicants have made such a showing, the Commission has stated that the unilateral and coordinated effects of a

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[9] *Id.*

[10] *Id.* ¶ 3.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* ¶ 2.

[15] *Cingular/AT&T Wireless Merger Order* ¶ 42.

proposed merger are mitigated by competitive forces only to the extent that barriers to entry or expansion are sufficiently low that competitors would "expand or enter with sufficient strength, likelihood and timeliness to render unprofitable an attempted exercise of market power resulting from the merger."[16] It is not enough for Applicants to show that the anti-competitive effects of a merger are counterbalanced in part by potential pro-competitive effects; their burden is to show that their transaction has the ultimate effect of "affirmatively advancing competition throughout the region."[17]

Finally, as a pre-condition to approval of any proposed merger, Section 214(c) of the Act authorizes the Commission to impose "such terms and conditions as in its judgment the public convenience and necessity may require."[18] This enables the Commission to impose and enforce transaction-specific conditions on its approval of any such transaction.[19] Indeed, the Commission has recognized that its regulatory and enforcement experience positions it uniquely and appropriately to "impose and enforce conditions to ensure that the merger will yield overall public interest benefits."[20] It is noteworthy that nearly every proposed RBOC acquisition of another major carrier since the 1996 Act was enacted has been found to be unlawful due to their likely anti-competitive effects,[21] and that the Commission has permitted these mergers to go

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16 *NYNEX/Bell Atlantic Merger Order* ¶ 11.

17 *Id.* ¶ 14.

18 47 U.S.C. § 214(c).

19 *Cingular/AT&T Wireless Merger Order* ¶ 43.

20 *Id.*

21 *See generally*, *GTE/Bell Atlantic Merger Order*, 15 FCC Rcd. 14032; *SBC/Ameritech Merger Order*, 14 FCC Rcd. 14712; *NYNEX/Bell Atlantic Merger Order*, 12 FCC Rcd. 1985; *Cingular/AT&T Wireless Merger Order*, 19 FCC Rcd. 21522.

forward only after attaching conditions that were carefully designed to remedy the perceived anti-competitive effects.

III. THE COMMISSION MUST CONSIDER VERIZON'S DEMONSTRATED PROPENSITY TO ENGAGE IN PREDATORY ANTI-COMPETITIVE BEHAVIOR WHENEVER IT HAS THE OPPORTUNITY.

In order to effectively weigh potential anti-competitive effects against purported public interest benefits of a proposed transaction, the Commission considers evidence of whether the transferee "has the requisite qualifications to hold Commission licenses,"[22] in addition to hard market data. Thus, using "the Commission's character policy initially developed in the broadcast area as guidance in resolving similar questions on common carrier license transfer proceedings,"[23] the Commission should here "review allegations of misconduct directly before it, as well as conduct that takes place outside the Commission."[24]

Verizon's track record of non-compliance is particularly relevant here because, "as the Commission long ago observed, licensing 'enables future conduct.'"[25] The standard by which the proposed merger must be judged is whether it will enhance competition. [*See Sec. II supra.*]

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22 *Cingular/MCI Wireless Merger Order* ¶ 56; *see also* Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C. 2d 1179 (1986) ("*Character Policy Statement*"), *modified*, 5 FCC Rcd. 3252 (1990), *recon. granted in part*, 6 FCC Rcd. 3448 (1991), *modified in part*, 7 FCC Rcd. 6564 (1992).

23 *Cingular/MCI Wireless Merger Order* ¶ 47 (citing WorldCom, Inc. and its Subsidiaries, Transferor, and MCI, Inc., Transferee, Applications for Consent to Transfer and/or Assign Section 214 Authorizations, Section 310 Licenses, and Submarine Cable Landing Licenses, *Memorandum Opinion and Order*, 18 FCC Rcd. 26484, ¶ 13 (2003) ("*WorldCom Bankruptcy Order*")).

24 *Cingular/MCI Wireless Merger Order* ¶ 47 (citing *GM-News Corp. Order*, 19 FCC Rcd. at 486, ¶ 23; EchoStar Communications Corp, General Motors Corp, and Hughes Electronics Corp., Transferors, and EchoStar Communications Corp, *Hearing Designation Order*, 17 FCC Rcd. 20559, 20576, ¶ 28 (2002) ("*EchoStar/DirecTV HDO*"); *GTE/Bell Atlantic Merger Order* ¶ 429).

As described in *Section IV* hereafter, there is no question that, rather than satisfying this standard, the proposed merger will both increase Verizon's incentives to discriminate against competitors, *and* create or preserve market power that will enable Verizon to inflict damage on competition in new and formidable ways. Verizon undoubtedly will argue that it has no plans to engage in anti-competitive behavior, and that regulatory requirements would prevent the company from doing so in any event. Unfortunately, overwhelming evidence from recent regulatory proceedings exists that shows that is not the case.

Verizon has a demonstrated record of seizing every opportunity to engage in anti-competitive activity. Importantly, attempts to control Verizon's behavior through regulation have failed. As the events cited hereafter make clear, Verizon has demonstrated repeatedly its propensity to use its incumbent size and status to undermine competitors, regardless of legal requirements to the contrary, and is content to pay any fines for breaching applicable rules as an acceptable cost of doing business. The unfortunate fact is that the amount of such fines is dwarfed by the benefit derived by Verizon from preventing competition from taking hold in its operating region.

The Commission cannot ignore Verizon's past record and unmistakable predilection to act anti-competitively despite Commission orders and rules designed to prevent such behavior when evaluating the potential harms and putative benefits of combining MCI with Verizon. Given its horrid record, Verizon's assertion that it has no intention to use the advantages gleaned from an MCI acquisition in an anti-competitive fashion simply cannot be taken at face value. As importantly, the Commission must accept that the mere existence of its regulatory oversight has

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[25] *Character Policy Statement* ¶ 21 (1986).

proven woefully insufficient to constrain Verizon's penchant for undermining competition in unlawful ways. In view of Verizon's performance to date, the Commission must assume that wherever the proposed merger results in increased market power for Verizon, the company will employ that power to unfairly reduce competition in precisely the ways described below.

A. Verizon has been Penalized Repeatedly for Engaging in Anti-Competitive Conduct.

By Joint Petitioners' count, in the last ten years, and particularly in the nine short years since the passage of the 1996 Act, Verizon has (i) entered into at least eight *Consent Decrees* with the Commission;[26] (ii) violated merger conditions causing damages to CLECs;[27] and (iii) been found the culprit of an array of other incidents within the purview of the courts and other agencies.[28]

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26 Verizon Tel. Cos., Inc., *Order and Consent Decree*, 19 FCC Rcd. 14409 (2004); Verizon Tel. Cos., *Order and Consent Decree*, 18 FCC Rcd. 3492 (2003); Verizon Communications, Inc., *Order and Consent Decree*, 17 FCC Rcd. 16071 (2002); Verizon Communications, Inc., *Order and Consent Decree*, 16 FCC Rcd. 16270 (2001); Bell Atlantic Communications, Inc., *Order and Consent Decree*, 15 FCC Rcd. 20134 (2000); GTE Service Corp., *Order and Consent Decree*, 15 FCC Rcd. 13946 (2000); Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, *Order and Consent Decree*, 15 FCC Rcd. 5413 (2000); NYNEX Tel. Cos., *Consent Decree Order*, 11 FCC Rcd. 15417 (1996).

27 Global NAPs v. Verizon, *Memorandum Opinion and Order*, 17 FCC Rcd. 4031 (2002) ("*Global NAPs Order*").

28 *See, e.g.*, Josh Long, *Heavy-Handed or Hallow, Regulator Says Enforcement a Priority; Competitors Cry Foul*, PHONE+, May 2003, *available at* www.phoneplusmag.com/articles/351FEAT3.html ("In Massachusetts, for example, Verizon Communications, Inc. is liable for up to $142 million annually under the so-called performance assurance plan, which represented 36 percent of its net income in the Bay State, says a Massachusetts regulator."); Press Release, Washington Utils. & Transp. Comm'n, *State Fines Verizon for Not Offering Rate Quotes to Customers Making Collect Calls From Pay Phones in Washington* (May 30, 2001), *available at* www.wutc.wa.gov/webdocs.nsf/0/f8a2f5acff745c0c 88256a5c00733595?opendocument; Testimony before the New York Assembly Committee on Corporations, Authorities and

. . .*Continued*

Importantly, Verizon has shown no recent inclination to abandon its anti-competitive ways. Within only the past five years:

March 9, 2000: The Commission and Verizon entered into a $3 million Consent Decree to settle charges relating to Verizon's mishandling of competing carrier orders, contrary to Section 271 of the Act and Verizon's authorization to provide long distance service in New York.[29]

October 17, 2000: The Commission and Verizon entered into a $250,000 Consent Decree to settle charges relating to Verizon's admitted slamming. Verizon had voluntarily disclosed to the Bureau that it could not locate TPV records for numerous consumers whom it had switched to Verizon's long distance service in New York State.[30]

April 23, 2002: The Commission released the Consent Decree modifying the Merger Conditions adopted in the *GTE/Bell Atlantic Merger Order* to preserve a competitive balance by requiring that changes in the California Plan adopted by the California Commission may be implemented in the federal Carrier-to-Carrier Performance Plan.[31]

August 20, 2002: The Commission and Verizon entered into a $260,000 Consent Decree to settle charges relating to Verizon's discrimination in favor of its affiliates in the provision of special access service and violations of other specific "market opening conditions" of the *GTE/Bell Atlantic Merger Order*.[32]

Commissions, Kenneth R. Peres, Economist, Communications Workers of America, Public Hearing: March 7, 2005.

29 Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, *Order and Consent Decree*, 15 FCC Rcd. 5413, ¶ 7 (2000) ("Evidence submitted by Bell Atlantic in this investigation suggests that Bell Atlantic's performance in providing order acknowledgements, confirmation and rejection notices, and order completion notices for UNE-Platform local service orders deteriorated following Bell Atlantic's entry into the New York long distance market.").

30 Bell Atlantic Communications, Inc., *Order and Consent Decree*, 15 FCC Rcd. 20134 (2000).

31 Application of GTE Corp. and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License, *Order and Consent Decree*, 17 FCC Rcd. 7773 (2002).

32 Verizon Communications, Inc., *Order and Consent Decree*, 17 FCC Rcd. 16071 (2002) ("In this Order, we adopt a Consent Decree terminating an investigation into compliance by Verizon . . . with the Merger Conditions under" the *GTE/Bell Atlantic Merger Order*).

October 2002: Displaying a blatant disregard of the Commission's Rules, the Commission found Verizon liable for "willful and repeated violation" of the Commission's Rules stemming from Verizon's failure to comply with tower structure requirements.[33]

March 4, 2003: The Commission and Verizon entered into a $5.7 million Consent Decree to settle charges relating to Verizon's admission that it violated Sections 271(a) and (b) and 272(g)(2) of the Act and marketed long distance services in its local service region prior to receiving FCC authorization. Under the terms of the Consent Decree, Verizon admitted that it marketed long distance services originating in its local service region on five separate occasions from January through July 2002, in violation of section 272(g)(2) of the Act. The violations occurred in nine states within the Verizon region and through various media, including cable television advertising, bill inserts and direct mail solicitations.[34]

November 7, 2003: The Commission awarded over $12 million in damages to competitive local exchange carrier, Starpower, for violation of an interconnection agreement by Verizon. The Commission specifically found "relevant Verizon South's concession that it engaged in the very same conduct that it now alleges is unlawful when done by Starpower."[35]

July 27, 2004: The Commission and Verizon entered into a $300,000 Consent Decree to settle charges that Verizon discriminated against competing carriers within its region in a manner contrary to *GTE/Bell Atlantic Merger Order* conditions, Sections 271 and 272 of the Act and the Commission's Rules. Verizon paid $17,000 in excess of the proposed forfeiture, which also included an admonishment regarding Verizon's violation of Section 272(b)(5) of the Act and Section 53.203(e) of the Commission's Rules.[36]

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[33] Verizon Wireless (VAW) LLC, *Notice of Apparent Liability for Forfeiture* in File No. EB-02-DV-119, NAL/Acct. No. 200332800002 (Oct. 29, 2002); *see* Verizon Wireless (VAW) LLC, *Forfeiture Order*, 18 FCC Rcd. 854 (2003); Verizon Wireless (VAW) LLC, *Order*, 18 FCC Rcd. 3246 (2003) (setting aside the January 2003 Forfeiture Order).

[34] Verizon Tel. Cos., *Order and Consent Decree*, 18 FCC Rcd. 3492 (2003).

[35] The Commission awarded damages to Starpower in the amount of $12,059,149, plus prejudgment and post-judgment interest at the annual rate of nine percent. Starpower Communications, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd. 23265, ¶ 14 (2003).

[36] Section 272 requires a BOC that has received authority to provide in-region interLATA telecommunications service pursuant to Section 271 of the Act to provide that service through a separate affiliate and establishes certain structural, transactional, and nondiscrimination safeguards that govern the relationship between a BOC and its 272 affiliate. *See* 47 U.S.C. §§ 271, 272. On September 8, 2003, the Commission released a Notice of Apparent Liability proposing a forfeiture of $283,800 against Verizon for apparent violations of Section 272. Verizon Tel. Cos., *Notice of Apparent Liability for*

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In the past ten years, "Verizon has had to pay more than $220 million in penalties – including $70 million in just the last three years including $15 million in 2004."[37] Since Verizon has a clear record of non-compliance with rules intended to prevent anti-competitive behavior, the Company's application to increase its market power through merger should be denied. However, should the Commission approve the Application subject to conditions, then the Commission must take special care to craft conditions that are clear, tough and easily enforceable.

B. Verizon Has Routinely Violated Prior Merger Conditions Intended to Minimize Anti-Competitive Effects.

Verizon's proven disregard for the conditions attached by the Commission to prior mergers should be of particular concern. Recall that the Commission first determined that Verizon's (then Bell Atlantic) proposed acquisition of GTE was unlawful, and made its consent to proceed expressly conditional on Verizon's acceptance and adherence to a set of carefully crafted conditions intended to ameliorate the obviously anti-competitive effects of the combination.[38] Unfortunately, the ink on the order had barely dried before Verizon reneged on its end of the deal, and began a blatant streak of ignoring the conditions imposed upon it.

As a condition of the GTE deal, for example, the Commission required, among other things, that the combined company provision collocation arrangements subject to a 95% on-time

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Forfeiture, 18 FCC Rcd. 18796 (2003). The Consent Decree resolved the investigation that led to that Notice as well as a subsequent, similar investigation. Verizon Tel. Cos., *Order and Consent Decree*, 19 FCC Rcd. 14409 (2004).

37 Testimony before the New York Assembly Committee on Corporations, Authorities and Commissions, Kenneth R. Peres, Economist, Communications Workers of America, Public Hearing: March 7, 2005.

38 *GTE/Bell Atlantic Merger Order*.

performance standard.[39] Soon after approving the merger the Commission found that additional scrutiny was warranted and began an investigation "[a]fter receiving information from competing LECs, indicating that GTE [Verizon] may have violated the Commission's rules."[40] Based on the Commission's review of whether Verizon complied with the requirements of the Commission's merger conditions, as well as its Rules in place to protect competition, Verizon and the Commission agreed that Verizon would pay $2.7 million to the U.S. Treasury to settle claims regarding how the combined company collocated with competitors (the payment was made in addition to Verizon's obligation under the merger order to make voluntary payments).[41]

Then, in September 2001, Verizon agreed to make another payment to the U.S. Treasury in order to settle another investigation relating to whether Verizon discriminates against competitors.[42] Verizon's second settlement of charges relating to interconnection and collocation occurred in the face of explicit merger conditions[43] and only 13 months after the first settlement in which Verizon (GTE) had "represent[ed] that it is committed to full compliance with the Commission's interconnection and collocation requirements as effective and further

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39 *GTE/Bell Atlantic Merger Order.*

40 FCC Public Notice, FCC, *GTE Enter Into Consent Decree Improving Compliance with Local Competition Rules; GTE Agrees to Pay $2.7 Million* (released Aug. 1, 2000); GTE Service Corp., *Order and Consent Decree*, 15 FCC Rcd. 13946 (2000) ("*Verizon August 2000 Consent Decree*"). In June 2000, the Commission adopted and released the Merger Order granting applications seeking approval to transfer control of certain licenses and authorizations in connection with the merger of GTE and Bell Atlantic. *GTE/Bell Atlantic Merger Order.*

41 *Verizon August 2000 Consent Decree.*

42 Specifically, the Commission's "Investigation" related to an "investigation initiated by the Bureau's April 5, 2001 letter of inquiry regarding Verizon's compliance with 47 C.F.R. § 51.32(h)." Verizon Communications, Inc., *Order and Consent Decree*, 16 FCC Rcd. 16270, ¶ 5 (2001) ("*September 2001 Consent Decree*").

43 *September 2001 Consent Decree.*

represents that the Company opposes noncompliance with such competitive provisions by any telecommunications carrier."[44] Thus, in short order, Verizon made a key acquisition to gain market dominance and then flexed its muscle against competitors contrary to Commission Rules, explicit Commission merger conditions, and a representation it made to the Commission.

Soon after, the Commission released an order ruling in favor of Global NAPs on a complaint alleging that Verizon had violated one of the conditions of the Commission's approval of the merger application of Bell Atlantic and GTE. The condition requires Verizon under certain specified circumstances to permit requesting carriers to adopt in one state an interconnection agreement that was voluntarily negotiated in another state. The Commission concluded that Verizon acted contrary to explicit merger conditions and should have allowed Global NAPs to opt into certain provisions of a Rhode Island interconnection agreement for use in Massachusetts and Virginia in accordance with the condition.[45]

These and other instances[46] reveal a shocking disregard by Verizon for clear state and federal laws and regulations intended to regulate Verizon's market dominance and rein in potential anti-competitive conduct. More particularly, they show a disturbing Verizon inclination to pull a "bait and switch" with the Commission on its merger applications -- *i.e.*,

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[44] *Verizon August 2000 Consent Decree* ¶ 7.

[45] *See Global NAPs Order.*

[46] *See, e.g.*, Josh Long, *Heavy-Handed or Hallow, Regulator Says Enforcement a Priority; Competitors Cry Foul*, PHONE+, May 2003, *available at* www.phoneplusmag.com/articles/351FEAT3.html ("In Massachusetts, for example, Verizon Communications, Inc. is liable for up to $142 million annually under the so-called performance assurance plan, which represented 36 percent of its net income in the Bay State, says a Massachusetts regulator."); Press Release, Washington Utils. & Transp. Comm'n, *State Fines Verizon for Not Offering Rate Quotes to Customers Making Collect Calls From Pay Phones in Washington* (May 30, 2001), *available at* www.wutc.wa.gov/webdocs.nsf/0/f8a2f5acff745c0c 88256a5c00733595?opendocument.

accepting pro-competitive remedial conditions to obtain approval, and then intentionally violating them once their deal is closed. While the Commission recently determined that Verizon's history of non-compliance with the merger conditions was not determinative in the context of a $5.7 million settlement related to violations of sections 271 and 272 of the Act,[47] Verizon's behavior clearly is highly relevant in connection with the Commission's review of the instant Application. Here, Verizon is seeking to merge with one of the largest competitors in its region. Thus, Verizon's pattern of non-compliance with prior merger conditions is highly predictive and directly relevant to the present Application.

IV. APPLICANTS HAVE FAILED TO ADDRESS THE LIKELY ANTICOMPETITIVE CONSEQUENCES OF THE MERGER.

A. Applicants Have Failed to Analyze the Consequences of the Increased Concentration in Local Transmission Inputs that Would be Caused by the Proposed Merger.

Of all the markets affected by the proposed merger, none is more important or as likely to experience severe harm as the business markets. The transmission inputs needed to serve business customers are a critical part of this country's telecommunications infrastructure. Unfortunately, as the Commission has repeatedly held, there is a severe shortage of loop and, with rare exceptions, local transport facilities needed to transmit telecommunications and information services to and from business customers. The local transmission capacity upon which this country's commerce depends is controlled by a small number of carriers, of which Verizon is overwhelmingly the dominant market leader in its incumbent territories. Moreover, capacity removed from the market through mergers of CLECs into the incumbents is unlikely to be replaced any time soon because the entry barriers to deploying local fiber and other facilities

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[47] 47 U.S.C. §§ 271, 272; *Verizon March 2003 Order*.

are extremely high. Yet, amazingly, Applicants have now blithely asked, with very little supporting analysis and data regarding the effect of the merger in this market, for approval to allow Verizon to acquire one of the two largest competitors in its operating territories. If allowed, Verizon's already predominant position as a wholesale supplier of transmission facilities will be significantly strengthened in those unfortunately already few areas and in those several buildings where competition exists, and especially where MCI functions as one of the actual or potential suppliers of these wholesale inputs. This result is unacceptable.

There should be no dispute that it makes sense to focus on the effect of the proposed merger on the availability of local transmission facilities used to serve business customers. Local transmission inputs are "a distinct and essential ingredient for providing" service to all types of business end-users.[48] Verizon has itself argued that any CLEC that, like MCI, has deployed local fiber facilities can "channelize" the capacity of those facilities to provide any level of capacity to other carriers or end user customers.[49] The Commission has found that, once a carrier has deployed a fiber facility, "that carrier can then add electronics to channelize or

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48 Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd. 18025, 18041, ¶ 28 (1998) ("*MCI/WorldCom Merger Order*").

49 "[T]he fiber networks that competing carriers deploy can be used to provide any kind of service, to any kind of customer, at any level of capacity, simply by adding or modifying the electronics at the ends of the cable . . . Thus, wherever competitive fiber networks have been deployed, they are capable of serving any type of customer – from small businesses that use only a single DS1 of capacity, to larger businesses that use multiple DS3s and above – which further increases the size of the market available to CLECs." *Verizon Reply Comments*, WC Docket No. 04-313 *et al.* at 47-48; *id.* at 48 (asserting that competing providers, like MCI, have acknowledged that they channelize their fiber networks to provide services at different levels of capacity from DS1 on up); *id.*, Declaration of Robert F. Pilgrim ¶¶ 9-10 (describing channelization).

otherwise serve smaller capacity services using existing facilities."[50] The conclusion applies not only to transport facilities but equally to loops, for which the "incremental costs of providing channelized capacity . . . are minimal."[51] The Commission has held that such high levels of "production substitution" among a set of downstream services justifies focusing the examination of competitive harm caused by the merger on the necessary upstream input facilities.[52] The Commission has also held that the analysis is the same (that the "competitive analysis would be logically equivalent"), regardless of whether the transmission inputs are treated as a distinct product market or the focus is on the effect on the downstream retail markets of increased concentration in the provision of inputs.[53] Finally, the Commission has held that, when examining the effect of a proposed merger on the availability of inputs, it is appropriate to focus on the capacity of available inputs, rather than the number of customers served by such facilities.[54]

Regardless of the geographic market definition used, whether it be wire centers, density zones or some other appropriate geographic unit, it is clear that ownership of local transmission capacity along the individual routes and to the individual buildings needed to serve business customers is highly concentrated in the Verizon region. Although Applicants offer limited data and analysis of local transmission input markets in the Verizon region, such data and analysis, as discussed further below, is too aggregated to be useful in any serious review of the proposed

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50 Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Order on Remand*, 20 FCC Rcd. 2533, ¶ 86 (2005) ("*TRRO*").

51 *See id.* ¶ 154.

52 *See MCI/WorldCom Merger Order* ¶ 27.

53 *See id.* ¶ 28.

54 *See id.* ¶¶ 43-50.

merger. Even without the requisite data at hand, national figures regarding market concentration provide a helpful indication that the level of concentration is already dangerously high. For example, the record in the Triennial Review proceeding showed that only "3% to 5% of the nation's commercial office buildings are served by competitor-owned fiber loops."[55] This indicates that an incumbent such as Verizon controls the vast majority of the loop facilities needed to serve business customers in its region. Moreover, the Commission has held that cable transmission facilities are not used to serve business customers to any significant degree[56] and that fixed wireless and satellite do not offer a viable mode of local transmission for business customers.[57]

Loop facilities are the most critical transmission facilities for competition. It is clear that MCI and AT&T are currently the largest, or close to the largest, wholesalers of transmission capacity. MCI is the most active CLEC bidder in the Verizon regions and appears to have constructed loop facilities to more buildings than any other non-ILEC. According to the UNE Fact Report submitted by Verizon and other ILECs in the record of the Triennial Review Remand proceeding, in 2001/2002, the last year relevant data was made public, MCI had the largest volume of fiber loop capacity on its own of any competitor with 76.4 million business voice grade equivalents, and AT&T had the second largest volume of fiber loop capacity among competitors with 40 million business voice grade equivalents.[58] Furthermore, as Verizon has

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55 Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978 at n.856 (2003) ("*TRO*").

56 *TRRO* ¶ 193.

57 *Id.* n.508

58 UNE Fact Report 2004, Prepared and Submitted by BellSouth, SBC, Qwest and Verizon, WC Docket No. 04-313 *et al.*, Table 6 (filed Oct. 4, 2004) ("*UNE Fact Report*").

itself asserted, MCI makes its transmission facilities (including loops) available at wholesale.[59] But even if, in some cases, MCI currently does not make its local transmission facilities available at wholesale, it must be considered one of the few potential entrants into the wholesale market. The elimination of one of the largest non-ILEC wholesalers (or potential wholesalers) of local transmission capacity in the Verizon territories raises obvious risks of harm to consumer welfare that must be carefully examined.

There is no reason to believe that competitors will deploy significant local transmission capacity in the foreseeable future because the entry barriers to such deployment are extremely high. Competitors seeking to construct local transmission facilities face "steep economic barriers."[60] For example, "most of the costs of constructing loops are sunk costs."[61] The largest portion of the sunk "costs incurred in building a fiber loop results from deploying the physical fiber infrastructure into the underground conduit to a particular location."[62] Entities seeking to deploy fiber loops must overcome the "inability to obtain reasonable and timely access to the customer's premises both in laying the fiber to the location and getting it into the building thereafter, as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop facilities."[63] Construction of transport facilities that do not connect to particular end users is also characterized by extremely high entry barriers.[64] For

59 Verizon asserted, in the Triennial Review Remand proceedings, that competing carriers, including MCI, provide wholesale services, including loops and transport. *Verizon Reply Comments*, WC Docket No. 04-313 *et al.* at 41, 72, 79.

60 *TRO* ¶ 199.

61 *Id.* ¶ 205; *see also TRRO* ¶ 150.

62 *TRRO* ¶ 150.

63 *TRO* ¶ 312.

64 *See TRRO* ¶¶ 74-77.

example, the costs associated with deployment of dedicated transport include the costs of collocation, the costs of equipment and materials (both the fiber itself and the electronics required to "light" the fiber), and the costs of obtaining rights-of-way from municipalities.[65]

The acquisition of the network with perhaps the second largest local transmission capacity by the firm that controls the vast majority of local transmission capacity in the Verizon region raises serious risks to competition where there is little chance that much capacity will be added anytime soon.[66] But even on transport routes and at buildings where Verizon holds a monopoly over local transmission, the proposed merger raises serious concerns. Verizon and other ILECs have argued repeatedly that they make special access inputs available at discounted rates to competitors willing to make large volume and term commitments.[67] Given the enormous volume of special access that it apparently purchases (and perhaps the fact that its scale economies make it a significantly more credible threat than other CLECs, with the possible exception of AT&T, to construct transmission facilities where special access rates are too high), it seems likely that MCI could obtain a steeper discount off of the monthly tariffed special access rates than any other competitor (again with the exception of AT&T). Moreover, MCI appears to make transmission facilities it acquires under its unique special access discounts available at

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65 *Id.* ¶ 75.

66 Further, as discussed in Section IV.C *infra*, if the proposed merger with SBC is allowed, it is unlikely to expand its facilities further in the Verizon regions, and is not likely to market the transmission facilities it does not have with any vigor.

67 *See Verizon Reply Comments*, WC Docket No. 04-313 *et al.* at 88 (noting that competing carriers are able to purchase special access at deep discounts off the tariffed base rates for these services – on the order of 5 to 40 percent – when they enter into volume and/or term commitments); *see also* Wilkie Decl. ¶ 12.

wholesale in response to RFPs.[68] These leased facilities appear to be combined with MCI's own fiber facilities to offer comprehensive local transmission solutions to wholesale customers. It seems unlikely that other competitors (with AT&T again the exception) would be able to obtain the level of discounts MCI likely receives today off of Verizon's month-to-month tariffed prices. If this is so, the elimination of MCI as a reseller of Verizon local transmission inputs would likely harm competition.

The consequences of increased concentration in local transmission facilities for competition in downstream service markets are well-understood. A competitor in downstream markets that holds market power over upstream inputs needed to provide such downstream services has powerful incentives to raise rivals' costs.[69] By increasing the share of scarce local

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68 Wilkie Decl. ¶ 15. Indeed, wholesale transmission contracts bid on and won by MCI and AT&T are priced 50 to 60 percent below the ILEC's special access rates. Wilkie Decl. ¶ 24. The only conclusion must be that these two companies are using their volume discount leverage to undercut Verizon at retail.

69 *See SBC/Ameritech Merger Order* ¶ 107 ("In addition, incumbent LECs, which are both competitors and suppliers to new entrants, have strong economic incentive, to preserve their traditional monopolies over local telephone service and to resist the introduction of competition that is required by the 1996 Act. More specifically, an incumbent LEC has an incentive to: (1) delay interconnection negotiations and resolution of interconnection disputes; (2) limit both the methods and points of interconnection and the facilities and services to which entrants are provided access; (3) raise entrants' costs by charging high prices for interconnection, network elements and services, and by delaying the provisioning of, and degrading the quality of, the interconnection, services, and elements it provides. An incumbent LEC has similar, and probably greater, incentive to deny special accommodations required by competitive LECs seeking to offer innovative advanced services that the incumbent may not even offer. As noted at the outset, this view of the incumbent LECs' incentives and abilities is the fundamental postulate of the basic cornerstones of modern telecommunications law – the MFJ and the 1996 Act."). *GTE/Bell Atlantic Merger Order* ¶ 188 ("given their monopoly control over exchange access services, each Applicant currently has the ability to discriminate against rivals providing interexchange services, in favor of its own interexchange operations, by denying, degrading, or delaying access on the originating and terminating ends."); Regulatory Treatment of LEC Provision of Interexchange Services Originating in the

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transmission capacity under its control as a result of the contemplated merger, Verizon's incentive to engage in this kind of behavior would increase. It is hard to think of an outcome more antithetical to the pro-competition policies embodied in the Act generally and the 1996 Act more specifically.

Applicants have offered no analysis or data regarding this obvious threat to consumer welfare. Indeed, in their 69 page public interest statement, Applicants claim that the combination of Verizon and MCI "will not have any adverse effects on the ability to obtain capacity from competitive suppliers."[70] This is because, after the merger, there allegedly will still be other competitive fiber networks, operated by large and small telecommunications carriers (including AT&T), and non-traditional providers, such as affiliates of electric utilities and cable companies.[71] In addition, Applicants claim that competing carriers can provide service in those areas "by purchasing special access, deploying new fiber, or by relying on other growing competitive alternatives such as fixed wireless."[72]

The available evidence on meaningful competitive presence and the ability to offer wholesale alternatives to Verizon-provided transport facilities puts to the lie any such claims that competition will flourish following the merger. MCI, like its principal CLEC competitor, AT&T, compete in local wholesale access markets by providing circuits over facilities they own

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LEC Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order*, 12 FCC Rcd. 15756, ¶ 111 (1997) ("there are various ways in which a BOC could attempt to discriminate against unaffiliated interLATA carriers, such as through poorer quality interconnection arrangements or unnecessary delays in satisfying its competitors' requests to connect to the BOC's network.") (footnote omitted).

70 *See* Application, Exhibit I, Public Interest Statement at 34 ("Public Interest Statement").

71 *Id.* at 33.

72 *Id.*

and by reselling ILEC-provisioned special access, which they purchase on volume discounts at levels that only they, among the CLECs, can obtain due to their size and scope.[73]

The Joint Petitioners have obtained data from GeoResults regarding the number of commercial buildings served by competitors and Verizon in six East Coast MSAs.[74] This data is not ideal, because they do not distinguish between buildings served by resold special access and buildings served by a carrier's own fiber loops (both categories are included in the GeoResults data), and GeoResults relies on Telcordia data which are themselves imperfect. Nevertheless, they represent the best aggregate data currently available and are the data that other RBOCs, including SBC, rely upon.[75] It is instructive to look at the number of commercial buildings served by competitors, including MCI, in order to assess the impact of removing MCI as a supplier of alternative access to buildings.[76] The data shows that MCI is, relatively speaking, one of the two key competitive forces, in the Verizon territory.[77]

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73 Wilkie Decl. ¶ 18 ("In the latter role, MCI and AT&T act as efficient aggregators, essentially aggregating the demand of the smaller CLECs to facilitate CLEC entry to serve business customers through the volume discounts in the special access tariff that MCI and AT&T obtain.").

74 The markets (Albany, Baltimore, DC, New York, Philadelphia and Pittsburgh) were chosen for the study because they are in the Verizon region, MCI is known to have deployed local transmission facilities in those markets, and data regarding other competitors' facilities in those markets was readily available.

75 *See, e.g., Reply Comments of SBC Communications, Inc.*, WC Docket No. 04-313 *et al.* at 17, n.45.

76 Wilkie Decl. ¶ 19.

77 According to the UNE Fact Report, in 2001/2002, the last year relevant data was made public, MCI had the largest volume of fiber loop capacity on its own of any competitor with 76.4 million business voice grade equivalents, and AT&T had the second largest volume of fiber loop capacity among competitors with 40 million business voice grade equivalents. *UNE Fact Report* at Table 6. *See also* Wilkie Decl. ¶¶ 15, 18, 19, 25.

Uniformly, MCI and AT&T have the two largest CLEC building presences in the Verizon region.[78] Moreover, the third largest firms have much smaller shares.[79] For example, if we look at the New York metropolitan area, there are 16,869 commercial buildings served by CLECs using their own facilities or Verizon special access, and MCI serves 1,085 of those buildings. If the impact of AT&T scaling back its competitive presence in the Verizon region as would likely be the case if it were acquired by SBC is accounted for, the harm to competition is even more significant.[80] *Only one out of five buildings previously with a CLEC presence in New York City would continue to maintain a competitive presence.* The impact of removing both MCI and AT&T as suppliers of alternative access to buildings in New York and other metropolitan areas in Verizon's territory is summarized in Table One below.

BUILDINGS SERVED BY CLECS IN SELECTED VERIZON METROPOLITAN AREAS

Metropolitan Area	Buildings Currently Served by a CLEC	Buildings Served by a CLEC Other Than AT&T or MCI	% Decline
Albany, NY	1,207	350	71.0
Baltimore, MD	3,587	732	79.6
New York, NY	16,869	3,440	79.6
Philadelphia, PA	8,046	2,269	71.8
Pittsburgh, PA	3,988	772	80.6
Washington, D.C.	7,868	2,279	71.0
Source: GeoResults, Inc.			

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78 Wilkie Decl. ¶ 19.

79 *Id.*

80 Wilkie Decl. ¶ 19. *See* Section IV.C., *infra*, for a discussion of potential tacit collusion between Verizon and SBC following their contemplated acquisitions of MCI and AT&T, respectively, so as to eliminate effectively both MCI and AT&T as competitors throughout the combined Verizon and SBC footprints.

The table shows that if AT&T and MCI were removed from the markets as meaningful competitors, this would result in a 71-80 percent decline in the number of commercial buildings served by a competitor in these markets.[81] Thus, the total supply of buildings with circuits accessing buildings outside the control of Verizon will be materially reduced, causing a significant diminution in competition in these markets.[82] Moreover, post-merger MCI will no longer offer wholesale circuits based on reselling its discounted special access services.

The competitive harm this loss of competitive presence would represent is measured by looking at available bid data. The question, "What would the price be absent MCI's bid given the bids of the others?" must take into account that the remaining bidders will bid less aggressively to win in the absence of MCI, raising the equilibrium price.[83] While AT&T appears to have a greater building presence in the Verizon markets than MCI, bid data reveals that MCI is the more aggressive of the two in terms of submitting the low price bid.[84] In his Declaration, Dr. Wilkie examines CLEC-generated bid data from a major metropolitan market wherein the CLEC requested monthly recurring charge ("MRC") bids from carriers on point of presence ("POP")-to-central office DS1 circuits.[85] The CLEC received bids for approximately 100 DS1 circuits, of which MCI was the low-price bidder for approximately two-thirds of the circuits. In fact, MCI was the only bidder for many of the POP-to-central office DS1 circuits identified by the CLEC in the metropolitan area involved.[86] Where there was competitive bidding, the

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[81] *See* Wilkie Decl. ¶ 19.

[82] Wilkie Decl. ¶ 20.

[83] *Id.* ¶ 21.

[84] *Id.* ¶ 24.

[85] *Id.* ¶ 22.

[86] *Id.*

difference between the winning and second best bids is significant.[87] Indeed, the average difference between MCI's bid and the second lowest bid in these instances was more than $100 per DS1 circuit per month.[88] However, as Dr. Wilkie explains, this is only half the story. With the removal of MCI, the second lowest bidder need only bid slightly less than the third lowest bidder. If Verizon is that third bidder and, as is typical, is bidding its posted special access rates (or a fixed discount from them), then AT&T can win by just undercutting the Verizon tariff rate, such that the real impact of MCI's departure in almost all cases is to increase the price to just below the ILEC's special access rate.[89]

The removal of MCI as an independent competitor to Verizon in local wholesale access markets will cause significant consumer harm.[90] In particular, for those circuits where competition is eliminated and the requesting carrier is left with the special access tariff, or a single competitor bidding just under the ILEC price, prices will rise approximately 100 percent.[91] One recent study estimated that cost of a DS1 loop circuit amounts to about one-third of a wireline CLEC's incremental costs and that a 100 percent increase in such costs would in fact make it uneconomic for the CLEC to compete, causing that firm to exit the market.[92] Thus, by this model, and consistent with the data presented in Table One above, it would be feasible for

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87 *Id.*

88 *Id.*

89 Post-merger, where there is no competition from MCI or other access providers to constrain Verizon's special access price, Verizon could bid an access price that effectively forecloses the CLECs. Verizon would remain free to charge the monopoly price to the end user customer and earn a monopoly rent for its service. Wilkie Decl. ¶ 23.

90 *Id.* ¶ 25.

91 *Id.*

92 *Id.*

Verizon to foreclose competition for businesses located in thousands of locations throughout its area, and so enable the ILEC to raise prices to business customers in those locations. Consequently, customers would suffer from both a higher price and the loss of their first choice (and perhaps even second or third choice) provider in the market.[93]

Applicants' expert economists offer nothing to assuage this concern. Messrs. Bamberger, Carlton and Shampine offer only a brief overview of the impact of the proposed merger on the markets for business service.[94] They vaguely mention the fact that some CLECs have deployed "networks" in metropolitan areas,[95] but they concede that they have made no attempt to analyze "the extent to which CLECs' facilities in a given MSA serve the same areas."[96] As even Verizon has recognized in the past, the highly localized nature of transmission facility deployment decisions demands an inquiry as to whether there is competition in specific areas.[97] Although Applicants, through Verizon's Access Market and Financial Planning Vice Presidents,[98] offer some data on fiber facilities deployed in "groupings of contiguous wire centers" or "wire center clusters" within Verizon's service region to identify geographic areas where there putatively are competitive alternatives,[99] such approach is meaningless because the data is aggregated at such a

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93 *Id.*

94 *See* Carlton *et al.* Decl. ¶ 51.

95 *See id.* ¶¶ 49-51.

96 *See id.* n.64.

97 In the Triennial Review Remand proceeding, Verizon essentially conceded the need for a highly localized inquiry regarding the extent to which competitors have deployed transmission capacity. *See Verizon*, WC Docket No. 04-313 *et al.* (filed Oct. 4, 2004) at 25-26.

98 *See* Application, Declaration of Quintin Lew and Ronald H. Lataille ("Lew/Lataille Decl.").

99 Public Interest Statement at 31; *see also* Lew/Lataille Decl. ¶¶ 19-24.

high level so as to obscure whether meaningful competitive alternatives are being reflected. Specifically, references to data on a wire center level or even worse, through use of wire center "clusters," is misleading because it attributes competitive presence throughout the wire center cluster, even if fiber is deployed only in part of one wire center, or even just "passing through." By merely reporting the presence of competitively deployed fiber somewhere in the wire center, the Applicants fail to offer evidence reflecting the extent to which carriers (or customers) actually have competitive wholesale (or retail) alternatives in the absence of MCI, alone or together with the absence of AT&T following an SBC/AT&T consolidation.

In contrast, the data offered above by Joint Commenters regarding the number of commercial buildings served by competitors looks at actual competitive presence in terms of service to customers and demonstrated ability to offer wholesale capacity to buildings. These data show directly that the loss of MCI's competitive presence would signal the end of any price competition for the vast majority of locations. As noted above, even if AT&T continues to bid against Verizon, there would be no reason for AT&T to do anything other than price very slightly below Verizon's inflated special access rates.[100]

The other reasons offered by Carlton *et al.* for discounting the threat posed by the merger to business customers are easily rejected. Carlton *et al.* state that competitors "can" deploy facilities in response to demand,[101] but the Commission's own assessment of the entry barriers associated with loops and, to a lesser degree transport, refute this assertion. Carlton *et al.* cite to the wide variety of firms competing to serve business customers, including carriers, systems

[100] Wilkie Decl. ¶ 22.

[101] *See* Carlton *et al.* Decl. n.64.

integrators, equipment manufacturers, value-added resellers and cable companies.[102] But all of these firms (except cable companies, which do not serve the relevant market to any significant degree) would become victims of Verizon's increased power to raise rivals' costs if it were to gain control over MCI's local transmission capacity. The number of resellers in a market has no bearing on the extent to which they are vulnerable to anticompetitive conduct by the firm that controls upstream inputs. Carlton *et al.* also point to the fact that businesses purchasing telecommunications service are "highly heterogeneous."[103] Yet, this too is a red herring. Regardless of the differences in applications demanded by business customers, all such services must ride over the same underlying transmission facilities. Again, control over the transmission facilities yields control over the market and harm to consumers.

It is clear therefore that the threat that the proposed merger poses to the business market requires a detailed analysis of the transport routes and building connections that MCI owns. Applicants must then assess whether several other competitors besides MCI have deployed transmission facilities along the specific transport routes and to the specific buildings where MCI has built fiber in a relevant geographic area (wire center, density zone, or other), something Applicants have failed to do in their Application. In those cases where only MCI and Verizon have deployed facilities over a particular route or to a particular building, the merged firm would obviously obtain a monopoly over local transmission serving that route or building. It is hard to conceive of a clearer example of competitive harm caused by a merger. Where the number of providers of transmission inputs would drop from three (Verizon, MCI and one other competitor) to two as a result of the proposed merger, substantial competitive harm will result from the

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[102] *See id.* ¶ 58.

creation of a duopoly. This is precisely the holding of the Commission's order blocking the proposed merger of DirecTV and EchoStar.[104] Finally, even where the number of competitors drops from four to three, significant harm is likely.[105] The DOJ-FTC Merger guidelines support this conclusion, since a market with equal market share held by three competitors is deemed highly concentrated (with an HHI of 3267).[106]

But the relevant inquiry does not end at an analysis of fiber facilities deployed by MCI. As mentioned, MCI likely obtains a steeper discount for special access local transport from Verizon than any other competitor since it is unlikely that any other competitor, with the singular exception of AT&T, could justify purchasing special access in the volumes needed to obtain comparable discounts.[107] Thus, the proposed merger would remove a critical source of discounted transmission inputs that competitors cannot duplicate. The public interest harms of the loss of these discounts is enormous. Dr. Wilkie's study of wholesale transmission bids

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103 *See id.* ¶ 69-72.

104 *See EchoStar/DirecTV HDO* ¶ 275 ("The Applicants have failed to meet their burden of proof to show that, on balance, the proposed merger is in the public interest . . . The record before us irrefutably demonstrates that the proposed transaction would eliminate a current viable competitor from every market in the country, whether those markets are currently served by cable systems or are markets in which no cable systems exist, at best resulting in a merger to duopoly").

105 *See also* Section IV.C. *infra*, discussing the probability that where AT&T is the other supplier or one of two alternative suppliers, the practical effect will be to go from three suppliers to one in buildings with three suppliers (Verizon, AT&T, and MCI). *See also* Wilkie Decl. ¶ 25.

106 *See* US DOJ Antitrust Div. and Federal Trade Comm'n 1992 Horizontal Merger Guidelines, 57 FR 41552 (1992); US DOJ and Federal Trade Comm'n Revision to the Horizontal Merger Guidelines § 1.51 (Apr. 8, 1997). The HHI calculation here assumes an equal market share for all competitors, including Verizon, that have constructed facilities in a particular location. Given Verizon's ability to raise its rivals' costs in obtaining inputs needed to compete and Verizon's superior economies of scale, this is a highly conservative assumption.

indicates that if MCI is removed from the market for wholesale transmission, wholesale prices will likely increase 100 percent.[108]

To assess the extent of this risk, Applicants must disclose the extent of the special access discount Verizon provides to MCI, how it compares with the special access discounts available to other competitive carriers as a practical matter, and the extent to which MCI has or has planned to share some portion of its special access discount with other carriers by reselling Verizon's special access facilities (by themselves or bundled with MCI's facilities).

B. Applicants have Failed to Analyze the Consequences of the Proposed Merger for Mass Market Telephone Service.

The proposed transaction also raises serious concerns regarding increased concentration in the market for landline circuit-switched voice services demanded by mass market customers. Verizon is the dominant provider of these services within its region. Moreover, MCI, with its powerful brand and obvious expertise born of several decades' experience in selling voice services to the mass market, remains a substantial presence in the mass market with one of the two or three highest market shares, next to the RBOCs, of bundled local and long distance voice services.[109] The magnitude of Verizon's dominance over such a large region only increases the possible harms from merger since a relatively small increase in price for mass market services

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[107] Wilkie Decl. ¶¶ 12, 18.

[108] Wilkie Decl. ¶ 25.

[109] *See* Taylor, Nelson, Sofres PLC, *Combined SBC and AT&T Represents 28% of Wired Line Telecom Market, 10% of Total Telecom Spending*, Jan. 31, 2005, *available at* http://www.tnstelecoms.com/press-1-31-05.html. Based on 3Q 2004 data, a combined Verizon and MCI would control 27% of the wireline market. In comparison, a combined SBC and AT&T would control 28% of the wireline market. The combined Verizon-MCI entity would represent 9% of all consumer dollars spent on telecom services (not including revenue from Verizon Wireless), while a combined SBC-AT&T would

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will result in billions of dollars of consumer harm.[110] Even if MCI were to exit the market (which it has not), MCI would be almost uniquely positioned as a potential competitor, whose very existence as an independent company would discipline the prices Verizon charges for mass market voice services.[111] Regardless of whether the Commission considers the relevant product market to be stand-alone local service (*i.e.*, local exchange and exchange access service), stand-alone long distance service or "all distance voice" bundles, it is clear that the market for landline circuit switched voice service demanded by mass market customers (*i.e.*, residential and very small businesses) constitutes a separate product market.[112] Although the Applicants make much of wireless and VoIP as competitors to traditional voice service, the Commission has made clear that these services are, at most, complements to circuit switched voice service.

For example, in its recent order approving the merger of AT&T Wireless and Cingular, the Commission noted that it had "previously found that consumers tend to use wireless and wireline services in a complementary manner and view the services as distinct because of differences in functionality."[113] Accordingly, the Commission concluded that, "while there is some evidence of a small, but growing number of consumers that have chosen to cut the cord and use wireless services in lieu of wireline service, this trend is a relatively recent phenomenon."[114] It is instructive that huge decreases in wireless pricing have not induced large numbers of

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represent 10% of all consumers dollars spent on telecom services (not including revenue from Cingular). *Id.*

110 Wilkie Decl. ¶ 44.

111 *Id.* ¶ 38 (citing a study showing that RBOC entry into long distance markets lowered consumer long distance prices by 8 to 11 percent).

112 *Id.* ¶¶ 40-41.

113 *Cingular/AT&T Wireless Merger Order* ¶ 239 (citing *TRO* ¶ 230).

114 *Id.* ¶ 242.

wireline consumers to "cut the cord"; this lack of cross elasticity demonstrates that wireless and wireline services are in different product markets.[115] Tellingly, Verizon's Chief Executive recently explained that wireless services were not intended as substitutes for local landline telephony. Indeed, in a recent article, the San Francisco Chronicle summarized Mr. Seidenberg's comments as follows:

> 'Why in the world would you think your (cell) phone would work in your house?' [Seidenberg] said. 'The customer has come to expect so much. They want it to work in the elevator; they want it to work in the basement.' Seidenberg said it's not Verizon's responsibility to correct the misconception by giving out statistics on how often Verizon's service works inside homes or by distributing more detailed coverage maps, showing all the possible dead zones. He pointed out that there are five major wireless networks, none of which works perfectly everywhere.[116]

For these reasons, CMRS simply cannot be considered a substitute for mass market voice service.[117]

The same is true of mass market VoIP. As the Commission has found, to receive VoIP service, a customer must first subscribe to broadband (most likely cable or DSL), a service which many potential customers cannot afford[118] or choose not to take and which greatly increases the

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[115] Wilkie Decl. ¶ 41.

[116] *See* Todd Wallack, *Verizon CEO Sounds Off on Wi-Fi, Customer Gripes, Seidenberg Also Explains Phone Company's Reasons for Wanting to Buy MCI,* SF Chronicle, April 16, 2005, available at http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/04/16/BUGJ1C9R091.DTL.

[117] *Id.* Tellingly, in a receipt interview, Verizon's CEO, Ivan Seidenberg, was highly critical of wireless customers' expectations that their mobile phone service would actually work within their homes. *See* Todd Wallack, *Verizon CEO Sounds Off on Wi-Fi, Customer Gripes, Seidenberg Also Explains Phone Company's Reasons for Wanting to Buy MCI* , SF CHRONICLE, April 16, 2005, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/04/16/BUGJ1C9R091.DTL.

[118] *See TRRO* n.118.

price of VoIP service over existing circuit-switched voice rates.[119] Because of the need to subscribe to broadband service, the theoretically addressable market for VoIP only consists of the 32.5 million "high speed" cable and DSL lines in service as of June 2004,[120] as compared to 114.5 million mass market switched voice lines.[121] Moreover, the ILECs themselves, including Verizon,[122] have essentially ensured that the 17.4 million xDSL subscribers[123] – over half the theoretically addressable market – could not substitute a third party VoIP provider for the ILECs' own circuit-switched voice service because xDSL is generally only available as part of a bundled offering that includes ILEC circuit-switched voice service.[124]

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[119] For example, Verizon's circuit switched local phone service with caller ID and two enhanced services costs $28.95 per month. Verizon's Freedom package with unlimited calling nationwide and five enhanced services costs $51.95 per month. In contrast, Verizon's xDSL service costs $29.95 per month and Vonage's unlimited all distance plan costs $24.99 per month for a total cost of $54.94. Thus, VoIP service from Vonage (and likely other similar VoIP offerings) combined with broadband service costs $3 more per month than stand-alone circuit switched service. *See* http://www22.verizon.com/ForYourHome/sas/sas_Freedom.aspx; http://www.vonage.com/products_premium.php.

[120] *See TRRO* n.118.

[121] *See* FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2004, Table 2 (Dec. 2004) ("*Local Competition Report*").

[122] While this policy does not seem to be described on SBC's website, SBC service representatives inform prospective customers that they must order circuit-switched voice service along with xDSL.

[123] Matt Friedman, *DSL Growth Skyrocketed in 1004: Report,* NETWORKING PIPELINE, Feb. 24, 2005, *available at* http://www.networkingpipeline.com/showArticle.jhtml?articleID =60403146.

[124] *See TRRO* n.118. This practice is currently the subject of a Commission NOI. *See* BellSouth Telecommunications Inc. Request for Declaratory Ruling that State Commissions May not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers, *Memorandum Opinion and Order and Notice of Inquiry*, FCC 05-78, ¶ 37 (released Mar. 25, 2005) ("In this Notice of Inquiry, we seek to examine

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The RBOCs themselves have admitted that their own VoIP service is unlikely to compete with their traditional voice service. For example, Verizon's CFO Doreen Toben explained that "[t]he marketing research suggest[s] . . . [VoIP] is for the 'single geeky guys' who are basically OK having one phone in the house they can use this way . . . . If you have three phones, it doesn't really work."[125] Indeed, Verizon is not "worried about VoIP service cannibalizing traditional wireline offerings, but instead sees the technology as an alternative for . . . college students, as well as 'win-back' for customers who have switched carriers."[126] Moreover, Verizon has admitted that VoIP's appeal is limited, estimating that, at most, there will only be approximately 15 million non-RBOC VoIP customers by the end of 2008.[127] In light of these facts, it is unsurprising that the Commission recently concluded that "VoIP is purchased as a supplement to, rather than a substitute for, traditional local exchange service."[128]

Moreover, regardless of the geographic market definition used, the discrete product market for circuit-switched voice service demanded by mass market customers in Verizon's region is highly concentrated. The Applicants submit precious little data on this subject, but there is no doubt that Verizon provides local exchange service to the overwhelming majority,

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the competitive consequences when providers bundle their legacy services with new services, or 'tie' such services together such that the services are not available independent from one another to end users . . . Several commenters in this and other proceedings have raised the possibility that bundling services potentially harms competition because consumers have to purchase redundant or unwanted services."). *See also* Wilkie Decl. ¶ 42.

125 Justin Hyde, *Verizon Says Internet Phones a Niche Product*, REUTERS, Jul. 27, 2004, *available at* http://investor.news.com/Engine?Account=cnet&PageName=NEWSREAD&ID=1214380&Ticker=T&SOURCE=N27181390.

126 Kelly M. Teal, *Verizon Enters VoIP Market*, XCHANGE, Jul. 22, 2004, *available at* http://www.x-changemag.com/hotnews/47h22124954.html.

127 *See* UNE Fact Report, Table 9.

approximately 82 percent, of the residential local exchange customers throughout its region.[129] Verizon also serves 17.7 million long distance lines.[130]

MCI is one of the few major competitors in this market.[131] As of the end of 2004, MCI had over 7 million stand-alone mass market long distance customers nationwide, and over 3 million of these customers also subscribe to local services.[132] This represents over 33 percent of all CLEC mass market local customers nationwide.[133] MCI is a larger competitor in this market

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[128] *See TRRO* n.118.

[129] *See* Taylor, Nelson, Sofres PLC, *Combined SBC and AT&T Represents 28% of Wired Line Telecom Market, 10% of Total Telecom Spending*, Jan. 31, 2005, *available at* http://www.tnstelecoms.com/press-1-31-05.html.

[130] *See* Verizon SEC Form10-K for fiscal year ending Dec. 31, 2004.

[131] Any threat that wireless or VoIP services might pose to wireline dominance of a Verizon or an SBC is if these services could be offered in combination with wireline products. As Verizon's sister RBOC, Qwest, aptly observed in its opposition to the SBC/AT&T merger,

> SBC and Verizon are not merely trying to acquire their largest current competitors. They also are trying to eliminate – right here, right now, before it is too late – the threat that the assets of AT&T and MCI could be used against them in a converged world. SBC and Verizon are protecting themselves against the risk that developing intermodal threats could morph into meaningful, fully-integrated competitors in part through the use of AT&T and MCI facilities, customers, technical and marketing expertise, systems, and brands. If these mergers are approved, SBC and Verizon will not need to worry that AT&T and MCI may partner with smaller wireline companies, or wireless companies, or media companies, or internet companies, or computer companies, or power companies – or more likely some combination of the following.

Qwest Comments at 4, WC Docket No. 05-65 (filed Apr. 25, 2005).

[132] *See* MCI SEC Form 10-K for fiscal year ending Dec. 31, 2004 at 10.

[133] *See Local Competition Report*, Table 2 (noting that there are 20,824,618 switched access lines provided by CLECs to residential and small business customers). At the end of 2004, AT&T had 20 million stand-alone mass market long distance customers nationwide and 4.2 million mass market customers receiving bundled local and long distance services nationwide. *See* AT&T SEC Form 10-K for fiscal year ending Dec. 31, 2004, at 8.

than the cable companies. Indeed, cable companies have only a limited presence in the market for circuit switched mass market voice service.[134]

Moreover, the Commission has long held that the barriers to entry into the local voice market are high. New entrants must "attract capital, and amass and retain the technical, operational, financial and marketing skills necessary to operate . . . entrants will have to invest in establishing brand name recognition and, even more important, a mass market reputation for providing high quality telecommunications services."[135] MCI is one of the very small number of competitors that can clear these entry barriers. Its powerful brand and long experience in serving mass market customers has made it almost uniquely suited to competing in the local voice market.[136]

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134 The RBOCs estimate that all of the cable companies combined only provide service to 3.2 million circuit switched voice customers. *See UNE Fact Report*, Table 1. This presence is unlikely to grow because of their decision to transition to VoIP. *See* Ben Charney, *Cable Raises Its Voice*, NEWS.COM, Mar. 3, 2005, *available at* http://news.com.com/Cable+raises+its+voice+-+page+3/2100-7352_3-5597111-3.html?tag=st.next (noting that at first, cable companies relied upon circuit switches to provide phone service, but now they are beginning to transition to VoIP). For example, Cox is planning to immediately begin migrating its circuit-switched phone networks to VoIP. See Carol Wilson, *VON: Cox Announces VoIP Plans*, TELEPHONE ONLINE, Mar. 7, 2005, *available at* http://telephonyonline.com/voip/news/cox_voip_nortel_030705/index.html (noting that while existing TDM customers will be supported, new telephony adds will be VoIP based). There is every reason to think that the cable companies' VoIP offerings will resemble other mass market VoIP offerings and will thus not constitute a substitute for circuit switched phone service. Therefore, cable companies should not be considered significant participants in the market for mass market voice services.

135 *NYNEX/Bell Atlantic Merger Order* ¶ 6.

136 *Cf. GTE/Bell Atlantic Merger Order* ¶ 119 ("Finally, as in previous merger orders, we conclude that other firms currently serving or planning to serve the mass market for local exchange and exchange access services out-of-region are not yet included in the list of most significant market participants. Competitive LECs have begun serving residential markets but do not yet have the existing customer base and brand name that enable AT&T, MCI Worldcom, and Sprint, as well as certain incumbent LECs, to become most significant competitors.").

All of these factors demonstrate that the proposed merger poses a major threat to consumers of mass market circuit-switched voice service. The acquisition of the number two if not, by some measures, the number one competitor in the Verizon service territory by the firm with an overwhelmingly dominant position in an already highly concentrated market characterized by high entry barriers is likely to increase opportunities for the combined company to increase prices in the relevant market. Astonishingly (and tellingly) Applicants have offered no economic analysis of this important issue. They have also failed to submit the data interested parties and the Commission need to conduct such an analysis.

Rather than analyze the problem, Applicants instead claim that MCI's decision to stop vigorously marketing its voice service to the mass market shows that MCI's present market share is essentially irrelevant and that the merger will not eliminate a key competitor in that market.[137] But MCI's motivation for scaling back its mass market service activities must be closely scrutinized. The Commission has repeatedly discounted the stated intentions or market strategy of merger applicants to exit a market when such a position was taken to limit government scrutiny of a transaction. For example, in blocking the merger of EchoStar and DirecTV, the Commission found "self-serving" EchoStar's announcement that it would no longer fund Starband, a residential satellite Internet service, simply because EchoStar claimed the service was not viable.[138] The Commission analyzed the merger as if EchoStar were still in the market and held that the merger would "harm existing competition in the Ku-band Internet access market."[139] Similarly, in analyzing the SBC-Ameritech merger, the Commission found "self-

[137] Public Interest Statement at 46-51.

[138] *EchoStar/DirecTV HDO* ¶ 239.

[139] *Id.* ¶ 240.

serving" Ameritech's explanation for its abandonment of its "Project Gateway" to enter the St. Louis residential market.[140] Because the Commission believed Ameritech's actions were simply a way to gain merger approval, it treated Ameritech as "a significant market participant in the mass market for local [service] in St. Louis.[141] A similar inquiry is warranted here.

Even if MCI's decision to scale back its mass market operations were entirely unrelated to its desire to secure an offer of acquisition from an RBOC (a dubious proposition), MCI would remain a formidable threat to Verizon in the mass market. Of course, MCI continues to have a significant market presence in both the local and long-distance market. Simply because MCI is no longer vigorously marketing its service does not mean that MCI does not continue to compete in the market. Notably, MCI continues to take orders for local and long distance mass market circuit switched voice service.[142] In all events, MCI remains and would remain a powerful potential competitor whose very existence as an independent company places some discipline on Verizon in the mass market.

The Applicants assert that due to a series of market, technological, and regulatory changes, MCI's participation in the mass market, were it not acquired by Verizon, would consist largely of serving its legacy customer base and managing its decline as a provider of mass market services.[143] In this regard, Applicants claim that MCI is no longer able to serve the mass

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140 *SBC/Ameritech Merger Order* ¶ 80.

141 *Id.* ¶ 81.

142 On its website, MCI offers numerous circuit switched long distance plans and continues to offer circuit switched local service in the 48 contiguous states and the District of Columbia. http://consumer.mci.com/TheNeighborhood/res_local_service/jsps/default.jsp

143 *See* Public Interest Statement at 47; Decl. of Wayne Huyard ¶¶ 4-12.

market going forward in large part because of the elimination of UNE-P.[144] Yet Verizon has consistently trumpeted the ability of carriers to serve mass market customers without unbundled switching,[145] and Verizon and other RBOCs have signed multiple commercial agreements with CLECs,[146] including MCI, to transition their customer base from UNE-P to other wholesale arrangements.

Verizon recently announced that more than 50 carriers have signed agreements for commercial offerings of wholesale services to replace existing UNE-P arrangements.[147] The evidence is that MCI is one of these carriers. In March of this year, MCI and Verizon entered into an interim agreement to amend existing interconnection agreements to reflect a pricing change for UNE-P to the embedded base, *i.e.,* existing UNE-P lines, which has been filed in

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144 *See* Public Interest Statement at 35.

145 *See, e.g., Verizon Reply Comments*, WC Docket No. 04-313 *et al.* at 129-30.

146 For example, on August 25, 2004, Granite Communications signed an agreement with Verizon to replace the existing UNE-P leasing arrangement used to serve mass market and small business customers. *See* News Release, Verizon and Granite Telecommunications, *Verizon and Granite Sign Commercial Agreement for Wholesale Services*, August 25, 2004, *available at* http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/08-25-2004/0002238706&EDATE=. On March 2, 2005, New Rochelle Telephone Corp, signed a long-term, multi-state wholesale service agreement with Verizon to replace the existing wholesale network UNE-P leasing arrangement. Rich Tehrani, *Leaving UNE-P*, TMCNET, Mar. 2, 2005, *available at* http://voip-blog.tmcnet.com/blog/rich-tehrani/voip/leaving-unep.html.

147 Press Release, Verizon Communications, Inc., *Verizon Making Great Strides in Reaching Commercial Agreements with Wholesale Customers* (Mar. 11, 2005), *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=89738. *See also* Press Release, *SBC and Granite Telecommunications Sign Commercial Agreement for Wholesale Services*, Jan. 3, 2005, *available at* http://www.granitenet.com/documents/SBC-GranitereleaseFINAL010305.doc. Sage Telecom, the third largest CLEC in SBC's territory, serving more than one half million local service customers, has signed a similar agreement. *See* Press Release, *Sage Telecom and SBC Reach Wholesale Telecom Services Agreement: Nation' First Commercially Negotiated Agreement Ensures Healthy Phone Competition* (Apr. 5, 2004), *available at* http://www.sagetelecom. net/ViewNews.asp?NEWSID-73.

California among other states.[148] Tellingly, shortly thereafter, MCI withdrew pending standstill petitions it had filed in a number of Verizon states to preserve the status quo with respect to new UNE-P lines or their equivalent. The timing of this withdrawal strongly implies that MCI reached a competitively satisfactory solution regarding a UNE-P replacement for new lines at the same time it reached the agreement to amend the publicly filed interconnection agreements. MCI already had entered into a wholesale agreement with another RBOC, Qwest, to ensure that its existing mass market voice customers in the Western United States will not be cut-off when UNE-P is no longer available.[149]

Against these arrangements, the Applicants have presented no evidence indicating why wholesale alternatives to UNE-P do not represent a viable option for MCI to remain a competitor for mass market local exchange customers. The Applicants offer no explanation or analysis as to why it is not "viable and profitable" for MCI to compete for mass market customers, given that other CLECs, with fewer advantages and smaller market share, continue to compete. For example, the Applicants do not show how a move away from UNE-P to commercial arrangements would suddenly make provisioning local service to the mass market unprofitable. Absent such evidence, and in light of the agreements MCI has already entered into with Verizon and Qwest, there is no reason to believe that MCI could not reenter that market on short notice at minimal cost.[150] The only thing that MCI would need to reconstitute in order to quickly become

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148 *See* Verizon California Inc., Advice Letter No. 11159 to Public Utilities Commission of the State of California (filed May 4, 2005).

149 *See* Press Release, MCI, Inc., *MCI and Qwest Reach Commercial Agreement for Wholesale Services* (May 31, 2004), *available at* http://global.mci.com/about/news/news2.xml?newsid=10710&mode=long&lang=en&width=530&root=/about/&langlinks=off.

150 *See* Wilkie Decl. ¶ 46.

a full competitor once again is its marketing and customer care infrastructure. Despite MCI's recent reduction in headcount, there is no reason to believe that its expertise in these areas does not remain intact.

Furthermore, the decision of the Commission on remand to eliminate mass market switching will likely be appealed to the courts. Therefore, it is entirely possible that one of the key reasons proffered by the Applicants for why MCI allegedly exited the mass market will disappear completely, even in the absence of evidence that carriers are competing through commercial arrangements. Because the Applicants bear the burden of proving the transaction serves the public interest, the Applicants' application must fail on this point. Therefore, absent further information from the Applicants, MCI must be considered a key potential market competitor for mass market voice services, and the elimination of MCI in this market must be considered a substantial public interest harm.

C. Applicants Have Failed to Address the Fact that a Combined Verizon-MCI Will Likely have a Powerful Incentive to Engage in Tacit Collusion with a Combined SBC-AT&T.

In two linked markets, *i.e.*, adjacent geographic markets for similar products, of which there is a separate dominant firm in each market, the two dependent firms have incentives to engage in a form of interdependent behavior whereby they refrain from competing with each other.[151] This behavior may arise from no apparent agreement or even direct contact among the two firms. However, each recognizes that it is to its individual benefit to do so. Yet the result is the same: a significant potential competitor in each market is lost and consumers, as a consequence, suffer.[152]

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[151] *See* Wilkie Decl. ¶ 26.

[152] *Id.*

"Tacit collusion," sometimes called "conscious parallelism" or "coordinated efforts," describes a policy of firms that otherwise would be expected to compete acting for mutual, rather than individual, advantage.[153] For example, firms dominating in adjacent markets for similar products may refuse to take advantage of potentially profitable market opportunities in the others' area of operation in implicit reliance on an expectation that potential competitors will act similarly, thereby preserving the dominance of each firm in its own market.[154] Tacit collusion thus can support the ability of multiple firms to exercise market power in multiple markets without the aid of an explicit agreement to do so.

Instances in which competing firms embark upon similar courses of conduct may suggest that the firms have agreed to manipulate the market in some way. However, because direct evidence of such an agreement is often impossible to obtain, under antitrust law an illegal agreement must often be inferred from circumstantial evidence, including the public conduct and "business behavior" of competitors, as well as market realities.[155] A distinction is made between parallel but independently determined behavior and conduct based on an agreement, which need

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153 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 at 227 (1993).

154 *See* AREEDA, PHILLIP E. & HERBERT HOVENKAMP, ANTITRUST LAW, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1141a (2d ed. 2003) ("[there is] a possible additional deterrent effect when several firms confront each other in several different markets. Firm A may hesitate to reduce price in market # 1 when it fears that rival B may not only retaliate in that market but also retaliate to A's detriment in market # 2. That is, each firm may forbear from upsetting noncompetitive oligopolistic pricing in one market whenever it fears detrimental retaliation either in that market . . . Thus, competition might be diminished in one market when the same firms inhabit a second market where they compete.").

155 *See Theater Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954).

not be explicit.[156] While instances in which competing firms embark on similar courses of conduct may suggest that the firms have agreed to manipulate the market in some way, proof of parallel business behavior alone does not establish agreement for antitrust purposes.[157] Requisite agreement can be inferred by the existence of additional circumstances, often referred to as "plus factors," which, when viewed in conjunction with the parallel acts, tend to exclude independent self-interested conduct as an explanation for the parallel behavior (*i.e.*, conduct that was against the firm's economic self-interest).[158] Examples of "plus factors" from which courts have found that an agreement can be inferred with or without direct evidence of communication among the parties include the opportunity for collusion; a common motive to enter into a conspiracy; a high level of inter-firm communications; acts contrary to a firm's economic interest, but rational if the alleged agreement existed; and a departure from normal business practices.

The Commission's inquiry into potential tacit collusion or coordinated efforts between Verizon and SBC should not be limited to whether there is an actual antitrust statute violation.[159]

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156 *See Modern Home Inst., Inc. v. Hartford Accident & Indem. Co.*, 513 F.2d 102, 108-09 (2d Cir. 1975) (The crucial question is whether conduct "stemmed from independent decision or from an agreement, tacit or otherwise.").

157 *See Theater Enters.*, 346 U.S. at 541.

158 *See Interstate Circuit v. United States*, 306 U.S. 208, 222-23 (1939).

159 The Commission has repeatedly stated that its analysis of the competitive effects of a proposed transaction is informed by antitrust principles, but not limited by the antitrust laws. *See* Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer of Control of Corporation Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services, *Memorandum Opinion and Order*, 13 FCC Rcd. 15236, 15243-44, ¶ 12 (1998) (citing *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (stating FCC is not "strictly bound by the dictates of [the antitrust]laws" (internal citations omitted)); *see also NYNEX/Bell Atlantic Merger Order* ¶ 32.

The Commission's broader mandate "to make an independent public interest determination"[160] requires it to consider whether RBOC tacit collusion would be anti-competitive even if not strictly violative of the antitrust laws. For example, in the Bell Atlantic/NYNEX merger and the proposed British Telecom/MCI merger, the Commission analyzed whether a merger between actual or potential horizontal rivals could depress competition indirectly by making it easier for a diminished number of competitors to exercise market power through coordinated interaction.[161] While the DOJ's analysis, for example, focuses solely on whether the effect of the proposed merger would be substantially to lessen competition, the Commission's public interest authority enables it to rely upon its extensive regulatory and enforcement experience to find a merger unlawful unless it imposes and enforces certain types of conditions that serve to "tip the balance" and result in a merger yielding net public interest benefits.[162] To conclude that a merger is in the public interest, "the Commission must 'be convinced that it will enhance competition.'"[163]

The consequence of RBOC tacit collusion not to compete is especially dire in the context of this Application. The likelihood is not just that Verizon and will continue their past predilection to steer clear of each other in over two-thirds of the country, as detailed below.[164] The even more damaging probable consequence is that the inclination of Verizon and SBC not to

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160 *SBC/Ameritech Merger Order* ¶ 49.

161 *See NYNEX/Bell Atlantic Merger Order* ¶¶ 121-24, 144; The Merger of MCI Communications Corporation and British Telecommunications plc, *Memorandum Opinion and Order*, 12 FCC Rcd. 15351, 15398, ¶ 125 (1997); *Cingular/AT&T Wireless Merger Order* ¶ 150; *EchoStar/DirecTV HDO* ¶ 280.

162 *SBC/Ameritech Merger Order* ¶ 52.

163 *Id.* ¶ 49 (quoting *NYNEX/Bell Atlantic Merger Order* ¶ 2).

compete head-on will affect their newly acquired MCI and AT&T units, and those two critical existing competitors will be effectively lost as meaningful out-of-region market participants.

1. *Verizon-MCI and SBC-AT&T Each have Strong Incentives not to Compete Aggressively in the Other's In-Region Territories.*

When two firms that compete or could compete in multiple markets, each in which one of the firms has a significant cost advantage over the other, the two firms have mutual incentives to engage in tacit collusion to avoid competing in the market in which the other has a cost advantage.[165] If one firm attempted to compete in the market in which the other has the dominant cost advantage, the second firm is likely to respond in kind in the first firm's "territory." The result is a net loss to both firms, as prices are forced down while average costs increase.

The proposed mergers of Verizon/MCI and SBC/AT&T create fertile ground for tacit collusion. Their legacy monopoly status affords both Verizon and SBC large and indisputable cost advantages over new entrants in their respective operating regions. Their network cost advantages over rivals will only improve should Verizon and SBC succeed in acquiring MCI and AT&T as planned. This cost structure creates the classic set of conditions which are likely to produce collusive activity.

The fact that an independent AT&T currently operates in the Verizon region cannot be relied upon to establish that it will continue to be an aggressive competitor after being absorbed by SBC. Although AT&T currently has a presence in Verizon's territory, it has achieved only a

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164 The states in which Verizon and SBC are the predominant ILECs account for over 65% of the United States population.

165 Wilkie Decl. ¶¶ 26-36.

nominal market penetration, and possesses notable cost disadvantages relative to the much larger Verizon. While this is not a particularly favorable state of affairs for AT&T pre-merger, it is simply the environment in which it competes, not only with Verizon, but with the other RBOCs. Should SBC be allowed to acquire AT&T, the attractions to a post-merger SBC/AT&T of trying to expand AT&T's foothold in Verizon territory and invite reciprocal activity by Verizon in SBC's territory would be minimal. It is far more likely, post-merger, that AT&T (then SBC) would decline to market AT&T's services aggressively which will consequently be allowed to wither on the vine until they all but evaporate.

In short, the Commission should be concerned that the proposed Verizon/MCI and SBC/AT&T mergers in tandem will create powerful incentives for a combined Verizon-MCI to tacitly collude with a combined SBC-AT&T. Like MCI, AT&T's presence creates both real and potential alternatives to Verizon's excessive wholesale transmission prices. However, post-mergers, there would be a strong disincentive for the combined SBC-AT&T entity to continue bidding aggressively to provide wholesale services to other carriers in the Verizon region, and certainly to invest in new facilities there. Simply put, such conduct likely would spark the combined Verizon-MCI entity to retaliate by competing for wholesale services in the SBC territory. In other words, the market environment is so defined that each dominant player, acting rationally given its experience with rivals' reactions, chooses the same course of geographically partitioned action. In addition, the two newly-merged entities are likely to forego discriminatory conduct against any residual operations of the other in-region, and instead target discrimination

against all other competitors. The end result will be more concentrated markets that are *ever more conducive* to facilitating tacit collusion among the RBOCs.[166]

Similarly, in mass market voice services, both local and long distance, the combination of these two proposed transactions is likely to result in each carrier pulling back and refusing to market aggressively to business and residential users in the other's territory. The consequence would be, over a relatively short period, a dissipation and practical elimination of market shares for mass market voice services in the case of both AT&T and MCI in the Verizon and SBC territories, respectively.

2. *There Is a History of Tacit Collusion between Verizon and SBC – i.e. They Have Had the Opportunity to Compete with Each Other for Years, but Have Chosen Not to Do So.*

When enacting the 1996 Act, Congress anticipated that the RBOCs would offer each other significant competition, particularly in neighboring service territories. Congress intended that the implementation of the 1996 Act would achieve the full benefits of meaningful local

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166 As Qwest observed in its recent filing opposing the SBC-AT&T merger,

> The record to date is clear: SBC and Verizon prefer an environment of détente or mutual forbearance, where neither materially encroaches on the other's territory, and they have avoided an environment of vigorous competition. . . . This merger, and the parallel Verizon-MCI merger, would make matters much worse. First, SBC and Verizon would be eliminating their most significant current competitors – who are also the greatest threat to destabilize their exiting mutual forbearance. Second, having captured the large customer base and revenue of their competitors, SBC and Verizon would have even more to protect through mutual forbearance, and even less incentive to attack one another. And third, their ability to maintain détente is strengthened by the post-merger symmetry of the two companies. In short, a likely outcome of the two mergers is the creation of two enormous and durable regional monopolies.

Qwest Comments, WC Docket No. 05-65 at 43.

competition in a very short period of time by "get[ting] everybody into everybody else's business."[167] Indeed, the 1996 Act specifically authorized the RBOCs immediately to compete for *local and long distance* telecommunications services outside their region where they could take advantage of the Act's provisions that give them access to other incumbent's facilities.[168]

However, Verizon and SBC have made virtually no effort to enter each other's service territories in any significant way. While this failure to compete directly has been characteristic of ILECs, and especially the RBOCs, the absence of competition between Verizon and SBC is particularly conspicuous for two reasons. First, each of these companies, as a means of securing earlier merger approvals from the Commission – Verizon with GTE and SBC with Ameritech, obliged themselves to enter more than twenty major markets in competition with other ILECs. Each company has fallen woefully short of what was promised. Second, Verizon and SBC serve contiguous and extensively intermingled markets (*e.g.*, Connecticut, on the one hand, and in California, Texas, and the old Ameritech region, on the other), yet there has been negligible competitive overlap over the past decade as each company has steered clear of the other.

The failure of Verizon and SBC to become a CLEC in an adjacent market, areas that afford an opportunity for the most significant potential local competition, is indicative that something other than pursuit of the individual ILEC's competitive interest is at play. The

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167 143 CONG. REC. S686 (daily ed. Feb. 1, 1996) (statement of Sen. Pressler).

168 *See* 47 U.S.C. §§ 271(b)(2), 271(j). The RBOCs were required to comply with the unbundling and resale conditions mandated in the 1996 Telecom Act before they would be granted relief from the line-of-business restrictions that precluded their participation in in-region interLATA service markets. However, the RBOCs were prohibited only from providing interLATA service within their service regions. They were not precluded from participating in out-of-region interLATA services or local services. Indeed, the Act permits an RBOC to offer interLATA services originating in states where it does not offer local service as an incumbent.

unfortunate explanation has been made by the former CEO of Ameritech (now part of SBC) and current CEO of Qwest who declared on October 31, 2002, that "[e]ven though his company could use a new revenue stream . . . he would not consider competing against his old firm for phone customers in the Chicago area" and that "it would be fundamentally wrong to compete for Ameritech's residential customers even though Qwest could profit from the service."[169] His view recently was echoed by another former ILEC CEO who stated that "I also feel that the [ILECs] don't want to start a cross-border war. If ILEC A buys long-haul company B, then ILEC B is going to have to go after that. I think they feel that they have won the battle. They have beaten back the [CLECs]. Why would they want to start a cross-border battle?"[170]

a. To secure approval for earlier mergers, Verizon and SBC both promised to expand into other ILECs' local markets, but later reneged on those obligations.

The reluctance of Verizon and SBC to compete with each other runs so deep that even express Commission conditions requiring them to invade each other's territories have failed. After agreeing to compete out-of-region as pre-conditions to the approval of prior merger requests, both Verizon and SBC backed away from their commitments soon after the requirements sunsetted.[171]

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[169] Jon Van, *Ameritech Customers Off Limits: Notebaert*, CHICAGO TRIBUNE, Oct. 31, 2002, at Business, p. 1 (stating that "it might be a good way to turn a quick dollar but that doesn't make it right").

[170] *See* Chris Nolter, *Taking the Local*, 28 THE DEAL 9, June 2, 2003, at 22 (quoting Kevin Mooney, ex-CEO of Cincinnati Bell).

[171] *See, e.g.*, David Rohde, *Bells are Failing to Compete as They Promised*, NETWORK WORLD FUSION, Mar. 5, 2001, *available at* http://www.nwfusion.com/news/2001/0305 bellcomp.html; *see also* Elizabeth Douglass, *Verizon to Pull Plug on OneSource Service Plan; Telecom: Subscribers of Money-Losing All-in-One Program Would be Forced to Find Other Local, Long Distance Options*, LOS ANGELES TIMES, Feb. 26, 2001, at C-1.

Upon review of the GTE/Bell Atlantic merger, the Commission determined that the proposed merger posed significant potential harm to the public interest.[172] To mitigate potential public interest harms, Verizon proposed a set of voluntary commitments as conditions of approval of the proposed merger, including a promise to target 21 cities for out-of-region expansion and local competition with SBC, Ameritech, BellSouth and Qwest within 18 months of closing.[173] Verizon proclaimed that the merger would offer "a broad-scale attack on the local markets of the other RBOCs across the country" and "makes meaningful entry possible where the separate companies alone could not succeed."[174] Verizon claimed that the merger would enable the combined company to enter a large number of new local markets by allowing it to leverage Bell Atlantic's existing large business customer relationships.[175] Verizon also claimed that it needed a large customer base because its out-of-region expansion plan involved a facilities-based entry strategy that required a broad base of customer relationship to support the large capital investment required.[176]

Verizon's commitment was formalized into a condition that within 36 months from the merger closing – by 2003 – it would spend a minimum of $500 million to provide competitive local service outside its region or provide competitive local service to at least 250,000 out-of-

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172 *GTE/Bell Atlantic Merger Order* ¶ 3.

173 *GTE/Bell Atlantic Joint Reply Comments*, CC Docket No. 98-184, at 18 (Dec. 23, 1998); *see also* GTE Corp. and Bell Atlantic Corp. Application for Commission Consent to Transfer Control, CC Docket No. 98-184, at 6 (filed Oct. 2, 1998).

174 *Id.*

175 *GTE/Bell Atlantic Merger Order* ¶ 222.

176 *Id.* ¶ 223.

region customer lines.[177] Verizon further agreed to pay fines up to $750 million if it failed to reach the out-of-region competition commitments.[178]

In granting the merger application, the Commission determined that, in the context of Verizon's out-of-region expansion strategy, *the single primary benefit* of the merger was that the 21 targeted markets would receive the benefits of competition more rapidly as a result of the merger than without.[179] But Verizon's promise to invest in competitive telecom facilities was little more than a sleight-of-hand intended to obtain approval for their merger of ILECs.[180] For example, Verizon counted $90 million of a $150 million preliminary investment in DSL provider NorthPoint Communications Group, Inc. toward satisfaction of its commitment to spend $500 million on out-of-territory services, even though the NorthPoint acquisition was never completed.[181] Verizon made the investment as part of an intended acquisition but subsequently backed away from the buyout. Verizon's ultimate decision against acquiring NorthPoint arguably contributed to, if not caused, NorthPoint's demise, which eliminated a major potential

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177 *Id.* ¶ 43.

178 *Id.* ¶ 46.

179 *Id.* ¶ 225.

180 Even before beginning its expansion, in December 2000, Verizon announced it was discontinuing its bundled local and long distance service offered by GTE, which had been designed to compete against local carriers such as Pacific Bell and BellSouth for business and residential customers. This forced 370,000 customers in nine states to switch their local and long distance service to the incumbents or other options, if available. Elizabeth Douglass, *Verizon to Pull Plug on OneSource Service Plan; Telecom: Subscribers of Money-Losing All-in-One Program Would be Forced to Find Other Local, Long Distance Options,* LOS ANGELES TIMES, C-1, Feb. 26, 2001. The affected customers were located in California, Florida, Texas, Washington, Oregon, Illinois, Tennessee, Indiana and Kentucky.

181 *See, e.g.*, Fred Dawson, *The Real Story on Bell Out-of-Region Competition*, XCHANGE MAGAZINE, Sept. 1, 2002, *available at* http://www.xchangemag.com/articles/291feat1.html.

RBOC competitor.[182] While Verizon reportedly extended its high-speed data transport services to large business customers in select portions of the greater Los Angeles metropolitan area the following year,[183] it soon scaled back its competitive efforts against SBC, efforts which it has not subsequently sought to revive.[184] In short, despite minimal competitive presences in some of the twenty-one markets targeted by Verizon, the "broad scale attack on local markets" of other ILECs promised by Verizon has not come to pass.

Similarly, in granting the SBC/Ameritech merger in 1999, the Commission insisted that, without conditions, the merger posed significant potential harm to the public interest.[185] To gain approval for its merger with Ameritech, SBC promised in the merger application to implement its so-called "National-Local" strategy wherein it would compete for local customers in 30 additional major markets outside of its region within 30 months of the merger. This was transformed into a formal commitment, and SBC further agreed to pay fines up to $1.2 billion if it failed to reach the out-of-region competition targets it had committed to achieve on the promised timetable.[186] SBC claimed that it needed additional capital from the merger in order to

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[182] *See, e.g., Reply Comments of the Association for Local Telecommunications Services*, CC Docket No. 98-184 (filed Mar. 22, 2002).

[183] *See* Press Release, Verizon Communications Inc., Verizon Heralds New Era of Communications Competition in Los Angeles (June 27, 2002), *available at* http://newscenter.verizon.com.

[184] *See, e.g.*, Fred Dawson, *The Real Story on Bell Out-of-Region Competition*, XCHANGE MAGAZINE, Sept. 1, 2002, *available at* http://www.xchangemag.com/articles/291feat1.html; *see also* David Rohde, *Bells are Failing to Compete as They Promised*, NETWORK WORLD FUSION, Mar. 5, 2001, *available at* http://www.nwfusion.com/news/2001/0305bellcomp.html; *see also* Elizabeth Douglass, *Verizon to Pull Plug on OneSource Service Plan; Telecom: Subscribers of Money-Losing All-in-One Program Would be Forced to Find Other Local, Long Distance Options*, LOS ANGELES TIMES, Feb. 26, 2001 at C-1.

[185] *See SBC/Ameritech Merger Order* ¶ 348.

[186] *See SBC/Ameritech Merger Order* ¶¶ 398-99.

enter other local markets and compete against the other RBOCs, including Verizon,[187] and that its merger with Ameritech would ignite new local services competition by creating companies with the experience, financial means, and geographic positioning to succeed where other carriers had failed.[188]

The Commission adopted SBC's National-Local strategy as a condition to the merger to "ensure that residential consumers and business customers outside of [the SBC territory] benefit from facilities-based competitive service by a major incumbent LEC."[189] The Commission noted that the condition effectively required SBC and Ameritech to "redeem their promise that their merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier."[190] The merger was consummated in October 1999 and the first three cities in the National-Local strategy were promised to be operational "within a year" of closing.[191] In late 2000, SBC began its out-of-territory initiative by ostensibly offering high-end voice and data services to the enterprise market and targeting the mass market with switched

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187 *See* Tim Greene, *Critics Blast SBC Mega-Deal*, NETWORK WORLD, May 18, 1998, *available at* http://www.findarticles.com/p/articles/mi_qa3649/is_199805/ai_n8802174/print; *see also SBC May Accelerate Its 3-Year Expansion Plan*, FORTH WORTH STAR-TELEGRAM, Dec. 1, 1998 ("Stephen Carter, president of strategic markets, said the plan is contingent on regulatory approval for SBC's $77.4 billion purchase of Ameritech Corp., expected to be completed in the middle of next year.").

188 *See, e.g.*, *SBC Communications and Ameritech to Merge*, PR NEWSWIRE, May 11, 1998, *available at* http://www.prnewswire.co.uk/cgi/news/release?id=44254.

189 *SBC/Ameritech Merger Order* ¶ 398.

190 *Id.*

191 *See* ST. LOUIS POST-DISPATCH, Feb. 5, 1999 ("The three cities named will be the first targets, with service available within a year of the purchase, SBC said.").

voice in only a handful of the thirty out-of-region markets.[192] SBC also announced that it had entered into long term lease agreements for facilities to serve the markets.[193]

However, SBC fundamentally changed course in early 2001, when it declared that it was scaling back marketing efforts in the out-of-region areas and that it only would offer switched voice service pending changes in the regulatory and economic climate.[194] SBC admitted that it would continue serving only *existing* customers in the initial six out-of-region cities where it already had began to offer trifling amounts of service.[195] With regard to the other 24 markets, SBC stated that it would only maintain the minimum "network presence" that it believed was required under its commitment to the Commission.[196] A spokesperson for SBC subsequently admitted that its marketing effort in the out-of-region areas is limited to Yellow Pages advertising and "promotion" of services via SBC's website.[197] In short, SBC abandoned all

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192 *See* SBC Communications Inc. Form 10-K for the fiscal year ended December 31, 2000 under the heading "National Expansion"; *see also* SBC Communications Inc. 2000 Annual Report to Shareholders under the heading "Regulatory Environment" at p. 12 (service introduced in Boston, Fort Lauderdale, Miami, New York and Seattle in 2000).

193 For example, SBC announced that it had entered into two separate lease agreements, with terms of 20 and 21 years, respectively, to provide dark fiber to reach customers in 30 markets. *See* Press Release, SBC Communications, Inc., *SBC to Expand with Coast-to-Coast Network Agreements* (May 30, 2000).

194 *See, e.g.*, Patricia Horn, *SBC Trims Plans for Expansion*, PHILADELPHIA INQUIRER, Mar. 3, 2001; David Rohde, *Bells are Failing to Compete as They Promised*, NETWORK WORLD FUSION, Mar. 5, 2001, *available at* http://www.nwfusion.com/news/2001/0305 bellcomp.html.

195 Patricia Horn, *SBC Trims Plans for Expansion*, THE PHILADELPHIA INQUIRER, Mar. 3, 2001.

196 *Id.*

197 Fred Dawson, *The Real Story on Bell Out-of-Region Competition*, XCHANGE MAGAZINE, Sept. 1, 2002, *available at* http://www.xchangemag.com/articles/291feat1.html.

credible efforts to make the vision of vibrant local competition underlying the National-Local Plan a reality.

To more fully understand the extent of and the reasons for the failure of Verizon and SBC to fulfill commitments or announcements made in conjunction with the foregoing previous mergers, the Commission should, as part of its requests for information in this docket, seek from Verizon copies of all internal business plans, marketing plans, analyses, and other documents prepared expressly by or for Verizon (whether prepared internally or by outside advisors) that discuss Verizon's implementation of its merger-related commitment to spend $500 million on out-of-territory services and to enter twenty-one out-of-region markets.[198]

b. Even where they have adjacent ILEC service territories, Verizon and SBC rarely cross historic borders to compete with each other.

If Verizon and SBC had any serious intention to compete with each other in the provision of local telecommunications services, it is reasonable to expect that they would establish CLEC operations in areas adjacent to their ILEC monopoly service territories. However, a decade after they received the green light to compete beyond their historic borders, and five years after their prior, conditioned mergers, neither RBOC has chosen to do so in a significant way.

This is very peculiar given the significant extent to which the two operate in contiguous territory, in many cases one surrounding the other.[199] The maps in the attached Exhibit B

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[198] *See also* pp 64-65 *infra* regarding suggested requests for information.

[199] *See, e.g.*, David Rohde, *Bells are Failing to Compete as They Promised,* NETWORK WORLD FUSION, Mar. 5, 2001, *available at* http://www.nwfusion.com/news/2001/0305bellcomp. html. ("Nearly halfway into the three-year period the government defined for SBC Communications to compete locally with the three other Bells, users and independent competitive local exchange carriers (CLEC) call SBC's effort virtually invisible").

demonstrate this failure to cross-over in several key markets where Verizon and SBC share extensive borders – California, Connecticut, and Texas.[200] For example, Verizon has not expanded its out-of-region reach in any meaningful way in California since the GTE/Bell Atlantic merger in 2000. Verizon provides local service in California in approximately 260 exchanges and local calling areas.[201] The current Verizon service area mirrors, with few exceptions, the pre-merger GTE service areas.[202] In fact, the lists of extended area exchanges and district areas by zone in Verizon's current tariff appear to come directly from the pre-merger GTE tariff.[203] While Verizon and SBC serve many of the same areas nominally, there actually is minimal overlap in terms of offering individual consumers choice between the two.[204] The websites for both Verizon and SBC contain maps that illustrate the location of each company's wireline customer locations.[205] These maps clearly show that neither Verizon nor SBC provides service throughout the State of California. Moreover, the maps plainly show that both companies purposely avoid serving the same areas.[206]

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200 *See* Exhibit B.

201 Verizon California Inc. Tariff, Schedule Cal. P.U.C. No. AB; Schedule Cal. P.U.C. No. A-28.

202 GTE California Incorporated [pre-merger] Tariff, Schedule Cal. P.U.C. No. AB, Schedule Cal. P.U.C. No. A-28.

203 Verizon California Inc., Schedule Cal. P.U.C. No. A-28, sheets 7-26. The pages date back to 1991 and use the GTE name in the header.

204 *See* Wilkie Decl. ¶¶ 35-36. See also maps in the attached Exhibit C which graphically illustrate the dearth of competition between Verizon and SBC in the Los Angeles market, especially in comparison with CLEC competition as a whole, and in light of the interwoven nature of the separate Verizon and SBC territories in Los Angeles.

205 *See* http://investor.verizon.com/business/wireline.html (Verizon wireline map) and http://www.sbc.com/gen/investor-relations?pid=5708 (SBC wireline map).

206 *See* Exhibit B; Although certain SBC exchanges are listed as part of Verizon's local calling area extended area exchanges to which Verizon customers can call, they are not

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Similarly there is very little overlap between the Verizon and SBC service areas in and around Connecticut, despite the carriers sharing a long border in this densely populated area of the country. SBC provides service to most of the State of Connecticut. Verizon provides service in the southwest extremity of Connecticut and in contiguous states, *i.e.*, New York, Massachusetts, and Rhode Island. Verizon's dominance in the surrounding territories provides it with an extraordinary opportunity to compete aggressively and successfully in the adjacent Connecticut territory. However, Verizon has not sought to compete in any meaningful way in Connecticut.[207] Operating as SNET, SBC provides local exchange and toll service in 86 exchanges in Connecticut,[208] which encompass at least 101 service areas.[209] In contrast, Verizon's local exchange tariff lists only two exchanges in that state, which encompass 11 local service areas.[210] These are the exact same exchanges in which GTE provided service before it merged with Verizon in 2000. Just as Verizon has not ventured into traditional SBC territory, SBC has not ventured beyond the Connecticut border to compete with Verizon in New York, Massachusetts, or Rhode Island.

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included in Verizon's list of local exchanges from which customers may be served. Verizon California Inc. Tariff, Schedule Cal. P.U.C. No. A-28.

[207] Verizon is the incumbent local exchange provider in only two Connecticut communities, Greenwich and Byran, which adjoin Verizon's service area in New York. These two communities are part of the New York Metropolitan Area and are wholly located within the local access and transport area that includes New York City, Long Island, and Westchester County, New York.

[208] SNET America, Inc. Tariff, D.P.U.C. No. 1, § 4.2.2; The Southern New England Telephone Company, Local Exchange Tariff, Part X, § 1.B.

[209] SNET America, Inc. Tariff, D.P.U.C. No. 1, § 4.3.1; The Southern New England Telephone Company, Local Exchange Tariff, Part X, § 1.B.

[210] Verizon New York Inc., State of Connecticut No. 3, Telephone, § 1.B.

Texas provides another significant example where Verizon and SBC steadfastly refuse to cross swords despite being in each others' back yards. SBC has operated as the regional incumbent in Texas since divestiture. SBC currently provides local service in approximately 650 exchanges and calling areas in Texas.[211] However, Verizon serves large portions of the states as well, currently providing local service in approximately 490 exchanges in Texas. While there is incidental overlap between the Verizon and SBC service areas in Texas when examined under a microscope, for all practical purposes, *no competition between the two exists.* For example, the Verizon tariff includes the Irving exchange (which encompasses the DFW Airport area and certain suburban areas north of Dallas, including the cities of Euless, Grapevine, Coppell and Irving), but the SBC tariff does not. Similarly, while the Houston and Corpus Christi metropolitan exchanges are included in SBC's tariffs, they are not included in the Verizon tariff. The Verizon and SBC wireline maps for Texas also show that while nominal overlapping coverage exists, it appears that the companies purposely avoid serving the same areas in virtually all other parts of the state, despite the two ILEC's service territories being intermingled throughout.[212] In general, the Verizon customers are concentrated in central Texas, with a scattering of customers in the eastern part of the state. The SBC map shows that it does not serve customers in the central Texas area served by Verizon.[213]

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211 SBC Texas, Local Exchange Tariff, § 1.4; Southwestern Bell Telephone Company, Texas Local Exchange Tariff, § 1.2. This count of exchanges includes both SBC exchanges and exchanges associated with other telephone companies, but included in SBC's calling area.

212 *See* Exhibit B.

213 Similarly, there are many distinct areas within the states of Illinois, Michigan, Ohio, Wisconsin, and Indiana, to name the principal additional examples, that are served by Verizon and around which SBC provides service. *See* http://www.sbc.com/gen/investor-relations?pid=5708; http://investor.verizon.com/business/wireline.html. SBC has not

. . .*Continued*

As for the future, there is no reason for the Commission to anticipate anything other than similar behavior by Verizon in SBC's and other ILEC markets, and the same by SBC in Verizon markets. Certainly, Verizon and MCI in their Application offer no basis for concluding things will be different after the proposed mergers. Indeed, with the elimination in each case of the two principal competitors – MCI and AT&T – the meager prospects for cross-border competition only diminish further.

Post-mergers, Verizon and SBC are unlikely to compete in the consumer long-distance segment either, although this segment was long the concentration of both of their acquisition targets, MCI and AT&T. Currently, both Verizon and SBC, despite having the ability to compete for long-distance customers out-of-region since 1996, have essentially entered the long-distance fray only recently and in-region after receiving Section 271 approval to offer in-region interLATA services under the Communications Act. Exacerbating the unlikelihood that Verizon's acquisition of MCI and SBC's purchase of AT&T would change this fact is that both RBOCs are currently marketing long-distance service principally in bundled fashion with local service. So, except where Verizon and SBC provide local service – meaning within their historic home territories – they are extremely unlikely to compete against each other for long-distance customers.

Verizon is authorized to offer interstate long distance services nationwide, except Alaska.[214] However, Verizon provides service primarily to its local telephone service customers

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sought to compete in Verizon markets in these states by extending its network from its secure and historical base, and *vice versa*.

214 *See* http://www22.verizon.com/ForYourHome/sas/sas_LongDistance.aspx?ViewTab=LD.

located in 29 states and the District of Columbia.[215] Its efforts to market long-distance service have historically been linked to areas where it might gain or retain local customers through a bundled offering.[216] Similarly, SBC is now authorized to offer interstate long distance services nationwide. But SBC effectively only provides long distance service to persons residing in the SBC thirteen state home territory, who have chosen SBC as their local service provider.[217] Indeed, persons residing outside the thirteen-state SBC home territory apparently cannot obtain interstate long distance services from SBC.[218]

In order to examine the potential for tacit collusion and its ramifications fully before it renders any decision on the Verizon/MCI merger Application (or the SBC/AT&T merger Application), the Commission must have more information from the Applicants at its disposal. The Application filed by Verizon and MCI utterly fails to demonstrate that the surviving entity will compete in adjacent ILEC territories. To remedy these defects in the Application, the Joint Petitioners strongly urge the Commission to issue a request for information soliciting from Verizon and MCI data that will shed further light on the potential for public interest harm as a result of tacit collusion. Specifically, the Commission should request data regarding the Applicants' and other carriers' provision of certain voice, data, and managed retail and wholesale

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215 *See* Verizon Communications 2004 Annual Report at 13.

216 On April 27, 2005, Verizon reported that "Approximately 58 percent of Verizon residential customers have purchased local services in combination with either Verizon long-distance or a Verizon broadband connection, or both. This compares with 51 percent in the first quarter 2004." *See* Press Release, Verizon Communications Inc., *Verizon Reports Continued Strong Results with EPS Growth of 8.6 Percent, Revenue Growth of 6.6 Percent* (Apr. 27, 2005), *available at* http://newsfeed.verizon.com/detail?mid=2005042731260&mime=ASC.

217 *See* http://www02.sbc.com/Products_Services/Residential/Catalog; *see also* SBC SEC Form 10-K for fiscal year ended Dec. 31, 2004, Item 1. *InterLATA Long-Distance*.

218 *See* http://www.sbc.com/gen/general?pid=1106.

services and related equipment to enterprise customers both in and out of the Verizon regions, competitive analyses prepared by the Applicants, data regarding the Applicants' provision of special access and private line services to customers both in and out of the Verizon region, facilities deployed and services provided by competitors (including AT&T and SBC) in Verizon's territory, and the Applicants' plans to serve existing residential customers of MCI out of Verizon's region post merger.[219] The Commission should also require Verizon and MCI to provide copies of all analyses or studies prepared expressly by or for Verizon (whether prepared internally or by outside advisors) in the last five years that discuss Verizon's entry (potential or actual) into other ILEC territories, and to the extent that Verizon has purchased facilities and equipment to provide services out-of-region, identify the vendor, the facilities and equipment purchased, and the terms and conditions of the transaction.

V. APPLICANTS' CLAIMS REGARDING PUBLIC BENEFITS AND INCREASED EFFICIENCIES ARE HIGHLY SPECULATIVE, MOSTLY SUSPECT AND CANNOT POSSIBLY OUTWEIGH THE LIKELY HARMS CAUSED BY THE MERGER.

The Commission's task in reviewing the Application is to evaluate the proposed merger in light of the public benefits and public harms.[220] Under these circumstances, to make its case, Verizon should have presented at least a basic factual analysis explaining why, notwithstanding the undeniable anticompetitive effects of its acquisition of its second largest local competitor, consumers would benefit or at least not suffer from less choice, less innovation and higher prices than if MCI remained a free-standing competitive firm or was otherwise acquired by someone

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[219] In short, the FCC should ensure that the same sort of evidence solicited by the FCC in the SBC/AT&T merger docket (WC Docket 05-65) in its April 18, 2005, requests for information is also put into the record for Commission and public review in this proceeding.

less dominant. Remarkably, however, Verizon has elected to do nothing of the kind. Its Application is essentially devoid of any mention of possible anticompetitive effects of the merger, let alone any factual analysis underlying its request for approval and claim of public interest benefits. Rather, the cursory Application as presented is filled with nothing more than sound bites and rhetoric.

Indeed, Verizon provides nothing but platitudes, and those platitudes sing the theme of inevitability rather than public interest benefit. According to Verizon, the merger "represents the next logical step in the industry transformation."[221] Apparently, this industry transformation includes the elimination of every significant competitor to the dominant in-region carrier. Moreover, the Application implies – but never attempts to prove – that MCI cannot stand on its own as a competitor. This argument is the merest suggestion of a "failing company" justification for the merger, and as discussed more fully below, there is not a single shred of factual justification provided that substantiates such position.

The anticompetitive components of this proposed merger are clearly far greater and far more immediate than were evident in the previously approved mergers of contiguous RBOCs, such as NYNEX-Bell Atlantic. This is not a "potential competition" case where the competitive harms of the proposed merger are somewhat speculative. This is (among other things) a straightforward horizontal merger where the dominant provider in each of several relevant markets is acquiring one of its largest competitors.[222] The number one firm in the market is acquiring the number two or three firm in the market when no firms after the first three have any

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220 *See generally* 47 U.S.C. §§ 214(a), 310(d).

221 Public Interest Statement at 3.

222 *See* Simon Wilkie Decl. ¶¶ 5, 6, 15.

appreciable scale to compete with the resulting entity. With the exit of the second and third largest local competitors from the Verizon service areas, and the absorption of the MCI customer base back into Verizon, the merger on its face yields significant anticompetitive effects.[223]

Verizon's Application also fails to describe key details about the relevant geographic and product markets that might be affected by the merger.[224] It provides no data or analysis whatever on the degrees of market concentration in any market – either before or after completion of the merger.[225] It doesn't even mention local telephone competition, despite the centrality of local competition to U.S. telecommunications policy over the past decade and the facts that MCI (i) is the second or third largest local competitor in most Verizon markets (depending on which relevant market is considered and what measure of market share is employed), (ii) recently reported growth in its local service revenues,[226] and (iii) is one of the two largest competing providers of wholesale inputs in the Verizon territory.[227] Instead, the Application focuses (to the degree that it focuses on anything) on how Verizon will become a larger and more effective competitor for "large businesses and government customers"[228] because it will simultaneously acquire MCI's assets and remove MCI from the available competitive choices for such customers.

Verizon's assessment suffers from a variety of problems. First, Verizon is not simply acquiring MCI assets that fill holes in Verizon's network reach. Indeed, in the Verizon

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223 *Id.* ¶¶ 5-6.

224 *See* Simon Wilkie Decl. ¶ 9.

225 *Id.*

226 *See* MCI SEC Form 10-K for fiscal year ending Dec. 31, 2004 at 44.

227 *See* Simon Wilkie Decl. ¶ 5.

228 Public Interest Statement at 3, 16.

territories it would be hard to find such assets. Rather, Verizon is acquiring assets that are similar to and directly competitive with the assets that Verizon already has.[229] MCI has the largest or, at a minimum, the second largest competitive facilities-based network in the Verizon territories. MCI uses that network directly and head-to-head with Verizon, competing for both wholesale and retail customers.[230] Verizon's acquisition of these assets simply removes one of the largest competitive alternatives to Verizon itself, without materially improving the quality of Verizon's network or services in its territories.

With respect to the local service markets, a primary statutory area of concern for the Commission under the 1996 Act, however, Verizon says virtually nothing about potential benefits. It does not attempt to show that local residential and business customers will have more choice, or as much choice, or even any choice at all, when MCI exits the market. Unsubstantiated, and as shown below, contradicted generalizations about the possibilities of intermodal competition are all that Verizon could muster. Verizon also does not show how facilities-based competitors – and their associated customers – will fare when Verizon acquires an MCI that has been one of its most sophisticated and aggressive competitors in selling service and facilities in the local wholesale market. Indeed, Verizon does not even attempt to address the inevitable result of MCI and AT&T's exit from the local wholesale market, that Verizon, without an alternative supplier of wholesale inputs, will have the ability to price local wholesale

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229 *See* Simon Wilkie Decl. ¶¶ 5-6, 15.

230 *Id.* ¶¶ 5-6

circuits at supra-competitive rates in order to foreclose competition or extract monopoly rents from a new market entrant.[231]

The Application identifies several benefits to the public that are little more than fanciful claims that Applicants can make a silk purse from a sow's ear. The truth is that it is impossible to achieve meaningful public benefit through the merger when it, among other public harms, removes a significant facilities-based competitor from the marketplace, concentrates in Verizon significant in-region market power on both a vertical and horizontal basis, and eliminates at least 7,000 U.S. jobs.[232]

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231 *Id.* ¶¶ 11-25, concluding that if MCI were to exit as a competitor of Verizon in the local wholesale access market, significant consumer harm will result, estimating that special access prices, as offered by under special access tariffs, will increase approximately 100%. In making such conclusion, the author summarizes the following findings in connection with the competitive bidding process for carriers seeking to purchase local special access circuits:

- Winning bids are on average 50-60% lower than ILEC special access charges due to MCI and AT&T's buying power in the market.
- The RBOC is almost never the lowest bidder.
- AT&T and MCI are by far the most frequent bidders.
- AT&T or MCI is the low price bidder most of the time.
- There is significant differences between the winning price and the second lowest price.
- MCI has been bidding more aggressively over the last year due to its move to a wholesale business strategy, and thus the harms of the merger may be understated.

See Section IV.A. *supra* for a more detailed discussion.

232 Yuki Noguchi and David A. Wise, *For MCI Board, An Awkward Straddle*, Washingtonpost.com, March 4, 2005.

No matter what the Application says, to the consumer, the proposed merger will mean less choice and higher prices with a corresponding diminishment in investment and deployment of new and innovative services and products. This hurts consumers directly, but will also have a substantial negative impact on the nation's economy, not only through the loss of jobs, but through forgone investment and innovation.

One thing that is clear from the Application is that Verizon has much to gain from acquiring MCI. Indeed, Verizon's top executive summed up these benefits perfectly in a recent article in the San Francisco Chronicle:

> [Mr.] Seidenberg also said Verizon is interested in buying MCI, despite its financial and legal troubles, because of its national Internet network and *lucrative government and corporate contracts*. "*It would take us longer to build ourselves*," he said.[233]

So, while the benefits to Verizon are very clear, what is not clear is whether or how the merger will benefit the public. The Application makes sweeping claims regarding public benefits such as the merger will "produce only benefit with no material adverse effect on competition,"[234] "creat[e] a strong U.S. based competitor in the global communications marketplace,"[235] "generate synergies in the form of both cost savings and enhanced revenue opportunities,"[236] "produce substantial savings – in the form of both cost reductions and revenue improvements,"[237] "benefit government customers and promote national security,"[238] and

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233 Emphasis added. Todd Wallack, *Verizon CEO Sounds Off on Wi-Fi, Customer Gripes, Seidenberg Also Explains Phone Company's Reasons for Wanting to Buy MCI*, SF CHRONICLE, April 16, 2005, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/04/16/BUGJ1C9R091.DTL.

234 Public Interest Statement at 10.

235 *Id.* at 11.

236 Public Interest Statement at 3.

"accelerate the delivery of innovations to all consumers,"[239] but these unsupported claims cannot, and do not, stand up to simple scrutiny.

The truth is that:

- large carriers dominating the market do not "benefit" the competitive landscape;
- Verizon's desire to be a dominant world carrier does not benefit the American public and is not relevant to the Commission's analysis of the proposed merger;
- mega-mergers such as the one proposed herein, historically have failed to result in significant synergies that do not otherwise exist on a stand-alone basis;
- the perceived cost savings also historically do not materialize when dominant firms merge and, to the extent realized, are meaningless unless passed through to consumers;
- if national security is an issue and MCI's technology and network are somehow in jeopardy of not being able to meet the of the government save for the merger, this issue needs to be addressed by the government agencies that oversee MCI's government contracts; and
- firms that hold dominant positions in the marketplace are far less likely to innovate than firms facing effective competition.

This means that the combination of MCI and Verizon is likely to have the opposite effect of what Applicants claim in their submission.

A. Verizon Adds Nothing to MCI's Global Competitiveness.

The Application while making sweeping generalizations about the benefits of the merger does nothing more than detail how Verizon will be in a position to expand its reach with the addition of MCI's global network. It is of no surprise to anyone that, when you put two companies together, the combined company will be able to offer the services that the two

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[237] *Id.* at 14.

[238] *Id.* at 3.

[239] Public Interest Statement at 15

companies provided separately. That is simple math. But that is not the analysis here. The analysis here focuses on (i) what enhancements to competition will result, and (ii) how consumers, enterprises, and government customers will be better off with the companies combined than if left to compete on an individual basis. This is where the Application is sorely lacking. No doubt Verizon will benefit from the merger. Their top executive has stated as much publicly. But the Application provides no mention whatsoever as to how the combined Verizon-MCI positively alters the competitive landscape, or alternatively, will not harm competition. That is because there is nothing these two carriers can say that change the facts – MCI already is a major global provider of local, long distance, IP, Internet, data, and next generation services. Combining with Verizon will only serve to eliminate this major competitive presence in each of those markets. Verizon's failure to address this issue is telling.

Despite the fact that the combined Verizon-MCI will be a large global competitor, thanks to MCI's existing network, it is not a goal of the Communications Act, nor is it a public interest benefit, that a U.S. carrier be viewed as a "strong U.S. based competitor in the global communications marketplace."[240] Rather, it is the stated goal of the Communications Act, as reflected in the preamble to the 1996 Act, that *competition* be assured in the communications marketplace.[241] The preamble makes it clear that *competition, not combination, is in the public interest.*[242]

Indeed, while the Application claims that the merger will establish "the nation's most advanced broadband platform, capable of delivering next-generation multimedia service in

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240 *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 447 (3rd Cir. 2004) (citation omitted).

241 1996 Act, preamble, 110 Stat. 56.

markets across the country,"[243] it neglects to point out that MCI already holds that honor. Simply passing that honor to Verizon so it can recapture its past glory is not in the public interest. We can all pretend, as the Application does, that preeminence of Verizon in its territory, for example, was not the result of its dominant monopoly position, but that would not be true. The shortcut to market dominance is through monopolization, not competition. Mr. Seidenberg said it himself, "[i]t would take us longer to build ourselves." Unfortunately, this market reality is not adequate rationale for approving this highly anticompetitive combination, under any legal or antitrust theory. Indeed, the claims assumed in the Application could only be achieved if Verizon were able to gain the advantages that dominance and market power provide in the marketplace. When the pre-1984 AT&T, for example, held that position in the global telecommunications marketplace, the U.S. government acted to break AT&T of its dominance by divestiture.[244] It certainly is not a public interest benefit to put Verizon in the position of now regaining this unlawful dominance by acquiring one of its two largest competitors.

Boiled down, the Application's claims of future glory apparently equate to the notion that the merged entity will be better able to compete in the global marketplace. The Application does not, however, inform the Commission as to how or why the merger would allow the merged company to be a more effective global competitor. While the Application makes clear that MCI continues to operate one of the most advanced, extensive and sophisticated global IP

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242 1996 Act, preamble, 110 Stat. 56.

243 Public Interest Statement at 3.

244 *See United States v. MCI*, 552 F.Supp. 131 (D.D.C. 1982).

networks,[245] the Application provides scant evidence to support how Verizon will add to MCI's network, expertise or otherwise provide real synergies or other benefits for global customers.

The Application reflects the fact that Verizon adds little to nothing to MCI's global competitiveness by emphasizing that Verizon and MCI have complementary businesses, rather than overlapping businesses.[246] As a U.S. domestic carrier, Verizon currently does not have the experience or international networks to assist MCI in the global marketplace,[247] although it certainly has the financial strength and resources to expand into a global competitor if it so chose. However, as previously stated by Mr. Seidenberg, it would take Verizon too long to build. As such, Verizon today has little if anything to offer in the global arena. To the contrary, in addition to its global reach, MCI is one of the largest competitors of local services and facilities to Verizon in all of its major territories, a fact again the Application neglects to address.

As stated many times throughout this document, the Application may only be granted if the merger is found to be in the *public interest.*[248] It should be emphasized that there is a difference between what is beneficial for the merging companies versus what beneficial to the public. The "public interest" means that the merger is actually beneficial and not harmful to the public. The problem is that other than stating its desire to become a leading global carrier, the Application does not explain how Verizon will succeed where MCI has failed. More problematic is that the Application fails to show how its position as a global carrier would

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245 Public Interest Statement at 3, 10-12.

246 *See, e.g., id.* at 10-13, 17, 25, 47, 59.

247 *Id.* at 10.

248 *See generally* 47 U.S.C. §§ 214(a), 310(d).

benefit the American public, especially in light of the elimination of an existing global competitor in the process.

> Instead, Verizon's Application spends time discussing how customers who use wireless services and broadband services will benefit from the ability to purchase such services from a single provider, and how Verizon will now have a global reach. Even in these areas, however, Verizon offers neither data nor analysis of the current competitive conditions of these markets and the probable impact of the merger on competition after the merger were concluded. As discussed more fully in Section IV.B. above, the fact that such competition is almost non-existent when compared with users of traditional land-line local telephony appears to have eluded the Applications' drafters, who neglected to provide any formal economic market analysis for the degree of substitutability.[249] The Application relies on alternative services, such as wireless and VoIP as substitutes for traditional local service, despite all evidence pointing to the contrary. Indeed, every credible economic study has demonstrated that wireless services do not induce sufficient substitution of traditional landline telephony to be identified in the same relevant product market.[250] As mentioned in Section IV.B above, the absence of such substitutability was recently substantiated by the Commission and DoJ in their review of the Cingular/AT&T Wireless transaction.

As discussed in more detail in Section IV.B, technical limitations, as well as usage patterns, will also hinder widespread inter modal competition. As such, significant intermodal competition, while sounding good on paper, just doesn't exist today, and likely will not materialize for many years to come.

In the end, separating rhetoric from the facts, the Commission must decide whether Verizon's ambition to become leading global carrier has any true benefit for American consumers. Bragging rights for Verizon that it is a world communications leader is not a public interest benefit. Rather, consumers enjoying the choice of several carriers, a variety of services

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[249] *See* Wilkie Decl. ¶ 39.

[250] *Id.* at ¶ 41

and features, competitive pricing, and rapid innovation, the hallmarks and public interest benefits of a competitive marketplace.[251]

B. A Unified Verizon-MCI IP Network Confers No New Public Benefit.

Applicants also tout their plans to combine Verizon's extensive local network with MCI's IP backbone, resulting in "immediate efficiencies that will benefit . . . customers.[252] While IP networks clearly are in the public interest, there must be material new or increased functionality *resulting from the merger* in order to confer a public benefit for purposes of the Commission's public interest analysis. Nothing in Applicants submission substantiates this claim or otherwise explains why such efficiencies don't already exist today with MCI as a stand alone company. Indeed, Verizon notes that "[m]ass market consumers will benefit because of the combination of MCI's global IP network and products with Verizon's deployment of fiber-to-the-premises promises *faster* delivery of next-generation multimedia services."[253] While the services provided by MCI combined with Verizon's deployment of fiber-to-the-home may produce a benefit to consumers, it has absolutely nothing to do with the merger or any increased efficiencies. Provided Verizon plans to build out fiber-to-the-home as it alludes, customers will receive the benefit of higher speeds and greater bandwidth no matter what the two companies elect to do. Indeed, all the benefits claimed by Verizon can simply be provided by carriers contracting in the

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251 The Commission has recognized that "[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products." General Motors Corp. and Hughes Electronics Corp., and The News Corp., *Memorandum Opinion and Order*, 19 FCC Rcd. 473, ¶ 316 (2004) (citing *EchoStar/DirecTV HDO* ¶ 188); *NYNEX/Bell Atlantic Merger Order* ¶ 158; *see also* DOJ/FTC Guidelines § 4.

252 Public Interest Statement at 10-12, 15-18.

253 *Id.* at 12 (emphasis added).

marketplace.[254] Applicant's submission, while again containing significant rhetoric and "buzz" words nonetheless fails to establish any factual support or meaningful connection between the claimed benefits and the merger. As such, there can be no valid claim that this merger will benefit the public at large through increased efficiency or innovation in marrying the two networks.

In addition, while Verizon suggests that its resources can assist MCI to develop new applications for its IP network, it does not suggest any specific improvement that will occur, and offers nothing more than vague and sweeping generalizations about how Verizon's involvement might help.[255] Such unsubstantiated and unspecific claims can be afforded no weight. To the contrary, MCI already is a proven leader in the deployment of IP-based advanced services, and a host of other carriers such as Level 3, XO and Broadwing have introduced an array of IP-based service enhancements without any such ILEC backing. Indeed, Verizon can provide the benefits it claims in the Application by contracting with any one of these carriers. It is clear that the continued deployment of IP-based services by MCI will not be helped by Verizon, and is at least as likely to be hindered by Verizon's meddling. At least one industry analyst appears to agree. In a recent article in Network World, Lisa Pierce, a Vice President with Forrester Research, commenting on Verizon's prospective marriage of Verizon Wireless with MCI's global assets expressed concern over the combination citing Verizon's current inability to coordinate with its own wireless affiliate:

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[254] Wilkie Decl. ¶ 53-54.

[255] Application, Exhibit 1 at ¶¶ 10-13, 15-18.

'One important issue is that Verizon Wireless and Verizon are part of the same corporation, but they do not work together very well,' Pierce says. 'Adding MCI into the mix doesn't change that fact.'[256]

C. Claims of Cost Savings Attributable to the Merger Are Suspect, Are Insignificant, and Will Not Result in Consumer Benefits.

Applicants use a lot of words in their submission to describe network cost savings that might be achieved through merger.[257] The problem is, however, that nothing in the Application, (i) supports such a claim, and (ii) demonstrates that any realized savings will be passed on to consumers. Indeed, industry literature concludes otherwise.[258] Applicants use smoke and mirrors to come to an estimated net present value benefit of the merger at $7 billion, citing elimination of fixed overhead as well as increased efficiencies, or productivity gains, and revenue improvements, all of which value are speculative at best."[259] Indeed, Verizon itself admits in the Application that its "predictions about innovation are necessarily tentative."

First, we address the so-called productivity gains or increased efficiencies cited by Verizon in favor of its merger with MCI. As previously mentioned, other than rhetoric and speculation, Verizon has provided no concrete studies or factual evidence to demonstrate that any efficiencies will be garnered from the transaction resulting in cost savings to the combined entity. Indeed, to the contrary of their unsubstantiated assertions, a recent study involving 38

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256 Denis Pappalardo, *Will Verizon Wireless meet the needs of MCI global enterprise users?* NETWORKWORLD.COM, Feb. 21, 2005 ("For example, land line Verizon business users cannot have their Verizon Wireless services dollars count toward their annual revenue commitment. In other words if a user spends $2 million on land line services and another $2 million on wireless services annually, they do not receive discounts as if they were spending $4 million annually").

257 Public Interest Statement at 14-15.

258 *See* Wilkie Decl. ¶ 48 ("Such efficiencies are almost never realized, and it is well know that merging firms making such claims generally underperform the market").

259 *Id.* at ¶¶ 48-54.

Bell Operating Companies, compared the growth in productivity of stand alone firms with the merged firms of Bell Atlantic-NYNEX and SBC/Pacific Telesis.[260] The results demonstrated that *the mergers had a negative or at best a zero impact on productivity.*[261] This is particularly telling in light of Verizon's claim that it "has a flawless track record in achieving these efficiencies in prior acquisitions."[262] Indeed, the authors of the study concluded that not only was there no evidence of economies of scale or scope, but *such mergers likely raised total costs.*[263] Bolstering this conclusion is the fact that even assuming Applicants will realize certain of the stated reductions in marginal costs that might otherwise be cognizable, such as business process improvements or reductions in procurement, such savings have not been identified with any specificity or broken out by Applicants, so it is impossible for the Commission to know what the true benefits of the merger, if any, might be.

Even to the extent Verizon and MCI can point to concrete efficiencies and cost saving, such as those resulting from reductions in personnel, it is not clear that such actions would result in any public benefit. Aside from the fact that Verizon has publicly stated that at least 7000 people will lose their jobs, even if Verizon were to realize such savings, no benefit to the public is derived unless these savings are passed on to consumers. Reductions in redundant personnel and overhead are considered fixed costs, the reductions in which, traditionally, are not passed on to consumers. Alternatively, reductions in a company's marginal cost, are generally passed-

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260 *See* Wilkie Decl. ¶ 48.

261 *Id.* at ¶ 50.

262 Public Interest Statement at 14.

263 *See* Wilkie Decl. ¶ 50. Note, considering the steady increase in its UNE rates, Verizon apparently experienced increased costs after its acquisition of GTE.

through for the benefit of consumers. Thus, the key issue is not whether Verizon will reduce fixed overhead expense, but to what extent the merger would reduce Verizon's marginal costs.[264]

Notably, the savings alleged by Applicants here substantially involve reductions in fixed and overhead, rather than marginal, costs.[265] Indeed, Applicants have stated that they will eliminate "duplicative network facilities, staff, and information and operation systems." Such reductions represent two sides of the same coin. On the one hand, the merged firm may realize certain fixed cost reductions by the elimination of the target companies' redundant resources, which may then also have the effect of reducing industry average fixed costs. As stated above, however, these costs, due to their fixed nature, will likely not be passed on to consumers. On the other hand, if the merger were not to take place, the target company, in this case MCI, would remain in the market, and while possibly increasing industry average fixed costs, would provide the competition necessary to lower prices, thus benefiting the overall social welfare. This is the fallacy that is rampant throughout the Application. History has demonstrated that mergers such as that proposed do not result in substantial costs savings or price reductions, rather it is competition that creates these consumer benefits. For this reason, the reduction in competition discussed throughout this Petition that would result in the merger is likely to have a much greater impact on costs, on prices to consumers, than any purported cost savings resulting from the merger. Ironically, the cost benefits to Applicants due to head-count reduction, in particular in sales and marketing personnel, to the extent impacted by the resulting reduction in competition, may ultimately be the symptom of the anticompetitive effects of the merger.

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264 Wilkie Decl. ¶ 51.

265 Public Interest Statement at 15 ("The cost reductions will come from eliminating duplicative network facilities, staff, and information and operation systems. . . .").

Indeed, the Commission has already recognized this principal, rejecting claims of reduced fixed costs as a benefit of merger, "in the absence of explicit pass-throughs [to end users] which are publicly committed to by the applicants."[266] As stated above, Applicants have made no such showing of, nor committed to provide these, consumer benefits.

Nor do Applicants state what investments must be made in order to obtain the stated cost savings. For example, the Commission has held that any savings obtained in business process improvements must be netted against the cost of training employees or updating systems to take advantage of those new processes.[267] There is no indication that Applicants have even attempted to proffer this sort of net-cost information for any of the items which they describe, except Verizon's vague reference to "net present value."[268] Again, without knowing the savings ascribed to each item, and then discarding those items involving reductions in fixed costs, there is no way to measure the alleged benefits of the merger. For all these reasons, Applicants' description of merger savings is woefully deficient and cannot be taken into account in the Commission's balancing of the public interest harms against the benefits.

Finally, even if Verizon's analysis was not so woefully deficient and by some miracle it were able to accomplish all of the efficiencies it has alluded to in the Application, as well as demonstrate to a reasonable degree of certainty the costs savings it would enjoy, the resulting savings would equate to only, approximately less than one percent of gross revenues of the merged company.[269] Again, this is assuming all Verizon's dreams really do come true, and

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266 *SBC/Ameritech Merger Order* ¶ 332.

267 *SBC/Ameritech Merger Order* ¶ 336.

268 Public Interest Statement at 15.

269 Application, Smith Decl., Exhibit 1.

everything comes off exactly as planned, which in and of itself is not likely. Again, even taking this leap of faith, there is no assurance that such savings would be passed along to consumers as opposed to simply increasing the profits of Verizon. Either way, the potential savings would be so minor so as to not be regarded as a significant public benefit, especially when stacked against the loss of competition resulting from a more highly concentrated market.

D. Verizon Adds Nothing to MCI's National Security Business.

In the Application, the merger parties advance the unsupported argument that the transaction will benefit government customers and will promote national security.[270] The Application states that the combined company will be able to ensure that [critical government networks] remain robust and technologically advanced" and that he merger will enhance Verizon's ability to bring "investment and innovation" in the provision of services to large enterprise and government customers." Indeed, such rhetoric really addresses Verizon's ambitions for the merged company, rather than any benefit to the government or the public.[271] Upon even a cursory review, the supposed benefits are nothing more than what MCI already provides to the government today. These benefits do not result from the merger.

It is beyond dispute that MCI is perfectly capable of conducting its government services business without any help from Verizon, and indeed is innovating new, more secure technologies for use by the federal government. For example, just a few months ago, in October of 2004, MCI announced that it had developed one of the first end-to-end wireless solutions developed and hosted by a single provider that meets the federal government's classified security standards

270 Public Interest Statement at 3, 11, 16.

271 Public Interest Statement at 16.

and HIPAA's requirements for patient confidentiality.[272] With this new technology, according to MCI, "customers [will be able to] share sensitive or critical data without worrying about a third party accessing their messages. This is particularly important to organizations that need to exchange classified or confidential information in real-time."[273]

The Commission should consider that another important aspect of security is redundancy. Just as in the private sector, when purchasing communication services, the government selects from several qualified providers. This is important because different providers have different strengths, and the government cannot be in the position of putting all of its eggs in one basket.[274] The reduction in the number of qualified providers for the government becomes a national security issue because as the field of qualified carriers diminish, all of the services provided to the government will be from a very small number of providers. On this basis, there is no question that the proposed merger actually is contrary to the public interest.

It also is unclear how Verizon's control of MCI would enhance national security. What this would mean is that the entity that the government selected to contract with for these vital national security and other communications services, *i.e.*, MCI, is no longer the entity responsible to the government. Rather than enhancing national security, the fact that a company that the government did *not* select will now be responsible for these contracts detracts from national security because it overrides the government's selection process.

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272 Press Release, MCI, Inc., *MCI Messaging Solution Meets Classified Security Requirements* (Oct. 26, 2004).

273 *Id.*

274 Of the 7,000 MCI jobs that will be lost as a result of the merger, Applicants have not identified how many lost jobs will relate to supporting U.S. government communications services and networks.

Another aspect of the Application that is unclear is how the two companies, opposed to MCI alone, "will be able to ensure that [the] networks [used by national defense and security agencies] remain robust and technologically advanced."[275] This argument appears to be yet another example of the say-anything aspect of the Application. For the purposes of arguing the merger will enhance national security government services, apparently the two carriers together will ensure that the networks serving these customers remain technologically sound and reliable, yet there is no discussion why MCI alone, which is currently the only one of the two carriers providing such advanced services to the government, can't maintain the reliability of its own network, or continue to innovate new and valuable technologies to meet the government's needs. Indeed, this is exactly what MCI has been doing for the last 30 years. Obviously, before the Commission could credit the Application with any public benefit on this point, it would need to understand what technological or network benefit Verizon brings to the table that somehow strengthens MCI's already flourishing network and technology."[276]

E. The Merger Would Reduce Innovation, Not Increase It.

Applicants, on the one hand, make the unsubstantiated claim that their proposed merger will "accelerate the delivery of innovations to all consumers,"[277] and on the other admit that the "two companies have not been able to begin any joint business planning so predictions about innovation are necessarily tentative."[278] In either case, Applicant's submission again misses the

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[275] Public Interest Statement at 16.

[276] Press Release, MCI, Inc., *MCI Sets New Industry Standards For Managed Network Performance* (April 20, 2005), summarizing its "unmatched network restoration guarantee to its Managed Network Services customers."

[277] Public Interest Statement at 11, 15-18.

[278] *Id.* at 16.

mark and provides this Commission no substantive evidence or support for its assertions regarding increased innovation. That is because, as they also state, they have no such support to provide. As this Commission is aware, "tentative predictions" are simply not enough to pass muster either under the Merger Guidelines or pursuant to Commission precedent in demonstrating that the public interest would be served.[279] Indeed, such specious claims are exacerbated in the context of the significant anticompetitive impacts the merger will have, including the resulting harm to consumers in eliminating the largest remaining competitor to Verizon in the wholesale market for local access.[280]

Verizon's argument is, of course, counter-intuitive since it is well-established that innovation is the result of competition, not market power. New entrants that seek to unseat a dominant firm must innovate to obtain a toehold in the market; and companies with dominant positions in the market feel no urgency to take such steps, putting their captive customer base at risk.[281] Indeed, dominant firms are often reluctant to accept change, because it threatens to

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279 *See* US DOJ Antitrust Div. and Federal Trade Comm'n 1992 Horizontal Merger Guidelines, 57 FR 41552 (1992); US DOJ and Federal Trade Comm'n Revision to the Horizontal Merger Guidelines § 1.51 (Apr. 8, 1997).

280 *See* Wilkie Decl. ¶¶ 5-6, 52, 55.

281 Michael K. Powell, Commissioner, Federal Communications Commission, Before the Legg Mason Investor Workshop (Mar. 13, 1998), *Technology and Regulatory Thinking Albert Einstein's Warning* ("Innovation breeds new markets, and shatters the entrenched advantages of incumbency, as the recent history of telecommunications has shown. As such, policymakers must work to avoid (1) slowing the pace of innovation in technology and service offerings and (2) inadvertently picking or conferring advantage to a particular technology or service."). *See also*, Edward J. Markey, Preface, 10 COMMLAW CONSPECTUS 1-2 (2001) (explaining that AT&T Labs "because of its monopoly status, kept innovation in the labs and out of the marketplace. Introduction of new services and products rarely occurred, as AT&T was financially content because its service was profitable and regulated to be so.").

See Wilkie Decl. ¶ 56 (citing Jean Tirole, *The Theory of Industrial Organization*, Cambridge, MA; MIT Press (1994), at 390-92 (explaining the "replacement effect"

. . .*Continued*

strand existing investment, erode revenue from existing services, or provide opportunities for competitors.[282] In the case of the RBOCs, the economic literature demonstrates that they have additional incentives to delay innovation because of their desire to extract concessions from regulators.[283] One need only reference the more than 10 year delay in the rollout of ISDN or the RBOC's significant delay in rolling out DSL technology to understand this point.[284] Professor Faulhaber of the Wharton School, and former FCC Chief Economist probably summed it up best:

> In short, when confronted with an unprecedented market opportunity of which they had unique knowledge, the RBOCs took the traditional public utility "cost recovery" view and sought regulatory relief from the FCC. . . . The fact that DSL deployment lags cable modem deployment suggests that it was competition, not their market foresight, that has driven the RBOCs to deploy DSL.

A review of the major technical advancements in telecommunications of the past 20 years makes clear that new entrants develop and deploy new technologies as a means to enter markets,

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whereby an incumbent earning rents from an existing installed technology or large installed base will lose the legacy rents from installing new technology); and Clayton Christianson, *The Innovators Dilemma*, Harvard Business School Press (recently adapting the "replacement effect," and labeling it the Innovators Dilemma in connection with companies with a large installed customer base)).

282 Jonathan M. Barnett, *Private Protection of Patentable Goods*, 25 CARDOZO L. REV. 1251, 1290-91 (2004) (explaining that "a large firm that has a dominant market share may be reluctant to undertake or accelerate development projects that may generate radical innovations that could cannibalize the existing profit stream of current products. Instead, it will prefer to devote R&D resources to less risky development of incremental innovations that complement its existing and profitable product line.")

283 *See* Wilkie Decl. ¶ 56, citing James E. Prieger, *The Timing of Product Innovation And Regulatory Delay*, University of California, Davis – Department of Economics Working Paper No. 01-9 (Sept. 17, 2001).

284 *See* Gerald R. Faulhaber, Professor, Business and Public Policy Dept., Wharton School, University of Pennsylvania, and Chief Economist of the Federal Communications Commission, 2000-01, *Broadband Deployment: Is Policy in the Way?*, at 8; See also Wilkie Decl. ¶¶ 56, citing Patrick Flanagan, *DSL and the Access Race,* TELECOMMUNICATIONS ONLINE (May 1999), *available at* www.telecommagazine.com.

and the RBOCs, such as Verizon, then respond by adopting the same technologies as a defensive measure. Witness for example:

- *Mobile Wireless.* Cellular technology languished until myriad entrepreneurs such as McCaw Cellular spurred the deployment of systems designed from the outset to provide mobile telephony to the mass market. Until then, the RBOCs were perfectly satisfied providing expensive and bulky radio-phone services for a handful of elite users. Verizon and the other RBOCs invested in cellular only after the pioneering entrepreneurs proved the existence of a market, and created possible threats to their wireline monopoly. Even now, it is the competitive carriers that lead the way in deploying new mobile telephony technologies. Nextel, for example, introduced ground-breaking "push-to-talk" technology and Sprint brought the mobile picture-phone to market, and in both cases the RBOCs simply responded with mimic offerings after consumer demand was proven by the risk taking entrepreneurs.

- *Fiber Optics.* Sprint was the first to invest in all fiber optic networks, and set the market with its "pin drop" marketing campaign. WilTel and MCI soon followed. Again RBOCs responded *after* competitive carriers impressed their customers with superior technology.[285] The recent RBOC proposals to deploy fiber to the home are largely a belated response to the cable companies' own offerings of voice, video and data.

- *DSL.* Virtually no one outside of the engineering community had heard of DSL until data-CLECs such as NorthPoint and Rhythms appeared on the scene. Indeed, the RBOCs sat on DSL and related technologies for over 20 years and had no incentive to roll out the service until cable modem providers and DLECs began to offer consumer broadband. It was these so-called DLECs that first deployed DSL, and educated consumers to its advantages. RBOCs such as Verizon rolled out DSL, too, but only after they became concerned that they would lose the IP origination market to the DLECs and cable modem providers. Until then, RBOCs were content to sell T1 circuits at much higher prices.

- *Internet.* The RBOCs were late-comers to Internet technology as well. Companies such as BBN (later Genuity), UUNet (later MFS/MCI), Cable & Wireless, Sprint, MCI and Level 3 led the way in deploying true IP backbone networks. Only after these carriers established IP transport as the wave of the future did Verizon and other RBOCs respond by investing as required to upgrade their legacy networks.

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[285] *See, e.g.*, Edward J. Markey, Preface, 10 COMMLAW CONSPECTUS 2 (2001) ("AT&T sat on its monopoly for years, seeing no reason to invest in, for example, fiber optics. . . . [a]fter Sprint placed a significant order of glass fiber from Corning that AT&T finally 'heard the pin drop' and began to move to the new technology and make real investments in innovation.")

The list goes on. The truth is that the proposed merger of the Applicants would eliminate a key existing innovator, not create a new one. The fate of the Applicants' respective research organizations is a case in point. By merging the two research groups, the Applicants claim that somehow two minus one will equal three, and the single lab of the combined firm will be more productive than the two organizations operating today. Of course, two minus one in fact equals one, and hence the Applicants' plan results in the net loss of critical research and development efforts and represents a harm, not a benefit, of merger. The Commission has repeatedly come to this conclusion in its analysis of RBOC mergers. As the Commission explained, "[i]n the Bell Atlantic/NYNEX and Verizon/Ameritech Orders, for instance, the Commission concluded that the elimination of parallel research and development efforts would eliminate a form of non-price competition in which firms attempt to differentiate products in either function or quality. As was the case with those transactions, both Bell Atlantic and GTE engage in research and development, and the merger's consolidation of functions could result in a reduction in competitive differentiation."[286] It follows that the elimination of one or both of the Applicants' labs similarly will likely result in affirmative harm.

MCI is an acknowledged world leader in the development of broadband and IP technologies for both local and global applications, including for example, DSL and WiMax technologies.[287] It strains credulity to assert that those efforts will continue once the lab is

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286 *GTE/Bell Atlantic Merger Order* ¶ 242.

287 Press Release, MCI, Inc., *MCI-Wins 2005 Innovation Award From CMP Media LLC's Network Magazine* (May 4, 2005); Press Release, MCI, Inc. *MCI Expands Wi-Fi Coverage in U.S., Europe and Asia-Pacific* (Mar. 22, 2005); Press Release, MCI, Inc., *Frost & Sullivan Honors MCI with the Asia Pacific Service Provider Award for Most Comprehensive Service* (Mar. 1, 2005); Press Release, MCI, Inc., *MCI Recognized By AFCOM And Network World For Hosting Capabilities* (April 26, 2005); Press Release,

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controlled by the largest ILEC whose services, which rely on he incumbent legacy network, would otherwise compete with these very MCI technologies and innovations. It is telling that the new products and services that Verizon touts in the Application happen to be directly competitive with that of MCI – *e.g.*, DSL, WiFi, WiMax, and a "national network" of digital

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MCI, Inc., *MCI Successfully Completes Field And Customer Trial Of Converged Packet Access Technology* (May 3, 2005); Press Release, MCI, Inc., *MCI Introduces Next-Generation Ethernet Solutions Internationally* (May 3 , 2005).

See also White Paper, *WiMAX Overview and MCI Perspective*, at page 9-10 (Nov. 2004), "MCI has a long history of industry leadership in the evaluation and deployment of broadband and Internet technologies. MCI feels that the WiMAX strategy and technology are significant developments that deserve attention. MCI is actively engaged in technology assessments with several WiMAX Forum equipment vendors in order to investigate the commercial and technical feasibility of commercial service offerings using the WiMAX technology. We are pursuing technology trials as part of our evaluations. MCI, through its Skytel subsidiary, possesses significant wireless expertise, including both engineering and nationwide operations resources."

MCI further set forth significant alternative access technologies available while MCI continues to study and test the WiMax standard:

> MCI DSL provides reliable, efficient connections for continuous point-to-point service for business communications. DSL service delivers broadband access over ordinary copper local loops and is scalable to support network expansion. Multi-megabit transmission rates allow access to high-speed service and networks such as IP, Frame Relay, and ATM;
>
> MCI VSAT Satellite solutions can simultaneously deliver IP, voice, and data applications to hundreds or thousands of sites in an efficient manner. Our VSAT solutions range from broadband access to corporate networks, to e-mail and Internet access. MCI can find an affordable satellite solution that streamlines communications requirements and integrates with existing Frame Relay, ATP, IP VPN, or other networks. Applications supported by VSAT include retail POS, disaster recovery, VoIP, Internet access, as well as transport of other voice, data, and video services Available VSAT bandwidth options can be chosen from 64 Kbps to multi-megabits rates, in symmetrical and asymmetrical modes; MCI's innovative, and industry-leading Converged Packet Access (CPA) initiative will bring the best attributes of Ethernet and MPLS to our customers' doorsteps. CPA will deliver broadband access, either "on-net" or "off-net," with features and capabilities that cannot be matched with traditional forms of TDM access. *Id.* at 10.

capabilities and broadband technologies. Indeed, in its Application, Verizon highlights MCI's experience as a primary provider of "IP-based services ," and proceeds to list IP-based products and services in its recitation of its own innovations. Verizon's innovations were driven by defensive necessity; a necessity that disappears upon approval of this merger. One only needs to look at the weekly press releases to see the regular on-going innovations of MCI. Clearly a competitive MCI feels a need to invest in cutting edge products, while a monopoly Verizon does not. With Verizon in control post-merger, the combination could in fact result in a net loss of research, development and innovation.

Struggling to rationalize how the loss of MCI's development efforts could enhance innovation as they suggest, Applicants contend that additional financial resources will enable them to simply do more. They offer no details, evidence or examples of what new products would be so enabled. That is not surprising, as it is hard to imagine what service the nation's largest ILEC and world's second largest competitive carrier could develop together that they could not develop apart. Thus, it is evident that the proposed merger will not accelerate research, development and innovation as Applicants' suggest, but in fact, as the Commission has previously held, will reduce all three to the detriment of telecommunications consumers and contrary to the public interest.

F. MCI is Not a "Failing Company."

There is an undercurrent in the Application that leads to the conclusion that somehow MCI is not a viable company on its own. This notion is certainly the basis for the Application arguments that, if the merger is permitted, it will "creat[e] a strong U.S. based competitor in the

global communications marketplace" and that the merger will "promote national security."[288] MCI simply does not require a merger with Verizon to become a strong global competitor, which is what MCI has been for the past 20 years. Indeed, Verizon's argument, in essence, amounts to a "failing company" justification for the merger, that is, the merger is justified, even if otherwise anticompetitive, because of the failing state of the target company, in this case MCI. There are a variety of problems with this approach, however, and the fact that Verizon has made the argument informally and without facts or citation to the relevant law does not make these problems disappear.

First, the failing company defense arises if and only if the acquisition in question would be illegal except for that defense. Indeed, it is a complete defense to an acquisition, *otherwise illegal* under Section 7 [of the Clayton Act] that the acquired firm meets the requirements of the failing company doctrine at the time of the challenged transaction.[289]

Second the failing company defense is rigorously applied. In *Citizen Publishing Co. v. United States*,[290] the Supreme Court held that the defense was not applicable unless the defendant satisfied its burden of showing that (1) the resources of the acquired company were so depleted and the prospect of the firm's rehabilitation so remote that it faced the distinct likelihood of insolvency from which it could not be viably reconstituted, (2) the acquiring company was the only available purchaser, and (3) the acquired firm had made *bona fide* efforts to seek alternative purchasers. The rule is unequivocal that "there must have been a good faith

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[288] *See*, *e.g.*, Public Interest Statement at 3.

[289] Antitrust Law Developments 163 (Am. Bar Ass'n 2d Ed. 1984) (citing *United States v. General Dynamics Corp.*, 415 U.S. 486, 507 (1974)).

[290] *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 137-38 (1969).

effort to determine whether there were other purchasers available whose acquisition of the company would have resulted in less anticompetitive effects."[291]

Thus, it is far from sufficient for Verizon to claim that its purchase of MCI is of no competitive significance since MCI was failing as a local service provider and that its "mass market business . . . is in a continuing and irreversible decline."[292] Indeed, the facts are precisely the contrary. Verizon is by no means the only bidder for MCI's business and assets. Qwest has made what is indisputably a *bona fide* bid for MCI as well, which, until Verizon increased its offer, MCI had deemed "superior" to the terms of the merger with Verizon as set forth in the instant Application. Indeed, the acquisition of MCI by Qwest had the potential to bring new funding and possible competitive activity to the Verizon territories while the acquisition of MCI by Verizon simply increases market concentration and Verizon's dominance. As such, before the Commission can accept the casually sketched failing company defense that Verizon places in its Application, the Commission must engage in a serious fact-finding inquiry, investigation and review regarding the ability of a stand-alone MCI, or an MCI combined with a non-dominant entity, such as Qwest, to effectively compete in the mass market.

Indeed, that investigation will show that MCI is among the premier voice, video and data communications companies in the world. MCI touts itself as "one of the world's leading global communication companies."[293] MCI owns and operates one of the largest and most sophisticated telecommunications network in the U.S. and provides services in 200 countries and 2700 cities

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291 *The Pillsbury Co.*, 93 F.T.C. 966, 1032 (1979).

292 Public Interest Statement at 4.

293 *See* MCI SEC Form 10-K for fiscal year ending Dec. 31, 2004, Part I, item 1, page 2.

worldwide.[294] MCI's network includes approximately 100,000 route miles of network connections linking metropolitan centers and various regions across North America, Europe, Asia, Latin America, the Middle East, Africa, and Australia.[295] Just out of bankruptcy protection, MCI reported revenues in excess of $20 billion in 2004,[296] a reduced long-term debt load by more than 1.2 billion,[297] and 4th Quarter 2004 operating income of $750 million.[298] The truth is that despite MCI's recent emergence from bankruptcy protection, in fact, in part as a result of it, MCI's continues to be one of the strongest competitors in the wireline telecom industry, rivaled only by AT&T and the monopoly RBOCs.

By any measure, MCI is one of the most significant telecommunications companies that has ever operated in this country and it is disingenuous to imply that MCI needs to merge with Verizon to conduct its global business. Any notion that MCI is a "one trick pony" that cannot flourish in the wake of lower long distance revenues fails to recognize the 37 year history of this company. It also fails to recognize MCI's efforts to evolve its business strategy, as all companies in time must do, to take advantage of the ever changing telecommunications marketplace.

In its 2004 Annual Report, MCI stated that it had developed a new four-part strategy based on their "current competitive position, significant telecommunications and computing technological developments and the increasing demand for sophisticated services." Reflecting

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294 *Id.* at 2, 8.

295 *Id.* at 2.

296 *Id.* at 7.

297 *Id.* at 54.

298 Press Release, MCI, Inc., *MCI Releases Preliminary 4th Quarter 2004 Results* (Feb. 14, 2005).

the company's desire and ability to change with the marketplace, the Report went on to state that MCI had a "strategically important position within the communications market." Touting its positioning, MCI recently described itself as

> a leading global communications provider, delivering innovative, cost-effective, advanced communications connectivity to businesses, governments and consumers. With the industry's most expansive global IP backbone, based on the number of company-owned points of presence, and wholly-owned data networks, MCI develops the converged communications products and services that are the foundation for commerce and communications in today's market.[299]

The 2004 Annual Report also informed shareholders that MCI was committed to strategically positioning its business in such emerging areas as Internet Protocol (IP) services, and Next Generation Services.[300] Indeed, MCI has already succeeded in that MCI's Internet Protocol Network and data services are considered to be one of the largest and most reliable in the world.[301] Continuing its focus on the future, among other initiatives, MCI recently announced successful field and customer trials of its Converged Packet Access Technology, and the release of its new Next Generation Ethernet Solutions to expand local area networks internationally, including that of the Chicago Mercantile Exchange, the largest futures exchange in the U.S.[302]

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299 Press Release, MCI, Inc., *MCI to Release First Quarter 2005 Financial Results* (April 2005).

300 *See* MCI SEC Form 10-K for fiscal year ending Dec. 31, 2004, Part I, item 1, page 5.

301 Press Release, MCI, Inc., *Frost & Sullivan Honors MCI with the Asia Pacific Service Provider Award for Most Comprehensive Service* (Mar. 1, 2005); Press Release, MCI, Inc., *MCI Recognized By AFCOM And Network World For Hosting Capabilities* (April 26, 2005).

302 Press Release, MCI, Inc., *MCI Successfully Completes Field And Customer Trial Of Converged Packet Access Technology* (May 3, 2005); Press Release, MCI, Inc., *MCI Introduces Next-Generation Ethernet Solutions Internationally* (May 3, 2005).

MCI is neither down nor out. With benefits running directly to consumers and the U.S. economy, MCI has proven that it can innovate and change when it must. It must because MCI operates in a competitive marketplace where invention, innovation, rational pricing and customer service are the hallmarks of survival. Having to compete, losing market share in one area of the industry, gaining market share in another area of the industry, having to innovate, trim costs, and invest in your infrastructure, provide better customer service and pricing are not reasons to throw in the towel or reasons to justify a merger of two of the most significant players in the telecommunications industry. In the final analysis, these truths of competition are not measures of whether a company is failing, but as MCI clearly understands, a roadmap to success.

VI. CONCLUSION

The Verizon/MCI merger Application, in combination with the SBC/AT&T merger application also under consideration, places the Commission at a critical crossroad. Approving the two applications effectively would be throwing in the towel on both the 1983 AT&T divestiture and 1996 Telecom Act. By allowing the two largest domestic telecom monopolists to swallow whole the two most meaningful competitive carriers by far, the Commission would be establishing a pathway for a return to the yesteryear of vertically integrated wireline BOC monopolies. This is an outcome which simply is antithetical to the express pro-competitive purposes of Congress in enacting the 1996 Act. It also is a result that runs afoul of clear Commission precedent requiring RBOCs to prove that their proposed acquisitions would actually enhance telecommunications competition rather than degrade it. Consequently, the Commission

must either deny the Verizon/MCI Application outright, or work with affected parties such as the Joint Petitioners to craft stringent and enforceable remedial conditions designed to off-set the likely anti-competitive effects of the proposed merger.

Respectfully submitted,

/s/

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May 9, 2005

CERTIFICATE OF SERVICE

I, Courtenay P. Adams, hereby certify that a true and correct copy of the foregoing Petition to Deny, was sent, this 9th day of May 2005, electronically, by hand, and/or by first class mail, postage prepaid, to the following:

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