Decision **DRAFT DECISION OF COMMISSIONERS KENNEDY AND PEEVEY**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc. (MCI) to Transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI	Application 05-04-020 (Filed April 21, 2005)

DECISION AUTHORIZING CHANGE IN CONTROL

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DECISION AUTHORIZING CHANGE IN CONTROL

1. Summary

Subject to three conditions, we grant the Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc. (MCI) (known together as "Applicants") to transfer control of MCI's California utility subsidiaries to Verizon.

The three conditions are:

1. Verizon shall, by February 28, 2006, cease forcing customers to separately purchase traditional local phone service as a condition for obtaining digital subscriber line (DSL) service (this condition is commonly known as a requirement to provide "naked DSL"). We further order that no later than February 28, 2006 Verizon shall submit an affidavit evidencing compliance with this condition of the merger.
2. Applicants shall adopt the agreement that Verizon California negotiated with The Greenlining Institute (Greenlining) and Latino Issues Forum (LIF) (The Greenlining Agreement). Under the key terms of this agreement, the Applicants agree to:

    a. Participate in a statewide Broadband Task Force.
    b. Increase corporate philanthropy over the next five years by an additional $20 million above current levels, with a good faith effort to maintain the aggregate contributions to minorities and underserved communities in a manner consistent with its past practice.
    c. Make a good faith effort to increase the supplier diversity goal for minority business enterprises from the current 15% to a minimum of 20% by 2010. To achieve this goal, Verizon California anticipates spending $1 million over five years in technical assistance to minority businesses and another $1 million to develop Verizon's internal infrastructure devoted to such efforts.

3. Applicants shall commit $3 million per year for five years in charitable contributions ($15 million total) to a non-profit corporation, the California Emerging Technology Fund (CETF), to be established by the Commission for the purpose of achieving ubiquitous access to broadband and advanced services in California, particularly in underserved communities, through the use of emerging technologies by 2010. No more than half of Applicant's total commitment to the CETF may be counted toward satisfaction of the Applicants' commitment in the Greenlining Agreement to increase charitable contributions by $20 million over five years.

These conditions ensure that the proposed merger will bring the benefits of advanced telecommunications services and telecommunications competition to all Californians.

We find that this transaction raises no "concerns adverse to the public interest" when carefully examined against the criteria enumerated in Pub.Util. Code § 854.[1] Further, our analysis confirms the findings of the Advisory Opinion of the Attorney General[2] that the transaction raises no antitrust issues that require further mitigating actions. Finally, this is a purely financial transaction, and has no environmental consequences.

As a result of this detailed review, we find that the proposed transaction, subject to the three conditions listed above, is not adverse to the public interest and is therefore approved.

Finally, we affirm the determination in the Assigned Commissioner's Ruling of September 19, 2005 that no evidentiary hearings are necessary in this proceeding.

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[1] All code section references are to the Public Utilities Code.

[2] Opinion of the Attorney General on the Proposed Merger of Verizon Communications, Inc., and MCI, Inc., September 16, 2005 (Advisory Opinion).

2. Procedural Background

The Joint Application (A.) 05-04-020 of Applicants Verizon and MCI seeks approval of the transfer of control of MCI's California utility subsidiaries that will occur indirectly as a result of a transaction between Verizon and MCI. The transaction will result in Verizon obtaining direct control of MCI, which is not regulated by the Commission as a public utility, and indirect control of MCI's certificated public utility subsidiaries.

The Joint Application was filed on April 21, 2005, and was amended on May 9, 2005.

In Resolution ALJ 176-3152 on May 5, 2005, the Commission preliminarily determined that this is a ratesetting proceeding and that hearings would be needed to resolve this matter.

Protests and responses to the Application were filed on May 25, 2005 by the following parties: the California Association of Competitive Telephone Companies (CALTEL); the Consumer Federation of America; Consumers Union of U.S., Inc.; Disability Rights Advocates (DRA), LIF, Greenlining, and The Utility Reform Network (TURN); Covad Communications Company (Covad); Cox California Telcom, LLC (Cox); Level 3 Communications, LLC (Level 3); Navigator Telecommunications, LLC (Navigator); the Office of Ratepayer Advocates (ORA); Pac-West Telecomm, Inc. (Pac-West); Qwest Communications Corporation (Qwest); and XO Communications Services, Inc. (XO) (collectively, "Intervenors").

Applicants filed a consolidated reply to the protests and responses on June 6, 2005.

Navigator and XO withdrew from the proceedings on June 22 and June 24, 2005, respectively, and Consumer Federation of America and Consumers Union

of U.S., Inc. have not been active in the proceeding since joining in TURN's protest.

Following an initial prehearing conference on June 21, 2005, a Scoping Memo and Ruling of Assigned Commissioner (Scoping Memo) was issued on June 30, 2005. The Scoping Memo identified the issues relevant to this proceeding and, while declining to rule immediately on whether §§ 854(b) and (c) applied to the transaction, instructed the Applicants to continue to provide all the information they considered necessary and appropriate to demonstrate compliance with those sections. The Scoping Memo also set forth two alternative procedural schedules, one to apply if evidentiary hearings were deemed necessary and the other to apply if such evidentiary hearings were determined not to be necessary.

On July 13, 2005, a group of Intervenors moved for an amendment to the hearing schedule. In response, on July 26, the Assigned Commissioner issued a ruling granting the moving parties additional time to file reply testimony and making certain other changes in the schedule.

Applicants and Intervenors undertook extensive discovery. To date, Applicants have collectively responded to approximately 900 data requests and have produced over one million pages of documents. The parties filed five motions to compel, three brought by Applicants to compel responses from Intervenors, and two brought by Intervenors to compel responses from Applicants.

On August 15, 16, and 18, 2005, the Commission conducted six Public Participation Hearings, in Whittier, Long Beach and San Bernardino, California, to take comments from the public on the proposed merger. These hearings

demonstrated broad consumer and community support for the merger, as further discussed below.

Intervenors filed their reply testimony on August 15, 2005, and Applicants filed rebuttal testimony on September 12, 2005.

On September 8, 2005, TURN, ORA and the LIF filed a Motion[3] that sought further modifications[4] to the procedural schedule adopted in this proceeding. The Motion explained that these parties desired additional time to prepare motions for evidentiary hearings, opening briefs, and reply briefs.[5] On September 8, 2005, the Commission received three responses to the Motion.[6] The response of Cox and the response of Qwest supported the Motion. The response of the Applicants opposed the Motion.

On September 12, the Assigned Commissioner denied the September 8 motion, ruling that the motion failed to demonstrate why further modifications

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[3] *Motion for Modification of Procedural Schedule,* filed September 8, 2005 (Motion)

[4] On July 26, 2005, we issued an *Assigned Commissioner's Ruling Extending Time for Service of Intervenor Testimony* (ACR). Of the three parties to this motion, two – TURN and ORA – were among the group of intervenors filing a motion for additional time filed on July 13, 2005. This ruling modified a schedule adopted in *Scoping Memo and Ruling of Assigned Commissioner,* June 30, 2005.

[5] Motion, page 1.

[6] *Response of Cox California Telecom, L.L.C., dba Cox Communications (Cox), to Motion for Modification of Procedural Schedule*, September 8, 2005; *Response of Qwest Communications Corporation (Qwest) to Motion for Modification of Procedural Schedule*, September 8, 2005; and *Applicants' (Verizon Communications, Inc. and MCI, Inc.) Opposition to Intervenors' Motion for Modification of Procedural Schedule*, September 8, 2005.

to the schedule were in the public interest. The specific considerations that led to the denial are detailed in the ruling.[7]

Motions regarding the need for evidentiary hearings were filed on September 14. TURN, ORA, Level 3, Qwest and DRA filed motions asking for evidentiary hearings. Replies were filed on September 16 by TURN, ORA, Qwest, Greenlining and the Applicants.

The Attorney General of California issued his opinion on the proposed transaction on September 16, 2005.[8] This opinion concluded that the transaction will not adversely affect competition in any telecommunications market.

On September 19, 2005, the Assigned Commissioner issued a ruling denying motions for evidentiary hearings and finding that §§ 854(b) and (c) do not, by their terms, apply to the transaction. More specifically, the ruling found that there is neither a statutory nor a due process right to evidentiary hearings in this proceeding, and that there is sufficient evidence in the record to permit the Commission to rule on the Application without such evidentiary hearings. The Ruling held that the case would be deemed submitted with the completion of reply briefs. In addition, the ruling noted that the public has already had ample opportunity to participate in these proceedings through the six Public Participation Hearings. Further, the ruling determined that there are few, if any, factual disputes between the parties, and to the extent there are any factual

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[7] *Assigned Commissioner's Ruling Denying Motion Requesting Further Modifications to Procedural Schedule,* September 12, 2005.

[8] Opinion of the Attorney General on the Proposed Merger of Verizon Communications, Inc., and MCI, Inc., September 16, 2005 (AG Opinion).

disputes, the record is sufficient to resolve them. The details of this ruling are discussed below.

Also while it determined § 854(a) applies to this transaction, the ruling held that §§ 854(b) and (c) did not apply to the transaction. However it stated that § 854(c) factors still should be considered. The ruling concluded that in order to determine whether the transaction is in the public interest under § 854(a), the Commission would assess the transaction using the seven criteria enumerated in § 854(c) as guidelines, while also taking into account antitrust and environmental considerations.

On September 28, 2005, ORA filed a motion asking that the full Commission, consistent with Rule 6(b), consider the September 19 ACR ruling that determined that there is no need for evidentiary hearings in this matter and also to further consider the legal reasoning pertaining to the applicable law. On October 11, consistent with a ruling shortening time, the Applicants, TURN, and Qwest filed replies to the motion. This decision addresses the matters raised in the ORA motion in separate sections below.

Via a letter dated October 14, 2005, Verizon informed the Commission that MCI stockholders voted on October 6, 2005 to approve the merger.

A draft decision was mailed on October 19, 2005.

3. The Corporate Entities and the Financial Transaction

The primary corporate entities involved in this financial transaction are Verizon and MCI. The financial transaction is one that places MCI under the control of Verizon.

3.1. Verizon

Verizon is a corporation created and existing under the laws of the State of Delaware.[9] Verizon directly or indirectly owns telephone operating companies that provide telecommunications services on a regulated and unregulated basis in 29 states, Puerto Rico and the District of Columbia, serving 53 million access lines. Although Verizon provides no services and is not a regulated telephone company within California or elsewhere, Verizon's local telephone subsidiaries are subject to public utility regulation in the jurisdictions in which they operate. They are also subject to regulation by the Federal Communications Commission (FCC) for the services they provide pursuant to federal tariffs and the Federal Communications Act of 1934.

Verizon California Inc. provides regulated telecommunications services, primarily in southern California. Another entity, Verizon West Coast Inc., provides regulated telecommunications services to a small number of customers near the Oregon border. Other Verizon corporate entities provide long distance service throughout California, as well as local private line and other competitive services to customers, including multi-dwelling unit customers. Verizon Wireless provides wireless voice and data services in California, across the United States and internationally. Stressing diversity and a commitment to the communities in which it operates, Verizon has a highly diverse national workforce of 210,000 employees, including approximately 18,000 employees in California. Verizon has a strong balance sheet and investment-grade credit rating and is a stable, viable enterprise.

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[9] See Exhibit Verizon/MCI 3 for description.

3.2. MCI

MCI is a corporation created and existing under the laws of the State of Delaware.[10] MCI's subsidiaries provide telecommunications services on a regulated and unregulated basis throughout the United States and in several foreign countries. They provide services to business and government customers, including 75 federal government agencies. MCI is also a significant provider of services to the State of California. Among the enterprise services MCI provides through its subsidiaries are a comprehensive portfolio of local-to-global business, Internet, and voice services, including Internet Protocol (IP) network technology, Virtual Private Networking, synchronous optical network (SONET) private line, frame relay, ATM and a full range of dedicated, dial and value-added Internet services. MCI's subsidiaries also provide mass market services, including interstate long distance services, intrastate toll services, competitive local exchange services, and other communications services. Although MCI is not a regulated telephone company within California or elsewhere, some of MCI's subsidiaries are deemed public utilities in the jurisdictions in which they operate. MCI's subsidiaries are also subject to regulation by the FCC with respect to interstate services.

Several of MCI's operating subsidiaries are certificated to provide services in California. MCIMetro Access Transmission Services LLC (MCIMetro) is licensed by the Commission and provides local and long distance services in the State. MCI WorldCom Communications, Inc. (MWC) and MCI WorldCom Network Services, Inc. (MWNS) both provide long-distance services.

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[10] The description of MCI and its business and subsidiaries in base on Ex. Verizon/MCI 4.

Teleconnect Long Distance Services and Systems Co. (Telecom*USA) and TTI National, Inc. (TTI) also provide interexchange services. Another subsidiary, SkyTel Corp. d/b/a SkyTel Communications, Inc. (SkyTel) provides various wireless messaging services. Collectively, these certificated entities operating in California are referred to as the MCI "California Subsidiaries."[11]

3.3. Description of Financial Transaction Transferring Control

The proposed transaction involves a merger of Verizon and MCI, the parent holding companies, as a result of which MCI will become a subsidiary of Verizon. The MCI California Subsidiaries will remain subsidiaries of MCI, and the authorizations and licenses currently held by those MCI California Subsidiaries will continue to be held by the respective entities.

The specific terms of the transaction are set forth in the Agreement and Plan of Merger between Verizon and MCI as approved by the boards of directors of both companies on February 14, 2005 (Agreement) as amended on March 29, 2005 (Amendment).[12] Under the Agreement as amended, MCI's shareholders will receive for each share of MCI common stock (i) Verizon common stock equal to the greater of 0.5743 shares or the quotient obtained by dividing $20.40 by the Average Parent Stock Price (as defined in the Agreement); and (ii) a special dividend in the amount of $5.60 per share, less the per share amount of any

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[11] Four other subsidiaries were recently decertified in California. These include include: Teleconnect Company; Nationwide Cellular Service, Inc.; Choice Communications, Inc. d/b/a WorldCom Wireless, Inc.' and Nationwide Cellular Services, Inc. d/b/a MCI Wireless, Inc.

[12] The Agreement is identified as Ex. Verizon/MCI 1 and the Amendment as Ex. Verizon/MCI 2.

dividends declared by MCI between February 14, 2005 and the consummation of the transaction.

The Agreement does not call for the merger of any assets, operations, lines, plants, franchises, or permits of the MCI California Subsidiaries with the assets, operations, lines, plants, franchises, or permits of any Verizon entity.[13] To the extent that any such reorganization might be made at a later date, it will be made in the normal course of business and subject to such regulatory approvals as may be required. Similarly, the Agreement does not call for any change in the rates, terms, or conditions for the provision of any communications services provided in California. Applicants acknowledge that to the extent any such changes might be made at a later date, they too will be subject to such regulatory approvals as may be required.

The Applicants state that the transaction will not affect the regulatory authority of the Commission over any of Verizon's regulated subsidiaries or over the MCI California Subsidiaries. Verizon's subsidiaries and the MCI California Subsidiaries will continue to meet all of their obligations and commitments under the Commission's rules, regulations, and orders.[14]

4. Jurisdiction and Scope of Proceeding

The scope of this proceeding is governed by Pub. Util. Code §§ 851-856.

4.1. § 854(a) Applies to This Transaction

Pub. Util. Code § 854(a) specifies that "[n]o person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control

[13] Ex. Verizon/MCI 3, ¶¶ 14-15

[14] *Id.*

either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from this Commission. The Commission may establish by order or rule the definitions of what constitute merger, acquisition, or control activities that are subject to this section of the statute."[15]

In the Scoping Memo, the Assigned Commissioner directed the Applicants to continue to provide all the information they believed necessary and appropriate to demonstrate compliance with all of the provisions of Pub. Util. Code §§ 854(a), (b) and (c) to ensure that there would be no unnecessary delay in processing of the application. There is no dispute as to the applicability of § 854(a) to this transaction.

4.2. Application of §§ 854(b) and (c) to This Transaction

The plain language of § 853(b), prior Commission decisions, and legislative history guide our application of §§ 854(b) and (c) to this transaction.

4.2.1. The plain language of § 853(b) affords the Commission significant discretion in determining whether to apply § 854 (b) and (c).

Pub. Util. Code § 854(b) states:

> Before authorizing the merger, acquisition, or control of any electric, gas, or telephone utility organized and doing business in this state, where any of the utilities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars ($500,000,000), the commission shall find that the proposal does all of the following:
>
> (1) Provides short-term and long-term economic benefits to ratepayers.

[15] § 854(a).

(2) Equitably allocates, where the commission has ratemaking authority, the total short-term and long-term forecasted economic benefits, as determined by the commission, of the proposed merger, acquisition, or control, between shareholders and ratepayers. Ratepayers shall receive not less than 50 percent of those benefits.
(3) Not adversely affect competition. In making this finding, the commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to avoid this result.[16]

Pub. Util. Code § 854(c) further instructs the Commission to review eight enumerated factors and to determine if "on balance, that the merger, acquisition, or control proposal is in the public interest."[17] The § 854(c) inquiry only applies to transactions where any utility that is a party to the transaction has gross annual California revenues exceeding $500 million.[18]

The Commission, however, has "the authority to exempt a utility from §§ 851 and 854 if we find the public interest does not require that we apply them."[19] Public Util. Code § 853(b) provides that the "commission may from time to time by order or rule…exempt any public utility…from this article if it finds that the application thereof with respect to the public utility or class of

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[16] § 854(b).

[17] § 854(c).

[18] *Id*.

[19] *In re Application of WorldCom, Inc. Pursuant to Public Utilities Code Section 853(b) for Exemption from the Requirements of Section 851 and 854 of the Public Utilities Code With Respect to its Bankruptcy Reorganizations*, Decision 03-11-015, 2003 Cal. PUC LEXIS 554, *10 (Aug. 20, 2003).

public utility is not necessary in the public interest."[20] The plain language of § 853(b) establishes that an exemption may apply to transactions of any scale, so long as application of the merger requirements "is not necessary in the public interest."

4.2.2. Prior Commission decisions recognize our broad power to exempt mergers from review under §§ 854(b) and (c).

Many past Commission decisions affirm our ability to exercise substantial discretion in deciding whether to subject a transaction to § 854 scrutiny. In examining the plain language of § 853(b) in the British Telecom-MCI merger, we held that the statute grants us sweeping authority: "the extent of our *broad exemptive powers* in § 853(b) is clear on the face of that statute."[21] Later, in the AT&T-TCI merger, we reiterated that § 853(b) "confer[s] *broad discretion* upon us to determine whether…§§ 854(b) and (c) should apply to a particular merger."[22]

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[20] §853(b).

[21] *In the Matter of the Joint Application of MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) for All Approvals Required for the Change in Control of MCIC's California Certified Subsidiaries That Will Occur Indirectly as a Result of the Merger of MCIC and BT*, Decision 97-05-092, 1997 Cal. PUC LEXIS 340, *24 (May 21, 1997) (emphasis added).

[22] *In the Matter of the Joint Application of AT&T Corp., Italy Merger Corp. and Tele-Communications, Inc. for Approval Required for the Change in Control of TCI Telephony Services of California, Inc. (U-5698-C) That Will Occur Indirectly as a Result of the Merger of AT&T Corp. and Tele-Communications, Inc.*, Decision 99-03-019, 1999 Cal. PUC LEXIS 382, *21 (March 4, 1999) (emphasis added) (citing Decisions 97-05-092, 98-05-022, and 98-08-068 in support of this assessment). *See also In re Application of WorldCom, Inc. Pursuant to Public Utilities Code Section 853(b) for Exemption from the Requirements of Section 851 and 854 of the Public Utilities Code With Respect to its Bankruptcy Reorganizations*, Decision 03-11-015, 2003 Cal. PUC

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Given this broad discretion, we have granted exemption from §§ 854(b) and (c) in many transactions before the Commission.[23] These decisions are based

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LEXIS 554, *10 (Aug. 20, 2003) ("[T]here is no question that §853(b) grants the full Commission the power to exempt a transaction from the requirements of §§ 851 and 854."). In rebuttal, ORA points to other Commission decisions that maintain that § 853(b) should only be applied in "extraordinary" situations. ORA Opening Brief, p. 14 (citing, for example, *Application of Pacific Gas and Electric Company for an Order Under Section 853 of the California Public Utilities Code for an Exemption from the Requirements of PUC Section 851, or Alternatively for an Order Under PUC Section 851 Approving 6 Sales Transactions for Certain Public Utilities Properties*, Decision 02-01-055, 2002 Cal. PUC LEXIS 3, *7 (Jan. 23, 2002) (declaring "the Commission does not grant exemptions except in extraordinary situations"); *Application of Pacific Gas and Electric Company (U 39 E) for an Order under Section 853 of the California Public Utilities Code for an Exemption from the Requirements of PUC Section 851, or Alternatively for an Order Under PUC Section 851 Approving 73 Sales Transaction for Certain Public Utility Properties*, Decision 99-04-047, 1999 Cal. PUC LEXIS 194, *10 (stating "this seldom-used procedure is invoked in extraordinary cases")). But unlike the holdings of the merger decisions discussed above, the assertion cited by the ORA originated in an altogether different context than the one at issue here: The "extraordinary" language originated in decisions considering whether a company should be granted an exemption from § 851 requirements after it failed to abide by the statute and sold utility assets without Commission approval. *Id.* Indeed, ORA does not cite a single Commission decision that involves a merger and references this "extraordinary" language.

[23] *See, e.g., In re Request of WorldCom, Inc. and Intermedia Communications Inc., For Approval to Transfer Control of Intermedia Communications Inc. and its Wholly-owned Subsidiary to WorldCom, Inc.*, Decision 01-03-079, 2001 Cal. PUC LEXIS 219 (Mar. 27, 2001); *In the Matter of the Joint Application of AT&T Corp., Meteor Acquisition Inc., and MediaOne Group, Inc. for Approval of the Change in Control of MediaOne Telecommunications of California, Inc., (U-5549-C) That Will Occur Indirectly as a Result of the Merger of AT&T Corp. and MediaOne Group, Inc.*, Decision 00-05-023, 2000 Cal. PUC LEXIS 355 (May 4, 2000); *In the Matter of the Joint Application of AT&T Corp., Italy Merger Corp. and Tele-Communications, Inc. for Approval Required*

Footnote continued on next page

upon specific features of the merger applicants and the state of the market as a whole. But we have not established any one set of criteria for whether an exemption is warranted under § 853(b). Instead we have recognized a number of different factors that may prove useful in determining whether § 853(b) should relieve a transaction from § 854 review.[24] Our past decisions are tailored to the specific transactions before the Commission and consistent with our determination that the waiver statute "give[s] us discretion to decide on a case-by-case basis whether waiver is appropriate."[25]

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for the Change in Control of TCI Telephony Services of California, Inc. (U-5698-C) That Will Occur Indirectly as a Result of the Merger of AT&T Corp. and Tele-Communications, Inc., Decision 99-03-019, 1999 Cal. PUC LEXIS 382 (Mar. 4, 1999); *In re Application of WorldCom, Inc. and MCI Communications Corporation for Approval to Transfer Control of MCI Communications Corporation to WorldCom, Inc.*, Decision 98-08-068, 1998 Cal. PUC LEXIS 912 (Aug. 31, 1998); *In the Matter of the Joint Application of AT&T Corp. ("AT&T"), Teleport Communications Group Inc. ("TCG") and TA Merger Corp. for Approval Required For the Change in Control of TCG's California Subsidiaries That Will Occur Indirectly as a Result of the Merger of AT&T and TCG*, Decision 98-05-022, 1998 Cal. PUC LEXIS 533 (May 7, 1998); *In the Matter of the Joint Application of MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) for All Approvals Required for the Change in Control of MCIC's California Certified Subsidiaries That Will Occur Indirectly as a Result of the Merger of MCIC and BT*, Decision 97-05-092, 1997 Cal. PUC LEXIS 340 (May 21, 1997).

[24] See Decisions 03-11-015, 01-03-079, 97-05-092 for three different examples of sets of factors used in determining whether an § 853(b) exemption is warranted.

[25] *In re Request of WorldCom, Inc. and Intermedia Communications Inc., For Approval to Transfer Control of Intermedia Communications Inc. and its Wholly-owned Subsidiary to WorldCom, Inc.*, Decision 01-03-079, 2001 Cal. PUC LEXIS 219, *8 (Mar. 27, 2001).

For example, in reviewing the British Telecom-MCI merger,[26] we identified three elements that convinced us that it was not necessary to apply §§ 854(b) and (c) to the merger. First, we observed that the transaction did not involve putting together two traditionally regulated telephone systems. Then we examined elements that explicitly refer only to the transferred entity. Second, we concluded that we did not exercise the type of ratemaking authority that would facilitate an allocation of the merger benefits as contemplated under § 854(b). Third, we found that the acquired company grew under competitive forces at the sole risk of it shareholders. For these reasons we decided that "competitive market forces, rather than mandated rate reductions," should distribute merger benefits to ratepayers, and review of the transaction under § 854(b) would be a "futile exercise" that was "not in the public interest."

In the WorldCom-Intermedia merger[27] other factors persuaded us that it was not necessary to apply §§ 854(b) and (c) to the transaction. First, we held that conditions imposed by a settlement with the Department of Justice mitigated any resulting disruption to consumers. Second, we noted that the acquired company primarily served business customers in a market "where there is a great deal of competition." Third, we found that the acquired company was not a major provider of telecommunications services in California, so "there would be little benefit to conducting a full Section 854(b) and (c) review."

As established by these and other cases, the Commission consistently has exercised its broad authority under § 853(b) to exempt individual transactions

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[26] Decision 97-05-092, 1997 Cal. PUC LEXIS 340, *27-31 (May 21, 1997).

[27] Decision 01-03-079, 2001 Cal. PUC LEXIS 219 (Mar. 27, 2001).

from review under §§ 854(b) and (c), regardless of the presence of gross annual revenues in excess of the $500 million threshold. Thus it would not be a significant departure from our prior decisions if we recognized an exemption was warranted due to the facts and circumstances presented in the merger before us.

4.2.3. Legislative history reaffirms the Commission's ability to exercise substantial discretion in determining whether to exempt a transaction from § 854 scrutiny.

Legislative history confirms that the Legislature intended to grant the Commission significant flexibility in deciding whether to apply §§ 854(b) and (c) to telecommunications transactions. Subsections (b) and (c) were added to § 854 in 1989, following a series of proposed mergers in the electric industry. Specifically Senate Bill 52, which revised § 854, responded to the change in control of San Diego Gas & Electric (SDG&E). After being subject to two different takeover attempts, SDG&E ultimately reached an agreement to merge with Southern California Edison (Edison). The combination of the two companies would have formed the largest energy utility in the United States, and legislators knew that subsections (b) and (c), which became known as the "Edison conditions," could block the transaction.[28]

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[28] *In the Matter of the Joint Application of MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) for All Approvals Required for the Change in Control of MCIC's California Certified Subsidiaries That Will Occur Indirectly as a Result of the Merger of MCIC and BT*, Decision 97-05-092, 1997 Cal. PUC LEXIS 340, *24-26 (May 21, 1997) (reviewing the early legislative history of §§ 854(b) and (c)).

Legislative history indicates that the Legislature did not specifically intend for § 854 to apply to other transactions in other markets. Indeed, the Assembly on Committee on Utilities and Commerce maintained that "[w]hether the Edison conditions will apply to any transaction other than the pending Southern California Edison/San Diego Gas & Electric merger proposal may depend to a large extent on the definitions of control activities that the PUC adopts pursuant to the bill's directive."[29] This statement evinces a legislative intent to allow the Commission to use its powers under both § 853(b) and § 854(a) to exempt transactions from §§ 854(b) and (c) review, regardless of the presence of gross annual California revenues in excess of $500 million.[30]

We thus conclude that the legislative history reaffirms that the Commission is well within its discretionary authority under § 853(b) to exempt the transaction from the allocation of economic benefits *vis-à-vis* a traditional ratemaking mechanism contemplated under § 854(b). We also find that these amendments were not intended to countermand the statutory obligation that any such transaction be approved only if it is in the public interest.

4.2.4. The facts and circumstances surrounding the Verizon-MCI merger indicate that we should

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[29] *Id*. (citing the analysis published by the Assembly Committee on Utilities and Commerce).

[30] *In the Matter of the Joint Application of MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) for All Approvals Required for the Change in Control of MCIC's California Certificated Subsidiaries That Will Occur Indirectly as a Result of the Merger of MCIC and BT*, Decision 97-05-092, 1997 Cal. PUC LEXIS 340, *25-26 (May 21, 1997).

not subject the transaction to §§ 854(b) and (c) review.

In determining whether an § 853(b) exemption is warranted in the case of the Verizon-MCI merger, we reaffirm that the Legislature granted us broad discretion to grant an exemption under the statute, and we examine both the specific merger applicants and the market as a whole. This approach is consistent with the plain meaning of § 853(b), prior Commission decisions, and the legislative history reviewed above.

In particular three elements convince us that exemption from § 854(b) and (c) is warranted by the facts and circumstances presented in the Verizon-MCI merger. First, competitive markets are better positioned to ensure that the actual benefits of the merger accrue to consumers. Any attempt to use traditional rate regulation mechanisms to mandate distribution of merger benefits would be detrimental to the operation of market forces and contrary to the main thrust of the 1996 Telecommunications Act, state telecommunications policy, and this Commission's stated policies under the "New Regulatory Framework" (NRF). Five years have passed since the Commission last distributed merger benefits via a sur-credit.[31] In those years we have worked to develop a new regulatory regime that depends more on market forces, and this regime does not facilitate equitable distribution of merger benefits through traditional ratemaking mechanisms contemplated by § 854(b).

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[31] *In the Matter of the Joint Application of GTE Corporation ("GTE") and Bell Atlantic Corporation ("Bell Atlantic") to Transfer Control of GTE's California Utility Subsidiaries to Bell Atlantic, Which Will Occur Indirectly as a Result of GTE's Merger with Bell Atlantic*, Decision 00-03-021, 2000 Cal. PUC LEXIS 398 (Mar. 2, 2000).

None of the parties to the merger is subject to traditional rate regulation. MCI and its California subsidiaries never have been subject to traditional cost-of-service regulation. Moreover Verizon California, while an incumbent local exchange carrier (ILEC), is no longer subject to traditional cost-of-service rate regulation. In 1998 the Commission took steps to remove the last vestiges of traditional rate of return regulation when it suspended the sharing mechanisms for both Verizon and SBC. Instead Verizon now is governed by NRF, which provides significant or complete pricing flexibility for all services other than basic local exchange service. Under our current price-cap based regulatory structure, Verizon must achieve efficiency gains to offset inflation, because prices are not indexed to inflation. Merger synergies are simply efficiencies gained from the combination of the two companies.

Under this new regulatory framework, the telecommunications market is more competitive now than ever before. As we recognized earlier this year in our Order Instituting Rulemaking for the Purpose of Assessing and Revising the Regulation of Telecommunications Utilities, recent years have witnessed a dramatic increase in number of telecommunications service providers and offerings:

> ILECs now compete with cellular and cable TV companies in both the local and long-distance markets. Although there is vigorous competition for long distance services, "long-distance" is disappearing as a stand-alone service as more and more consumers opt for bundled service packages or use Internet Protocol based networks. In fact, consumers are increasingly communicating in ways that bypass traditional telephone networks entirely. For example, it is now common to exchange voice and text

> messages through cell phones, computers, and other means without ever having to use the public switched telephone network.[32]

In particular the long distance market, where MCI primarily operates, is competitive and rapidly declining.[33] MCI has no guaranteed franchise territory to buffer risk and reward. The company has grown (and shrunk) under competitive market forces at the sole risk of its shareholders; it has no captive ratepayer base.[34] In the merger context these competitive pressures will no doubt push the Applicants to distribute benefits to their consumers.

In contrast we would face considerable difficulty in parsing out what specific benefits may be attributed to the acquisition of the regulated aspects of California utilities involved in the transaction. MCI and Verizon engage in many activities beyond our jurisdiction. Both have international operations. The companies also offer services not subject to state regulation, such as interstate telecommunications and information services. Thus we conclude that it is preferable to rely on the market to distribute California-based merger benefits to California consumers.

Second, no significant adverse consequences would arise from the acquisition of MCI's California subsidiaries. The transaction involves the acquisition of a global company that attributes only a small percentage of its operations to California intrastate services, and post-merger, the acquired company's California operations will comprise a very small proportion of the

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[32] Decision 05-04-005 (Apr. 7, 2005).

[33] Verizon/MCI 3 Section VI #64.

[34] *Id*.

combined company's total operations.[35] MCI's California intrastate revenues account for less than 3 percent of MCI's total revenues.[36] Additionally Verizon California's revenues account for only 2.8 percent of Verizon's overall revenues.[37] Together the California subsidiaries of the combined company will account for only 2.7 to 3 percent of the combined company's revenues and expenses.[38] Hence, we are looking at only a small portion of a much bigger transaction and one in which California's interests are not uniquely affected.

The Attorney General of California reviewed the California conditions specific to the proposed merger and issued an Advisory Opinion stating that no significant adverse consequences would arise from this transaction. The Advisory Opinion reported that MCI's "absence will have inconsequential effects on price and output levels" in both the mass market (facilities-based) long distance and enterprise services.[39] Also the Advisory Opinion concluded that "the merger will not adversely affect competition for DS1 and DS3 special access services supplies to enterprise customers."[40] This report and the evidence in the record pertaining to its findings are discussed at length below.

The merger also was subjected to antitrust review by the DOJ, which entered into a consent decree with Verizon for divestiture of certain local assets

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[35] Applicants Reply Brief, p. 34.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Advisory Opinion, p. 11.

[40] *Id.*

outside of California.[41] The DOJ, by not requiring a similar divestiture in the California markets, further supports our conclusion that the merger will not adversely affect competition.

Furthermore, as we noted in the two prior acquisitions of MCI,[42] the proposed merger here does not involve the acquisition of an ILEC. Instead all of MCI's California subsidiaries are non-dominant inter-exchange carriers (NDIECs) and competitive carriers (CLECS). Commission treatment of similar cases involving acquisition of NDIECs and CLECs has been clear and consistent. The last two times MCI was acquired we exempted the transactions from §§ 854(b) and (c) review.[43] Also this pattern extends beyond just MCI. In the past decade, the Commission has authorized scores of transactions involving NDIECs and CLECs, but uniformly has exempted them from the detailed

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[41] Joint Applicants Opening Brief, pp. 2-3.

[42] *In re Application of WorldCom, Inc. and MCI Communications Corporation for Approval to Transfer Control of MCI Communications Corporation to WorldCom, Inc.*, Decision 98-08-068, 1998 Cal. PUC LEXIS 912 (Aug. 31, 1998); *In the Matter of the Joint Application of MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) for All Approvals Required for the Change in Control of MCIC's California Certified Subsidiaries That Will Occur Indirectly as a Result of the Merger of MCIC and BT*, Decision 97-05-092, 1997 Cal. PUC LEXIS 340 (May 21, 1997). Both of these analyses applied the three factors considered in the British Telecom-MCI merger. While we discuss additional grounds for exemption, we observe that all three of the British Telecom-MCI factors are fulfilled in the Verizon-MCI merger as well. First, the transaction does not involve the two traditionally regulated telephone systems. MCI has never been subject to traditional utility regulation. Second, the Commission lacks effective ratemaking authority over MCI's California subsidiaries. Third, MCI grew under competitive forces without a guaranteed franchise authority.

[43] *Id*.

requirements of § 854(b) and, with limited exception, § 854(c). Forty-one decisions reaching this result are listed in Appendix A.

Third, Verizon has agreed to abide by additional conditions that will ensure that the general benefits of this merger stretch to all California ratepayers. § 853(b) provides that the "commission may…impose requirements deemed necessary to protect the interest of the customers or subscribers of the public utility… exempted under this subsection."[44] And pursuant to this authority, we require Applicants to contribute a total of $15 million over five years to the California Emerging Technology Fund (CETF). CETF is a non-profit organization tasked with ensuring that all California residents have ubiquitous access to broadband and advanced services by 2010. A significant portion of CETF's efforts will be targeted to underserved communities.

Also the Greenlining Agreement imposes further California-specific conditions on the Applicants. It provides that the Applicants will boost corporate philanthropy over the next five years by an additional $20 million above current levels, participate in a statewide Broadband Task Force, and increase its supplier diversity goal for minority business enterprises from its current level of 15% to a minimum of 20% by 2010.[45]

We further recognize that Verizon accepted additional merger conditions imposed by the FCC. The FCC conditions require the Applicants to freeze special access rates for thirty months, refrain from seeking an increase in rates for unbundled network elements (UNEs) for two years, maintain the same number

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[44] § 853(b).

[45] Greenlining Opening Brief, Exhibit A.

of peering partners for the next three years, and enforce the FCC's net neutrality principles for two years.[46]

To conclude, the three factors discussed above convince us that granting an exemption under § 853(b) in this case is consistent with past Commission practice and is in the public interest. The market and Verizon's acceptance of additional merger-related conditions will ensure that benefits from the transaction reach all segments of California ratepayers. Thus, subjecting such a transaction to § 854(b) "is not necessary in the public interest," and pursuant to the authority granted us in PU Code § 853(b) and § 854(a), we find that this transaction is exempt from §§ 854(b) and (c).

4.2.5. Commission precedent and § 854(c) provide the appropriate guidelines for determining whether this transaction is in the public interest.

Over time, the Commission has used its discretion in different ways in reviewing mergers. In D.70829 the Commission approved a transfer of control after determining that the transaction "would not be adverse to the public interest."[47] Historically, the Commission has sought more broadly to determine whether a change in control is in the public interest:

> The Commission is primarily concerned with the question of whether or not the transfer of this property from one ownership to

[46] Joint Applicants Opening Brief, pp. 3-5.

[47] *Ibid.,* Finding of Fact 3, 645.

> another...will serve the best interests of the public. To determine this, consideration must be given to whether or not the proposed transfer will better service conditions, effect economies in expenditures and efficiencies in operation.[48]

D.97-07-060 notes that over the years, our decisions have identified a number of factors that should be considered in making the determination of whether a transaction will be adverse to the public interest.[49] More recently, D.00-06-079 provides an overview of these factors:

> Antitrust considerations are also relevant to our consideration of the public interest.[50] In transfer applications we require an applicant to demonstrate that the proposed utility operation will be economically and financially feasible.[51] Part of this analysis is a consideration of the price to be paid considering the value to both the seller and buyer.[52] We have also considered efficiencies and operating costs savings that should result from the proposed merger.[53] Another factor is whether a merger will produce a broader base for financing with more resultant flexibility.[54]
>
> We have also ascertained whether the new owner is experienced, financially responsible, and adequately equipped to continue the business sought to be acquired.[55] We also look to the technical and

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[48] Union Water Co. of California, 19 CRRC 199, 202 (1920) at 200.

[49] 1997 Cal PUC LEXIS 557 *22-25.

[50] 65 CPUC at 637, n.1.

[51] *R. L. Mohr (Advanced Electronics)*, 69 CPUC 275, 277 (1969). See also, *Santa Barbara Cellular, Inc.* 32 CPUC2d 478 (1989).

[52] *Union Water Co. of California*, 19 CRRC 199, 202 (1920).

[53] *Southern Counties Gas Co. of California*, 70 CPUC 836, 837 (1970).

[54] *Southern California Gas Co. of California*, 74 CPUC 30, 50, modified on other grounds, 74 CPUC 259 (1972).

[55] *City Transfer and Storage Co.*, 46 CRRC 5, 7 (1945).

> managerial competence of the acquiring entity to assure customers of the continuance of the kind and quality of service they have experienced in the past.[56]"[57] (Note: footnotes in this text, with the exception of footnote 44 appeared in the original, but have been renumbered consistent with this sequence).

Subsequently, D.00-06-079 assessed the proposed transaction against the seven criteria identified in § 854(c),[58] and included a broad discussion of antitrust and environmental considerations.[59] Thus, even though § 854(c) does not apply to this transaction, it is reasonable to consider these factors. Therefore, a review of this transaction in terms of § 854(c), as well as a consideration of environmental and competitive issues, constitutes the appropriate scope of this proceeding.

4.3. Summary of Applicable Law

In summary, we find that § 854(a) applies to this transaction, but §§ 854(b) and (c) do not. We note that on September 28, ORA filed a motion asking for full Commission review of the legal determinations reached in the Assigned

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[56] *Communications Industries, Inc*. 13 CPUC2d 595, 598 (1993).

[57] D.00-06-079 (2000 Cal PUC LEXIS 645, *17-*20), footnotes included but renumbered into the current sequence.

[58] Public interest factors enumerated under this code section are whether the merger will" (1) maintain or improve the financial condition of the resulting public utility doing business in California; (2) maintain or improve the quality of service to California ratepayers; (3) maintain or improve the quality of management of the resulting utility doing business in California; (4) be fair and reasonable to the affected utility employees; (5) be fair and reasonable to a majority of the utility shareholders; (6) be beneficial on an overall basis to state and local economies and communities in the area served by the resulting public utility; and (7) preserve the jurisdiction of the Commission and our capacity to effectively regulate and audit public utility operations in California."

[59] D.00-06-079 (2000 Cal. PUC LEXIS 645, *17-*38); see also D.01-06-007 (2001 Cal. PUC LEXIS 390 *25-*26) for a similar list of factors.

Commissioner's Ruling of September 19. Consistent with the discussion above, we affirm the ruling of the Assigned Commissioner concerning the applicable law and deny ORA's motion for further review.

To determine whether this transaction is in the public interest, the proposed transaction will be assessed against the seven criteria identified in § 854(c),[60] and will include a broad discussion of antitrust and environmental considerations, as has been done in previous cases.

5. Are Evidentiary hearings Necessary To Decide This Matter?

As noted above, by Resolution ALJ 176-3152 on May 5, 2005, the Commission preliminarily determined that evidentiary hearings would be needed to resolve this matter. The *Scoping Memo and Ruling of Assigned Commissioner*, June 30, 2005 noted that:

> Parties disagree as to whether evidentiary hearings are necessary for developing the record for this application. Based upon hearing parties' arguments and in view of the protests that have been filed, I defer ruling on the request for evidentiary hearings until parties have filed testimony as set forth in the procedural schedule adopted

[60] Public interest factors enumerated under this code section are whether the merger will" (1) maintain or improve the financial condition of the resulting public utility doing business in California; (2) maintain or improve the quality of service to California ratepayers; (3) maintain or improve the quality of management of the resulting utility doing business in California; (4) be fair and reasonable to the affected utility employees; (5) be fair and reasonable to a majority of the utility shareholders; (6) be beneficial on an overall basis to state and local economies and communities in the area served by the resulting public utility; and (7) preserve the jurisdiction of the Commission and our capacity to effectively regulate and audit public utility operations in California." In addition, § 854(c) asks that the transaction "Provide mitigation measures to address significant adverse consequences that may result." We will address this issue in conjunction with our review of criteria 1 through 7.

> below and have been afforded an opportunity for motions and responses on this matter. Those requesting hearings should identify material issues of fact and explain why we cannot resolve them with the record already developed. Those opposing hearings should respond on the schedule ordered.

Motions regarding the need for evidentiary hearings were filed on September 14. TURN, ORA, Level 3, Qwest and Disability Rights Advocates (DRA) filed motions asking for evidentiary hearings. Replies were filed on September 16 by TURN, ORA, Qwest, Greenlining and the Applicants. Greenlining stated that as it related its issues, there was no need for evidentiary hearings because those issues were resolved via an agreement.

On September 19, an Assigned Commissioner's Ruling denied the motions for evidentiary hearings and determined that evidentiary hearings were not necessary in this proceeding and ruled that the case would be deemed submitted upon the filing of reply briefs.

Subsequently, on September 28, ORA filed a motion asking for a Rule 6.5(b) decision affirming the Assigned Commissioner's Ruling denying the motion for evidentiary hearings (as well as full Commission review of the legal conclusions as discussed above). The Assigned Commissioner established an abbreviated comment cycle, and received responses to the motion on October 11, 2005 from the Applicants, Qwest, and TURN. We will also discuss this issue below.

We now turn our attention to the issue of whether evidentiary hearings are needed to resolve this matter.

5.1. No statute or Commission rule requires evidentiary hearings

No provision of law or Commission rule provides any party in this proceeding with a right to an evidentiary hearing. Section 1701.1(a) provides that the Commission, "consistent with due process, public policy and statutory requirements, *shall determine* whether a proceeding requires a hearing" (emphasis added). Rule 44.4 of the Commission's Rules of Practice and Procedure provides that the "filing of a protest does not insure that an evidentiary hearing will be held." Moreover, even without the appearance of witnesses or cross examination, the parties have had an adequate opportunity to be heard, consistent with due process.

The Commission has previously addressed this issue of whether and when due process considerations require evidentiary hearings. In *Re Competition for Local Exchange Service,* D.95-09-121, 1995 Cal. PUC LEXIS 788, at *13-*14, the Commission stated:

> Due process is the federal and California constitutional guarantee that a person will have notice and an opportunity to be heard before being deprived of certain protected interests by the government. Courts have interpreted due process as requiring certain types of hearing procedures to be used before taking specific actions.
>
> The California Supreme Court has laid down a simple rule regarding the application of due process. According to the Court if a proceeding is quasi-legislative, as opposed to quasi-judicial, there are no vested interests being adjudicated, and therefore, there is no due process right to a hearing. (Citing *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 901; *Wood v. Public Utilities Commission* (1971) 4 Cal. 3d 288, 292).

This proceeding is not a quasi-judicial proceeding in which a hearing is required because no vested interests of any party are being adjudicated. Rather,

it is a ratesetting proceeding. Moreover, no party even argued in its protest that the proceeding should be classified as adjudicatory for purposes of § 1701 of the Public Utilities Code or the Commission's rules.

In 4Cal3d 288, the court clearly stated that regulation, as to the setting of rates, is quasilegislative, and for that reason, there is no right to evidentiary hearings. The court stated as follows:

> In adopting rules governing service and in fixing rates, a regulatory commission exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions which require a public hearing for affected ratepayers. (United States v. Merchants and Manufacturers Association of Sacramento (1916) 242 U.S. 178 [61 L.Ed. 233, 37 S.Ct. 24]; cf. Koppers Co. v. United States (W.D.Pa. 1955) 132 F.Supp. 159; and Florida Citrus Commission v. United States (N.D. Fla. 1956) 144 F.Supp. 517, affd. 352 U.S. 1021 [1 L.Ed.2d 595, 77 S.Ct. 589].)
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> Thus, in Public Utilities Com'n of State of Cal. v. United States (9th Cir. 1966) 356 F.2d 236, 241, certiorari denied 385 U.S. 816 [17 L.Ed.2d 54, 87 S.Ct. 35], the court rejected the claim of the California commission that due process entitled it to be heard in an informal meeting before the Federal Communications Commission, which later resulted in rate changes. The court stated that "Public utility regulation, historically, has been a function of the legislature; and the prescription of public utility rates by a regulatory commission, as the authorized representative of the legislature, is recognized to be essentially a legislative act. Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 589, 65 S.Ct. 829, 89 L.Ed. 1206 (1945). As a ratepayer would have no constitutional right to participate in a legislative procedure setting rates, this right to be

> heard in a commission proceeding exists at all only as a statutory and not a constitutional right."[61]

The court went further to state:

> The Public Utilities Code does not require public hearings before rate increases or rule changes resulting in rate increases may be authorized. Section 454 of that code requires only a showing before the commission and a finding by the commission of justification for such increases. It leaves to the commission the determination of the appropriate procedures to be followed. (See Pub. Util. Code, § 701.)[62]

Finally, in 25 Cal.3d 891, the court clearly states that ratemaking is "quasilegislative."[63]

Both these decisions were made in a period preceding the statutory division of cases into quasilegislative, ratemaking, and adjudicatory. From the text of the decisions, it is clear that for the purposes of the courts and for due process consideration, ratemaking proceedings are deemed quasilegislative. As noted above, there is still no law or rule of procedure that requires a hearing for a ratemaking proceeding such as this. Thus, a hearing is not necessary for due process reasons under any state law. Furthermore, the California Court of Appeal has confirmed that the Public Utilities Code does not require the Commission to conduct public evidentiary hearings concerning rates, but leaves

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[61] *Wood* v. *Public Utilities Commission* (1971) 4 Cal. 3d 288, 292 [93 Cal. Rptr. 455, 481 P.2d 823].)

[62] *Id.*

[63] *Consumers Lobby against Monopolies v. PUC*, 25 Cal. 3d 891, 909.

the matter to the Commission's discretion.[64] The Court in *PG&E* also noted that the Code expressly permits the Commission to determine whether or not to hold hearings.[65] For example, § 1701.3 states that *if* the Commission determines that a ratesetting case requires a hearing, certain procedures should apply, indicating that whether to hold a hearing in a ratesetting case is a matter within the Commission's discretion (Emphasis added). Similarly, § 454(b) allows the Commission to adopt rules that apply in ratesetting cases including the form and manner of the presentation of the showing, *with or without a hearing*, and the procedure to be followed (Emphasis added). These statutes and precedents amply demonstrate that, in a ratesetting case such as this one, the Commission has discretion to determine whether to hold an evidentiary hearing.

Permitting the Commission to determine whether to hold evidentiary hearings is entirely consistent with federal due process considerations. Federal cases concerning due process in administrative proceedings are in accord with California law discussed above. Federal courts have held that, where an administrative proceeding cannot truly be said to be quasi-judicial, there is no due process right to a trial-type hearing with an opportunity to cross-examine witnesses.[66] Cross examination is not necessary to satisfy due process in an administrative proceeding unless motive, intent, or credibility are at issue or

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[64] *Pacific Gas & Electric Co. v. State Department of Water Resources*, 112 Cal. App. 4th 477, 500-502 (2003).

[65] *Id.* at 500-501.

[66] *Allied Van Lines Co. v. United States*, 303 F. Supp. 742 (C.D. Cal. 1969).

there is a dispute over a past event.[67] Here, there could be no credible claim that such matters are at issue, and therefore no evidentiary hearings are necessary.

Finally, we note that the Commission has itself affirmed that due process does not require a hearing that serves no useful purpose.[68]

As shown throughout this decision, the issues in this case can be resolved without cross examination. Thus, Commission precedent, California law, and federal law all make clear that the Commission s obligation to afford due process to parties participating in this proceeding does not require that it hold evidentiary hearings.

5.2. There is sufficient evidence in the record to permit the Commission to decide this matter

The record in this proceeding is extensive. This evidentiary record was developed through exhaustive discovery, which has proceeded efficiently and with few disputes requiring Commission resolution. Applicants have responded to approximately 800 data requests, or over 1,400 when subparts are counted separately, and produced well over a million pages of documents. All Intervenors have had ample opportunity to discover the facts on which the Applicants' positions are based and to present facts which support their own positions. The parties presented their positions in many hundreds of pages of opening, reply and rebuttal testimony, briefs and reply briefs.

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[67] *Exxon Co., U.S.A. v. F.E.R.C.* 182 F.3d 30, 46-47 (D.C. Cir.1999).

[68] *In Touch Communications, Inc. and Inflexion California Comm. Corp., For the Sale and Purchase, Respectively of the Customer Base, Operating Authorities and other Assets*, D. 04-09-027, 2004 Cal. PUC LEXIS 417 *6-7

Because the Commission has ample information in this extensive record to determine whether the proposed transaction satisfies the requirements of law, no evidentiary hearings are needed.[69]

5.3. The public has had ample opportunity to participate in this proceeding

The Commission conducted six Public Participation Hearings on August 15, 16 and 18, 2005, in Whittier, Long Beach and San Bernardino to take comments from consumers on the proposed merger. Verizon and MCI sent notices to all of their customers and posted newspaper announcements inviting the public to attend the public hearings. Nearly 400 persons turned out for the meetings, and the Commission heard from 245 speakers.

The overwhelming majority of speakers supported the proposed merger. Most of the speakers represented non-profit organizations, schools and other community organizations that had received financial and volunteer support from Verizon. They praised Verizon as a leading corporate citizen, and they endorsed the proposed merger for combining what they said were the complementary technological strengths of Verizon and MCI. For example, Vince Vazquez, a policy fellow in technology studies at the Pacific Research Institute in San Francisco, said that with new technologies like wireless, satellite and cable becoming more affordable, "traditional wireline companies like Verizon and MCI [must] seek additional ways to hone their competitive edge." Long Beach Mayor Beverly O'Neill praised Verizon as a leader in supporting community literacy efforts and added that in 2003 Verizon won the award of excellence for

[69] See *AT&T/MediaOne*, D.00-05-023, 2000 Cal. PUC LEXIS 355 at *17.

public/private partnership from the United States Conference of Mayors Business Council.

Twelve speakers opposed or had misgivings about the merger, expressing concern about the market power of the combined organization, the elimination of a strong competitor like MCI and the risk of reestablishing telephone monopolies. For example, Rick Werniche, speaking at one of the Whittier hearings, said, "The only thing I can see this merger doing is diluting shareholders' value and possibly adding a huge debt to the ratepayers, which the PUC will probably add on to our bill…This is a power play by a bunch of guys in New York that circles the wagons trying to put back together what Judge Green took apart [in the AT&T divestiture]."

In addition to those attending the Public Participation Hearings, the Commission also heard from more than 325 consumers who wrote letters or sent electronic mail in response to the announcement of the hearings. In contrast to the public speakers, the letters and e-mails were running about 80% in opposition to the transaction and about 12% in favor of it, with the rest undecided or urging conditions to keep rates low and improve service. Many cited individual service complaints, particularly against MCI. A typical message commented that, "As in the past with Pacific Bell and SBC, or AT&T Wireless and Cingular, mergers proved detrimental to the consumers as I could witness through decreased customer service, increased prices and overall lower quality."

In summary, this proceeding has already benefited from a review by the public of this proposed transaction.

5.4. Since § 854(b) does not apply to this transaction, many issues raised by parties become moot.

The first part of this section demonstrated that: 1) as a matter of law, § 854(b) does not apply to this transaction; 2) as a matter of Commission precedent, § 854(b) should not apply to this transaction; and 3) as a matter of policy, § 854(b) should not apply to this transaction.

Since neither law, nor precedent nor policy supports an application of § 854(b) to this transaction, the factual disputes concerning the exact enumeration and division of merger benefits become moot. In particular, of the twelve factual issues identified by TURN, a full six (issues g through l) become moot. Similarly, major portions of ORA's testimony addressing the enumeration and distribution of merger benefits become moot.

5.5. Many remaining issues identified conflate policy issues with issues of fact.

Many of the remaining issues identified by parties conflate policy disputes with disputes of facts. For example, ORA raises two issues: (1) the definitions of "short-term" and "long-term" and (2) the treatment of up-front merger implementation costs. Each of these issues is a matter that can and should be determined based on policy considerations and precedent, and cross-examination will shed no further light on them. Whether MCI's operations should be included in the calculation is plainly such an issue. The Commission has consistently exempted synergies associated with fully competitive services and declined to impose sharing obligations on NDIECs and CLECs.

The question in this case is simply whether the Commission should adhere to these precedents or, for policy reasons, depart from them. TURN admits that "the legal theory on which Applicants" exclude MCI-related synergies or revenue

synergies "is an issue for briefs."[70] These legal issues account for a majority of the differences among the synergy estimates, and the estimates of synergies that would result from applying one policy conclusion as opposed to another are not disputed as a factual matter. Likewise, the time period over which to calculate synergies, which TURN acknowledges is "one of the most significant determinants of the differences in estimates of shareable merger benefits,"[71] is a matter of policy and precedent. Neither ORA nor TURN disputes the estimates that would result depending on the various time periods chosen. While TURN argues that Applicants' management used a longer period than the one proposed here in calculating synergies, Applicants do not dispute that fact." Accordingly, the debate concerns whether this discrepancy is significant, as TURN claims, or irrelevant under Commission precedents that recognize that management calculations performed for purposes other than § 854(b)(2) are not controlling, as Applicants claim. Either way, these are matters for the briefs.

5.6. The Commission can and has frequently resolved issues of fact without evidentiary hearings,

Clearly, there are a series of factual issues identified above for which there remain factual differences between parties. For example, an assessment of the transaction's impact remains to be made concerning the competitive situation in California specific issues concerning special access circuits, as well as the need for regulation to ensure non-discriminatory treatment of packets moving across networks.

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[70] TURN, Motion, at 15.

[71] TURN, at 11.

The Commission on many occasions, including proceedings involving the merger or change in control of telecommunications utilities pursuant to § 854, has decided complex and contentious proceedings without holding evidentiary hearings. The Commission has approved a number of contested applications involving mergers or changes in control of telecommunications utilities without holding evidentiary hearings. Mergers or changes in control involving AT&T and Comcast (D.02-11-025), Qwest Communications Corporation (D.00-06-079), AT&T and Media One (D.00-05-023), MCI and WorldCom (D.98-08-068), and MCI and British Telecom (D.97-07-060) all were protested by one or more parties and all (except for AT&T/Comcast) were subjected by the Commission to an analysis of the public interest factors set forth in § 854(c). Despite extensive differences of opinion and disputes of facts presented and argued in the protests and the replies to protests in these cases regarding the public interest factors and other matters, the Commission elected not to hold evidentiary hearings, generally concluding instead that there was sufficient information in the record to determine whether the application complied with the requirements of §§ 851-854 and whether the application should be approved. In *Re AT&T and Media One*, *supra*, 2000 Cal.PUC LEXIS 355, at *17. While these decisions briefly discussed § 854(c) public interest factors, the Commission determined that each transaction was exempt from review under §§ 854(b) and (c).

The Commission's resolution of complex and contentious cases without holding evidentiary hearings is not restricted to telecommunications merger cases. In D.98-12-026,[72] the Commission made several significant modifications to the New Regulatory Framework applicable to Pacific Bell and GTE, including the suspension of sharing mechanisms by which cost savings related to streamlined regulation were shared with ratepayers and the elimination of Z factor adjustments related to the LEC's recovery of certain costs. Although parties to the NRF proceeding differed greatly on whether such modifications should be made and the impact on ratepayers from making or not making such modifications, the Commission made its decision without holding evidentiary hearings.

In D.04-11-015,[73] the Commission resolved a number of contested issues regarding PG&E's issuance of bonds related to its bankruptcy including the timing of the bond issuances, the permitted uses of bond proceeds, and the recovery of bond charges from departing load and new municipal load. Again, despite the fact that parties differed greatly on the resolution of these issues and their impact on ratepayers and others, the Commission resolved these matters without holding evidentiary hearings.

The mere existence of disputed facts does not require that evidentiary hearings be held. As in the telecommunications merger cases cited above, the question of whether to hold evidentiary hearings depends on whether there is sufficient information in the record to enable the Commission to determine

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[72] In *Rulemaking Re Third Triennial Review of the New Regulatory Framework*, D. 98-10-026, 1998 Cal. PUC LEXIS 669.

[73] In *Re PG&E Energy Recovery Bonds*, D. 04-11-015, 2004 Cal. PUC LEXIS 538.

whether the Application should be approved. Here, the record is clearly sufficient. There are no factual disputes that we require evidentiary hearings to resolve. Thus, a hearing would serve no useful purpose.

5.7. Consistent with Rule 6.5(b), the Assigned Commissioner's Ruling of September 19 determining that evidentiary hearings are not necessary is affirmed.

The ORA motion of September 28, 2005 requests a Rule 6.5(b) decision affirming the Assigned Commissioner's ruling of September 19 that reversed the preliminary determination that evidentiary hearings were necessary. In response, the Applicants note that although such rulings can be ratified by the full Commission in a simple procedural ruling, they can also be ratified in a final decision, and doing so is fully consistent with Commission precedent.[74]

This discussion of the need for evidentiary hearings and the resulting findings, conclusions of law and ordering paragraphs constitutes a Rule 6.5(b) decision affirming the Assigned Commissioner's ruling of September 19, 2005.

To the extent that the ORA motion of September 28, 2005 requests such a review, its motion is granted. To the extent that the ORA motion requests a

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[74] See, e.g., *Cal-American Water*, D.98-08-036, 1998 Cal, PUC LEXIS 617, *22 (reversing preliminary determination that hearings were required in rate increase application, citing Rule 6.5(b): "In light of the complete disposition of the applications by today's decision, it is unnecessary to issue a separate order regarding the joint [assigned commissioner and ALJ] ruling's changes to the preliminary determination on need for hearing."); *San Diego Gas & Electric Co.*, D.99-02-075, 1999 Cal. PUC LEXIS 51, *1-2 (reversing preliminary determination that hearings were required in §851 request to sell property, stating: "Granting the application constitutes Commission approval of the change in determination that evidentiary hearings are needed in this matter."); *Pacific Gas & Electric Co.*, D.04-08-048, 2004 Cal. PUC LEXIS 441, *31 (final decision reversed

Footnote continued on next page

reversal of the September 19 reversal of the preliminary determination, it is denied consistent with the reasoning contained above.

6. Does the Proposed Merger of the Parent Companies and Change in Control "Not Adversely Affect Competition?"

The Commission requested an Advisory Opinion from the Attorney General on the competitive effects of the proposed merger of Verizon and MCI on August 3, 2005.

The Advisory Opinion was filed at the Commission on September 16, 2005. The Advisory Opinion employs the approach embodied in antitrust laws, including the Department of Justice and Federal Trade Commission's 1992 Horizontal Merger Guidelines, including their April 8, 1997 revisions (the Guidelines).[75]

The Advisory Opinion finds no significant adverse consequences arising from this transaction. The Advisory Opinion notes that "Verizon has a relatively minor presence in the relevant markets for both mass market (facilities-based) long distance and enterprise services."[76] The Advisory Opinion further notes that "MCI dominates neither of those highly competitive industries" and also notes that "entry barriers are relatively minor."[77] The Advisory Opinion concludes that "MCI has a minimal share of the relevant market(s) for facilities-based local exchange services, and its absence will have inconsequential effects on price and output levels." The Advisory Opinion also finds that "the merger

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preliminary determination that hearings were required, based on finding of no disputed material facts).

[75] Advisory Opinion, p. 7.

[76] Advisory Opinion, p. 11.

[77] Advisory Opinion, p. 11.

will not adversely affect competition for DS1 and DS3 special access services supplies to enterprise customers."[78]

Although the Advisory Opinion does not control the Commission's findings concerning the effects of the proposed transaction on competition, the Advisory Opinion is entitled to "great weight."[79] In deference to this Advisory Opinion, we organize our discussion of the competitive effects of this merger following the analysis provided by the Attorney General. In particular, we examine the effect of this merger on 1) mass market local exchange; 2) mass market long distance; 3) enterprise services; 4) special access services; and 5) Internet backbone. In addition to following the structure of the Advisory Opinion, we will begin our examination of the effects of merger with the analysis contained in the Advisory Opinion.

The Advisory Opinion notes that the Guidelines require the calculation of changes that occur in the Herfindahl-Hirschman Index (HHI), a measure of concentration in local markets, because of the proposed transaction. The Advisory Opinion notes that "the relevance of the calculation is, however, highly dependent upon the structure of the industry, how rapidly it is changing, and the theory of competitive effects."[80]

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[78] *Id.*

[79] See, e.g., *Moore v Panish* (1982) 32 Cal.3d 535, 544 ("Attorney General opinions are generally accorded great weight"); *Farron v. City and County of San Francisco*, (1989) 216 Cal.App.3d 1071.

[80] Advisory Opinion, pp. 10-11.

For this transaction, the Advisory Opinion notes that "the applicants' market share in all of the relevant markets need not be precisely determined."[81]

6.1. Mass Market Local Exchange

The Advisory Opinion, following standard antitrust analysis, finds that there is a relevant market for residential and small business (mass market) local exchange services and begins its analysis with this market.

6.1.1. Advisory Opinion finds merger "will not have adverse effects upon competition in local markets"

The Advisory Opinion concludes that because concentration levels in local exchange markets will be affected only marginally by the incorporation into Verizon of MCI's facilities-based services, the merger will not have adverse effects upon competition in those local markets in which MCI does not offer special access service to private line customers.[82]

The Advisory Opinion elects to follow the analytical framework set out in the *WorldCom/MCI* case by the FCC. In that case, the FCC excluded inputs competitively supplied and focused on the commercial level at which critical supply constraints could be assessed. Following that precedent, the Advisory Opinion notes that MCI "does not offer facilities-based local mass market services"[83] and that "many other CLECs also supply that readily available

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[81] Advisory Opinion, p. 11

[82] The Advisory Opinion addresses special access markets separately, which is discussed below.

[83] Advisory Opinion, p. 11.

service."[84] Therefore, the Advisory Opinion concludes that within the relevant market,[85] the merger will not have adverse effects upon competition."[86]

6.1.2. Position of Parties

In general, the Applicants support the determinations reached in the Advisory Opinion. Concerning mass market telecommunications services, the Applicants argue that: "the relevant question is whether Verizon's acquisition of MCI will have any incremental adverse effect."[87]

Applicants further argue that the "evidence is uncontroverted that MCI's mass market business is in an irreversible decline."[88] The Applicants, in particular, argue that MCI's UNE-P business is in decline due to a "confluence of technological, market and regulatory changes."[89]

The Applicants also support the Advisory Opinion in its decision to exclude resellers from its market analysis. The Applicants note that "the availability of facilities necessary to provide local mass market service, rather than the number of retail providers currently operating in the market, determines the total output of local mass market services."[90] Thus, "as a non-facilities based provider, MCI's provision of local service … to mass market

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[84] *Id.*

[85] The Advisory Opinion deems the relevant market to include "facilities-based UNE-L and cable suppliers, but not resellers at the competitive retail level." *Id.*

[86] Advisory Opinion, p. 13.

[87] Joint Applicants Opening Brief, p. 15.

[88] Joint Applicants Opening Brief, p. 16.

[89] Joint Applicants Opening Brief, p. 17.

[90] Joint Applicants Opening Brief, p. 20.

customers does not affect industry output, and that, hence, the transaction does not adversely affect competition in the mass market."[91]

The Applicants also argue that intermodal competition further mitigates any competitive concern. In particular, the Applicants note the rise of VoIP, and the announcement that Google will provide VoIP, and that eBay recently purchased Skype, a VoIP service provider."[92] The Applicants argue that "the record demonstrates that customers are actually turning to various intermodal alternatives in significant numbers today."[93]

TURN argues against acceptance of the Advisory Opinion, claiming that it "very seriously misunderstands the nature and likely result of the proposed Verizon/MCI merger"[94] stating that it "suspects that the AG [Attorney General] did not examine and does not understand [TURN's] evidence."[95]

TURN's evidence focuses on the calculation of the HHI. TURN argues that application of the Guidelines framework to the evidence in the proceeding suggests unacceptable increases in the HHI and faults the Advisory Opinion for its failure to conduct such an analysis.[96] This, in TURN's view, indicates that the proposed merger would lead to unacceptable increases in market concentration

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[91] Joint Applicants Opening Brief, p. 22.

[92] Joint Applicants Opening Brief, p. 23.

[93] Joint Applicants Opening Brief, p. 28.

[94] TURN Opening Brief, p. 61.

[95] TURN Opening Brief, p. 62.

[96] TURN Opening Brief, p. 63.

that would likely increase Applicants' ability to exercise market power in most retail markets in California.[97]

In addition, TURN argues that Applicants' claims concerning intermodal competition are wrong, and that intermodal competition will not offer a viable competitive alternative to basic telephone services. In particular, TURN argues that the Applicants misled the Commission by implying that Verizon's wireline losses are significant and that they are attributable to intermodal competition.[98]

In summary, TURN argues that the proposed merger will have adverse effects on local telecommunications markets and therefore the proposed merger is not in the public interest.[99]

Telscape argues that to protect for "potential anti-competitive impacts," the Commission should require Verizon to "offer a basic two-wire residential loop product at a reduced wholesale price."[100] In particular, Telscape proposes that as a condition of the merger, Verizon would offer UNE-L at a 50% discount.

CALTEL argues that the merger will produce a competitive "disaster."[101] CALTEL recommends that the Commission adopt conditions that it argues will prevent or mitigate significant adverse consequences. In particular, CALTEL recommends adoption of two general conditions:

- The Commission should implement a price cap plan for Verizon's wholesale network elements.

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[97] See TURN Opening Brief, p. 41.

[98] TURN, Opening Brief, p. 56.

[99] TURN, Opening Brief, p. 20.

[100] Telscape, Opening Brief, p. 2.

[101] CALTEL, Opening Brief, p. 1.

- The Commission should require Verizon to provide fair interconnection prices, terms and conditions for IP facilities and capabilities.[102]

Level 3 proposes one merger condition concerning mass market issues.[103] Level 3 argues that in order to ensure that the merger does not harm emerging competition in the market for IP-enabled services, such as VoIP, customers should not be forced to buy traditional local phone service or VoIP service from the ILEC in order to obtain DSL.[104] Level 3 argues that "if an ILEC offers DSL service but requires customers of that service also to buy its traditional local phone service or its VoIP service, then those customers are effectively precluded from using competitive VoIP providers, unless they want to pay twice for voice service. Such a practice of tying together the service offerings is anti-competitive and should not be allowed"[105]

Qwest argues that the proposed merger should not be approved unless the Applicants provide "stand-alone" DSL service. In particular, Qwest notes that the Applicants cite the availability of competitive alternatives to local mass-market telephone service as a reason for approving the merger. Qwest argues

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[102] CALTEL, Opening Brief, p. 8. We discuss CALTEL's recommendation concerning special access below.

[103] Level 3, Opening Brief, p. 19. Level 3 proposes several special access competitive conditions and several general mitigating conditions. They will be discussed separately.

[104] Level 3 Ex. 1. at 35

[105] Level 3 Ex. 1 at 33

that without the availability of "stand-alone" DSL, the VoIP alternative will not be widely available.[106]

ORA argues that the transaction will have an adverse impact on mass-market customers.[107] ORA presents a HHI analysis and claims that the analysis shows that the transaction will have serious anti-competitive impacts.[108] ORA further argues that intermodal competition is "speculative." It proposes a series of measures to maintain competitive choices, including requirements that Verizon offer DSL line sharing at TELRIC-based UNE rates and that Verizon offer "stand-alone" DSL.[109]

Concerning VoIP competition over DSL, ORA states that "By forcibly linking services to its DSL subscription – that is, forcing a bundle of additional services on customers who want only DSL service – Verizon leverages its market power as a monopoly holder of local access and last mile facilities."[110] Additionally, ORA cites New York Attorney General Elliott Spitzer in his analysis of the Verizon-MCI merger dated April 29, saying "Verizon customers wishing to use competitors' VoIP, instead of Verizon's wireline service, will have to choose between securing broadband services from a local cable operator, typically at a higher cost than DSL service – or continuing to purchase the bundled Verizon wireline/DSL product, and adding the cost of a competitor's

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[106] Qwest, Opening Brief, p. 46.

[107] ORA, Opening Brief, p. 26.

[108] ORA, Opening Brief, p. 25.

[109] ORA, Opening Brief, pp. 54-55.

[110] ORA 4, p. 5.

VoIP on top of that."[111] ORA continues: "The availability of stand-alone DSL becomes crucial to competitive choice to the extent the Joint Applicants are correct in their claims that VoIP represents a genuine 'intermodal' challenge to their dominance in the local exchange telecommunications marketplace."[112]

6.1.3. Discussion

We find no reasonable basis upon which to reject the Attorney General's Advisory Opinion. Further, we concur with the Attorney General's principal conclusion that the proposed transaction will have little effect in the local exchange market. In particular, we find the Advisory Opinion's focus on facilities-based competition in local markets appropriate and consistent with the approaches commonly used to review transactions such as this. As the Advisory Opinion notes, MCI does not have significant local facilities and its provision of local service does not affect industry output, and that therefore the transaction does not adversely affect competition in the mass market.

In addition, MCI has elected to exit the local market, and thus it no longer provides price constraining competition to Verizon. Speculation that MCI may return to this market is unconvincing.

Similarly, we agree with the Advisory Opinion that HHI analysis does not provide relevant insight into the dynamics of this market, and is not needed to perform a competitive analysis. Indeed, since the Advisory Opinion finds that the relevant local market is that of facilities-based service providers to mass market customers, and since MCI provides no facilities-based services in local

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[111] *Id.*

[112] ORA 4, p. 7.

mass markets (and therefore zero market share), and has no plans to offer service to local mass market customers, facilities-based or otherwise, in the future, then the acquisition of MCI will produce no increase in the HHI for this market.

As a result, TURN's criticism of the Advisory Opinion is particularly misguided. TURN's calculation of dramatic increases in the HHI arise from its definition of the local market to include "resold" or "UNE-P" services. TURN fails to recognize that the Advisory Opinion clearly links its restriction of the market to "facilities-based local services" to traditional competitive analysis that looks at whether a merged entity can manipulate the supply of the service, as well as to recent precedents used by the FCC in examining telecommunications markets that focus on facilities-based competition (which TURN argues do not apply). In addition, we also note that the FCC's competition policy supports just this type of facilities-based approach to competition, for it has recently eliminated UNE-P as a competitive entry mechanism in the TRRO decision and will phase out all pricing at UNE-P levels. Thus, in this regulatory environment, it would make little sense to include UNE-P resold service in any analysis of market shares, particularly on a forward going basis.

Rather than acknowledge this fundamental disagreement, TURN simply claims that "the AG did not examine and does not understand [the] evidence;"[113] and charging that "Other AG conclusions make no sense…"[114]

Most importantly, TURN's argument does not diminish the relevancy of the Advisory Opinion's straightforward analysis: If MCI is providing no

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[113] TURN Opening Brief, p. 62.

[114] *Id.*

telecommunications services in a market except through the resale of a Verizon service that the FCC is in the process of eliminating, then consolidation with Verizon should not affect the supply of telecommunications service to the market in any way. Without an increase in the ability to restrict supply of telecommunication services in a market, the merged firm does not have an increase in market power.

Furthermore, we find that intermodal competition will continue to provide a check on future anticompetitive outcomes in the local exchange market, but for this to remain a viable check in a consolidating and converging industry, consumers must have unfettered access to competitive VoIP services.

Applicants state that the transaction "is in keeping with the wider industry trend toward convergence and consolidation, which will allow companies to create the capabilities necessary to offer the full array of products and services customers …demand."[115] Applicants argue that "competition in the provision of communications services has expanded well beyond traditional wireline boundaries, such that customers of all types have choices among various types of service providers to meet their communications needs."[116]

Applicants further state that the transaction will "simply allow MCI and Verizon to use one another's strengths to become a stronger competitor in the evolving, increasingly intermodal, communications industry."[117] We agree with Applicants that industry consolidation and convergence have "fundamentally

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[115] Joint Application of Verizon Communication, Inc. and MCI, Inc. p. 13.

[116] Joint Application of Verizon Communication, Inc. and MCI, Inc. pp. 28-29.

[117] Joint Application of Verizon Communication, Inc. and MCI, Inc. at 12

changed the playing field and the nature of competition for wireline carriers,"[118] and that "VoIP has rapidly become an important source of communications competition."[119]

Therefore, we agree with Qwest, ORA and Level 3 that customers' access to competitors' VoIP over Verizon's DSL service is crucial to protecting consumer choice as the industry consolidates, technology converges, and intermodal competition increases.

Ensuring access to advanced services, including competitive VoIP providers, over DSL broadband is also critical to this Commission's obligation to promote access to broadband and advance telecommunications services, lower prices, and broader consumer choice pursuant to Public Utilities Code § 709.

Public Utilities Code § 709 states that it is the policy of the State of California to assure the continued affordability and widespread availability of high-quality telecommunications services to all Californians; to encourage the development and deployment of new technologies; to assist in bridging the "digital divide" by encouraging expanded access to state-of-the-art technologies for rural, inner-city, low-income, and disabled Californians; to promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct; to remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice.

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[118] Verizon/MCI 22 at 20.

[119] Verizon/MCI 22 at 39

Thus, we believe this Commission has a compelling statutory interest in fostering intermodal competition in the local voice telephony market, as well as fostering access to advanced telecommunications services, such as VoIP. To the extent Verizon forces consumers to separately purchase its traditional local phone service in order to obtain DSL, such a policy frustrates intermodal competition and access to advanced services, undermining the benefits to consumers that Applicants claim would occur as a result of this transaction.

Intervenors' recommendation that Verizon be precluded from bundling its own VoIP product with its DSL Internet service if it chooses to do so, however, has no reasonable basis. National telecommunications policy is clear that, in order to encourage investment in and development of emerging technologies, such as VoIP, these technologies should remain free from unnecessary regulation. The FCC has also occupied the field of regulation in this area, stating that, due to the inherently interstate nature of IP-telephony, VoIP services are under the exclusive jurisdiction of the FCC. Additionally, integrating and bundling advanced services offers benefits to consumers by reducing costs, fostering innovation and lowering prices.

Therefore, as long as there is no evidence that Verizon is using market power to limit consumers' access to competitive VoIP providers or other lawful content using Verizon's DSL broadband service, there is no compelling reason to place conditions on Verizon's ability to bundle its own VoIP product with other advanced services over DSL.

Thus we will order that as a condition of approving this transaction, no later than February 28, 2006 Verizon shall cease and desist from forcing customers to separately purchase traditional local phone services as a condition of purchasing Verizon's DSL service. We further order that no later than

February 28, 2006 Verizon shall submit an affidavit evidencing compliance with this condition of the merger.

In summary, consistent with the Attorney General's Advisory Opinion finding that the proposed transaction will not have adverse impacts on competition in local markets, we reject the recommendations of parties to deny the proposed transaction as anticompetitive. Moreover, with the exception of the requirement that Verizon cease forcing customers to separately purchase traditional local phone service as a condition for obtaining DSL, which we believe is critical to the Applicants' own argument that intermodal competition is a significant check on anti-competitive outcome, we adopt none of the restrictions and/or mitigation measures proposed that concern mass-market services. Therefore, we find that if the Applicants' cease forcing customers to separately purchase traditional local phone service as a condition for obtaining DSL, then the transaction will not have any anti-competitive effects on mass market local services.

6.2. Mass Market Long Distance

The Advisory Opinion then turns to an analysis of the competitive effects on the market for long distance telecommunications services sold to residential and small business customers.

6.2.1. Advisory Opinion finds long distance services "readily available" and that merger will "have minimal effects in concentration."

The Advisory Opinion concludes that the merger will have "minimal effects in concentration levels"[120] on mass market long distance services.

[120] Advisory Opinion, p. 13.

The Advisory Opinion follows the reasoning of the mass market local market analysis, but here the situation is exactly reversed. "MCI is a facilities-based provider of long distance services, while Verizon supplies its long distance customers through resale operations."[121] The Advisory Opinion applies the *WorldCom/MCI* reasoning to this transaction, and finds that the retail services offered by Verizon in this market are "readily available." The Advisory Opinion further concludes "that the relevant market is limited to facilities-based long distance services, and that the merger will have minimal effects on concentration levels."[122]

The Advisory Opinion also notes that the "FCC has repeatedly determined that competition among long distance suppliers is both substantive and national in scope."[123] The Advisory Opinion explicitly rejects the claims that "there are California "submarkets" for long distance services."[124]

In addition, the Advisory Opinion notes that Verizon "does not have a national long-haul network of its own."[125] Moreover, even if "Verizon were to move all of the long-distance services it currently purchases from other carriers onto MCI's network, it would not have a significant impact on those wholesale carriers."[126] Furthermore, Verizon competes at the retail level with many other suppliers of mass-market long distance services who face minimal entry costs..

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[121] *Id.*

[122] Advisory Opinion, p. 15.

[123] Advisory Opinion, p. 13.

[124] Advisory Opinion, p. 14.

[125] *Id.*

[126] *Id.*

Finally, the Advisory Opinion addresses the arguments of Intervenors who claim that the vertical integration of Verizon and MCI networks will have an anti-competitive effect in the long-distance services market. The Advisory Opinion states that the "gist of their theory here is that the wholesale carriers supplying long distance service to Verizon would be disadvantaged once the company moves all of its long distance services onto MCI's network."[127] The Advisory Opinion notes that there is no evidence that the loss of traffic will harm these carriers, for Verizon's purchases account for only about 3 percent of total industry revenues.[128] Moreover, if the merger leads to efficiencies for Verizon and MCI, the Advisory Opinion finds this "neither surprising nor troubling" and notes that the goal of antitrust policy is the "protection of competition, not competitors."[129]

6.2.2. Position of Parties

The Applicants support the analysis of the Advisory Opinion on this matter. Although the bulk of the Applicants' analysis focuses on the mass market for local service, they repeat the argument of the Advisory Opinion[130] and further argue that MCI, the mass market business of which is in decline, cannot provide "price constraining competition to Verizon absent the transaction, and hence the transaction has no adverse competitive effect."[131] Finally, the Applicants argue that consumer surveys "show that wireless service

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[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] See Joint Applicants Opening Brief, p. 21.

[131] Joint Applicants Opening Brief, p. 22.

has displaced 60 percent of long distance and 36 percent of local calling in households that have wireless phones."[132]

In general, parties to this proceeding did not address the mass market for long distance services separately from that of mass market local exchange services. In an argument related to this issue, TURN argues that the Applicants have failed to "demonstrate that the proposed merger will not harm competition for residential services other than primary network access connections."[133] It is, however, difficult to find an analysis by TURN on point because it objects to the market definitions in the Advisory Opinion. TURN does not specifically address the long distance market in its briefs. Although TURN addresses this market in its reply testimony, it notes that this market is "rapidly disappearing."[134]

6.2.3. Discussion

We find no reasonable basis upon which to reject the Attorney General's Advisory Opinion that concludes that the merger will have "minimal effects on concentration levels"[135] on mass market long distance services.

Once again, we find the Advisory Opinion's focus on facilities-based competition in local markets appropriate and consistent with the approaches commonly used to review transactions such as this. As the Advisory Opinion notes, Verizon does not have significant long distance facilities and its provision of long distance service does not affect industry output, and that therefore the

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[132] Verizon/MCI 22, ¶ 34.

[133] TURN, Opening Brief, p. 46.

[134] TURN 1, p. 168.

[135] Advisory Opinion, p. 13.

transaction does not adversely affect competition in the mass market for long distance services.

In addition, MCI has also elected to exit this market, and thus it no longer provides price constraining competition to Verizon. Speculation that MCI may return to this market is unconvincing. Moreover, this telecommunications market sector has been open to competition for the longest time, and the change in market structure brought about by this merger are not significant. In particular, since Verizon's purchases of long distance wholesale services amount to only 3 percent of total industry revenues, we see no anti-competitive outcomes arising from its consolidation with MCI.

Furthermore, we find that evidence provided by the Applicants concerning the migration of mass market long distance services to wireless services convinces us that intermodal competition is already present in this market.

In summary, we find that the preponderance of the evidence in the record supports the conclusion of the Advisory Opinion that this merger will have "minimal effects" on concentration levels in this market; and no credible evidence exists that supports a finding that the merger will have an anticompetitive outcome in this market. We therefore conclude that the merger will have no anti-competitive effects in the mass market for long distance telecommunications services.

6.3. Enterprise Services

Following the FCC, the Advisory Opinion recognizes a separate market for large businesses and government users, which the FCC calls the enterprise market. The Advisory Opinion analyzes this market segment next.

6.3.1. Advisory Opinion finds merger tentatively concludes that "merger will not cause undue increases in concentration levels."

Concerning the market for enterprise services, the Advisory Opinion tentatively concludes that the proposed merger of Verizon and MCI "will not adversely affect competition in this sector."[136]

The Advisory Opinion broadly defines the relevant product for enterprise customers "to include the full array of highly differentiated advanced information services that large businesses and government users demand"[137] and finds that the "relevant geographic market is the United States."[138]

The Advisory Opinion notes that the Applicants:

> … have focused on different sectors of the enterprise services market. MCI is a leading supplier to national customers that require long distance and complex or merged services. Verizon is a regional provider of local voice and traditional data services.[139]

The Advisory opinion cites an independent analysis by Lehman Brothers to confirm this analysis, estimating that:

> for 2005, AT&T's share [of large enterprise and medium sized businesses] will be 15.5 percent, SBC will have 13.1 percent, MCI will have 11.8 percent; Verizon's share will be 10.1 percent, Sprint's 5.9 percent; Qwest's 5.7 percent; BellSouth's 5.5 percent; Level 3's 1.2 percent; XO's 0.9 percent; and the rest of the industry, including systems integrators and CLECs will have 30.4 percent.[140]

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136 Advisory Opinion, p. 18.

137 Advisory Opinion, p. 15.

138 Advisory Opinion, p. 16.

139 Advisory Opinion, p. 16, footnotes omitted.

140 Advisory Opinion, pp. 16-17, footnotes omitted.

Based on this and other evidence, the Advisory Opinion concludes that "Although we lack detailed data, it appears that the industry is relatively unconcentrated."[141]

The Advisory Opinion provides additional support for its conclusion based on multiple FCC determinations. The Advisory Opinion states that "the FCC found in 1990 that the enhanced services market was 'extremely competitive.'[142] Subsequent entry by the BOCs, cable companies, and other well-financed firms further increased market competitiveness."[143] The Advisory Opinion also notes that the "FCC concluded in the 2005 Triennial Review Remand Order that the market was "competitive."[144] Based on these considerations, the Advisory Opinion concludes tentatively that "the merger will not cause undue increases in concentration levels."[145]

The Advisory opinion also finds that it is unlikely that the merger would "facilitate collusion"[146] and finds that a strategy of mutual forbearance with SBC "would have little likelihood of success."[147] In particular, the Advisory Opinion finds the Intervenors' scenarios on collusion and mutual forbearance implausible in light of the heterogeneity of the size, geography, and services demanded in this market.

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[141] Advisory Opinion, p. 17.

[142] Advisory Opinion, p. 17, footnote omitted.

[143] *Id.*

[144] Advisory Opinion, p. 14, citing *In re Unbundled Access to Network Elements,* Order on Remand, WC Dkt. No. 04-313 the TRRO, at ¶ 36, n. 107

[145] *Id.*

[146] *Id.*

[147] Advisory Opinion, p. 18.

The Advisory Opinion then concludes:

> Therefore, although additional data is required to fully assess post-merger competition in the enterprise market, we tentatively conclude that this merger will not adversely affect competition in this sector. We analyze separately the impact of this merger on special access."[148]

6.3.2. Position of Parties

In general, the Applicants support the findings of the Advisory Opinion and provide additional arguments in support of their view that the merger will not have anti-competitive effects in the enterprise market.

The Applicants argue that the "loss of MCI as an independent bidder for enterprise services is not economically or competitively meaningful, given that Verizon and MCI do not currently compete for the same enterprise customers to a meaningful degree."[149] They further argue that the market is highly competitive with numerous and significant competitors.[150] In addition, they claim that customers in this market "are sophisticated purchasers who typically employ competitive procurement practices."[151] The Applicants conclude that "it is not necessary for the Commission to find that intermodal alternatives are part of this market in order to determine that the transaction does not adversely affect competition for enterprise services."[152] Nevertheless, the Applicants' witness presented substantial testimony on the present competition in this particular

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[148] Advisory Opinion, p. 18.

[149] Joint Applicants Opening Brief, p. 30 citing Ex. Verizon/MCI 22 ¶ 102.

[150] Joint Applicants Opening Brief, p. 30.

[151] Joint Applicants Opening Brief, p. 31 citing Ex. Verizon/MCI 22 ¶ 126.

[152] Joint Applicants Opening Brief, p. 31.

market, both intra and intermodal, and concludes that "the acquisition will not be harmful to enterprise customers."[153] In particular, in this segment, the Applicants find that IXCs, Global Network Service Providers (such as Deutsche Telekom), Systems Integrators (such as Lockheed Martin and EDS and Equipment Providers (such as Cisco), CLECs, DLECs and Cable companies, and wireless providers all compete and will prevent anti-competitive outcomes.[154]

ORA argues that the merger will have anti-competitive consequences for enterprise markets. ORA argues that "MCI is a direct competitor of Verizon in the enterprise market, and there is no basis for concluding that, absent the merger, Verizon would not be as aggressive a competitor for enterprise business as it has been for consumer business."[155] ORA cites the rapid growth that Verizon has achieved since its entry into the enterprise markets.

TURN argues that the enterprise market is concentrated and that the Applicants have failed to make a case supporting the merger. TURN argues that "Applicants have not furnished any data that would allow the Commission to understand just how concentrated this market will become should the merger be approved."[156] TURN concludes that it "would be utterly irresponsible for regulators to allow the proposed merger to proceed without having any information whatsoever regarding how concentrated the enterprise market will become should the merger be approved …"[157]

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[153] Verizon/MCI 22, p. 83.

[154] Verizon/MCI 22, pp. 64-83.

[155] ORA, Opening Brief, p. 26.

[156] TURN, Opening Brief, p. 55.

[157] *Id.*

6.3.3. Discussion

We reach the conclusion that the merger will not adversely affect competition in this sector.

The enterprise market has been highly competitive for some time, and evidence indicates that it is not highly concentrated. Although the Advisory Opinion stated that additional data would be required to fully assess post-merger competition in the enterprise market, the Attorney General tentatively concluded that this merger will not adversely affect competition in this sector. We find no reasonable basis upon which to reject the Attorney General's Advisory Opinion, and based upon the array of evidence in the record and multiple FCC findings concerning this market that support the Advisory Opinion's conclusions, we conclude that this merger will not produce an anti-competitive outcome.

Although Verizon and MCI operate in the same enterprise market, as stated above, they focus on different sectors of this market. Thus, despite ORA's allegation, Verizon and MCI are not direct competitors. As a result, the merger will not restrict the supply of telecommunications services in any way, but will instead create a competitor with a wider range of service offerings.

Although TURN urges us to consider more data, we conclude that the record contains sufficient evidence on which we can base a decision. In particular, the Applicants' evidence concerning the range of firms and intermodal competitors is particularly extensive.[158] Further, the string of FCC decisions, ending with the TRRO decision of this year, all finding that this

[158] See Verizon/MCI pp. 64-83.

market is highly competitive, makes it implausible that the consideration of more data would do anything other than confirm the Advisory Opinion's conclusion. Thus, we find that the Applicants have demonstrated through a preponderance of the evidence that this merger will not have an anti-competitive effect in the enterprise market.

6.4. Special Access Services

The market for special access involves dedicated point-to-point facilities that are primarily high capacity (e.g., DS1 or greater) connections that can be used to connect an end user to an IXC s point of presence, to connect two end user locations, and to connect end users to CLEC, ISP, wireless or other competitive networks. The Advisory Opinion finds that there is a separate relevant market for the various special access services sold by the Applicants.[159]

6.4.1. Advisory Opinion finds "potential entry here should be sufficient … to counteract any potential anticompetitive effects."

The Advisory Opinion states that the principal "competitive issue raised by this merger is whether it will enhance the ability of the surviving firm to exercise market power over special access DS1 and DS3 services."[160] The Advisory Opinion concludes that "potential entry here should be sufficient … to counteract any potential anti-competitive effects."[161]

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[159] Advisory Opinion, p. 10.

[160] Advisory Opinion, pp. 18-19.

[161] Advisory Opinion, p. 21.

The Advisory Opinion notes that "Verizon provides special access predominantly on a wholesale basis to other carriers."[162] The Advisory Opinion notes that although MCI does not market its services as "special access," it does offer an equivalent service called "Metro Private Line."

Based on an analysis of data at a very granular level, the Advisory Opinion finds:

> First, the available data reveals that only a very small number of buildings in Verizon's California territory served by MCI are subject to any potential reduction in competition. Second, the majority of the MCI-lit buildings are in Verizon's California service areas where other CLECs operate within close proximity; this facilitates the ability of other firms to replace MCI as a competitor in serving these buildings.[163]

The Advisory Opinion then examines the construction timing of laterals and fiber rings. Based on this analysis of data, the Advisory Opinion concludes that:

> Thus, potential entry here should be sufficient within the Merger Guidelines to counteract any potential anticompetitive effects of the merger on special access DS1 and DS3 Services.[164]

6.4.2. Position of Parties

Applicants argue that very few of MCI's fiber rings are in Verizon territory. They were built to connect customers who are largely in metropolitan Los Angeles and San Francisco, which are both in SBC territory. As a result,

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[162] Advisory Opinion, p. 19.

[163] Advisory Opinion, p. 21

[164] *Id.*

Applicants claim that "MCI does not provide a significant level of special access services in Verizon California's service areas."[165]

The Applicants claim that in the few areas where there are overlapping facilities, there are many other competitors, thus no monopoly rents may be secured.[166] The Applicants note that "MCI's facilities in Verizon California's region are overwhelmingly located in areas that meet the FCC's criteria for determining that it is economic for competing carriers to deploy new facilities and where competitors have in fact deployed fiber facilities.[167]

The Applicants claim that special access is competitive not only in the MSAs that the FCC has declared competitive, but at the building level as well. The Applicants state that "nearly half of MCI's lit buildings are already connected to at least one other competitor's fiber."[168] The Applicants also cite with approval the Advisory Opinion's point of the ease of competitors to construct a "service lateral" to serve customers.[169]

ORA, in response, argues that evidence shows that "once MCI and AT&T no longer submit separate competitive bids, the wholesale price discount from special access rates will decrease on average by over 15% -- resulting in an overall increase in special access rates."[170]

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[165] Joint Applicants Opening Brief, p. 33.

[166] Verizon/MCI Exhibit 5, pp. 79-81.

[167] Joint Applicants Opening Brief, p. 34, citing Ex. Verizon/MCI 22 at ¶ 142.

[168] Joint Applicants Opening Brief, p. 36.

[169] *Id.*

[170] ORA, Opening Brief, p. 29.

Intervenors argue that the elimination of competition between MCI and Verizon will hamper competition and the ability of CLECs to get deeply discounted services. They argue that special access markets are highly concentrated,[171] and in many instances, the only competition to Verizon in its service area for competitive access is MCI or AT&T. Intervenors are concerned that unless regulators take appropriate steps, carriers needing special access/private line will not have any competitive alternative from which to purchase services.[172] Qwest and CALTEL claim that the removal of MCI (and AT&T) will remove competitive pressures on Verizon's special access pricing.[173] CALTEL asks that the Commission cap intrastate access rates for five years and recommends that the FCC do the same.[174]

Level 3 testifies:

> Obviously, competitors cannot effectively compete in an environment where it depends upon the one remaining supplier who is free to engage in anti-competitive conduct and set market prices. Eliminating the sole alternative provider of special access will make it unnecessarily expensive for carriers to reach Tier II and Tier III markets. That in turn will make it more difficult for consumers to obtain the affordable, high speed communications and data services they seek, which in turn makes those markets less economically viable for companies to do business.[175]

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[171] Level 3 Exhibit 1, p. 11.

[172] Level 3 Exhibit 1 at 12 and CALTEL Opening Brief, p. 16.

[173] Qwest Exhibit 1 at 11 and CALTEL Exhibit 2, pp. 35-36.

[174] CALTEL, Opening Brief, p. 18.

[175] Level 3 Exhibit 1 at 15-16.

As a remedy, Level 3 recommends that the Commission order the merged entity to divest overlapping facilities[176] and to adopt regulations concerning the service offerings of the merged firm.[177]

Qwest argues that MCI's alternative network facilities play a disciplining role with respect to Verizon's special access prices.[178] Qwest states that MCI (and AT&T) exerts competitive pressure on the special access market not only because of their competing facilities but also because with their high volumes of traffic and their ability to threaten to expand their facilities as an alternative to purchasing special access from Verizon.[179] This constrains monopoly pricing in two ways: it gives an incentive to the monopoly to avoid by-pass and to avoid the presence of another facilities-based supplier competing for the monopoly customers in that location.[180] Qwest recommends that the Commission should find that the merger does not meet the requirements of § 854 unless Verizon and MCI agree:

- To divest MCI's facilities and customers that overlap those of Verizon in the state;
- That Verizon will continue to offer intrastate and interstate special access, private line or its equivalent service at the lowest rates currently offered by either Verizon or MCI;
- That Verizon not favor MCI or any other post-merger affiliate …

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[176] Level 3 Opening Brief, p. 8.

[177] Level 3, Opening Brief, p. 13.

[178] Qwest, Opening Brief, p. 11.

[179] Qwest, Opening Brief, pp. 9-10.

[180] Qwest Exhibit 1 at 13 and Qwest Opening Brief at 9

- That, post merger, Verizon/MCI will offer to competitors in California any services or facilities that it purchases from other incumbent local exchange carriers … at the same rates, terms and conditions …
- That, post merger, Verizon and MCI will give its wholesale customers in California a "fresh look" right to terminate their contracts …[181]

6.4.3. Discussion

We find no reasonable basis upon which to reject the Attorney General's conclusion that there is little overlap of facilities and that potential entry should be sufficient to counteract any anti-competitive outcomes.

A review of the Advisory Opinion's analysis of this issue shows that it is meticulous. The Advisory Opinion examined the competitive data at the level of specific buildings in those areas where facilities overlap. In addition to examining the presence of competitors at a very granular level, it also examined the locations of customers and fiber routes, concluding that the ability to construct fiber laterals make potential entry a real competitive threat. The level of granularity conducted by the Attorney General in this analysis is more extensive than any such analysis in a merger proceeding reviewed by this Commission in the past 10 years. The analysis indicates that MCI serves only a very small number of buildings in Verizon's California territory with its own facilities.

MCI fiber facilities in Verizon California s service territory are overwhelmingly located in areas that meet the FCC's criteria for determining that it is economic for competing carriers to deploy new facilities and where

[181] Qwest, Opening Brief, p. 49.

competitors have in fact deployed fiber facilities. In the limited number of Verizon California wire center clusters where both Verizon and MCI have fiber facilities, there is at least one competitor other than MCI which has also deployed fiber facilities. In all but one of these clusters more than one additional competitor has deployed fiber.

At the level of individual wire centers, there are, on average, more than three competitors with fiber facilities deployed in wire centers in which Verizon and MCI fiber facilities overlap. Each of these overlapping wire centers is located in MSAs that the FCC has declared to be substantially competitive, as reflected in its treatment of MSAs under its pricing flexibility rules.

Finally, due to low barriers of entry, loss of MCI as an independent competitor in the market for special access services would have no impact on the current constraints on Verizon s pricing.

In contrast to the detailed and convincing review and sound analysis conducted by the Attorney General and supplemented by Verizon, the Intervenors failed to engage this issue and analysis on a substantive level. In particular, although Qwest proposes that MCI serves as a price discounter of special access that disciplines the entire market, Qwest provides no explanation of how MCI can provide such market discipline in Verizon's territory where it has very few facilities and is hardly in the market. Such a result defies logic. According to Qwest's own evidence, MCI has never negotiated the terms of any Verizon tariff plan in California.[182] Qwest's "evidence" concerned negotiations regarding special access services provided outside California that took place

[182] Applicants' Reply Brief, pp. 19-23

almost twenty years ago, and was thoroughly rebutted by Applicants in their reply brief and by the evidence submitted concurrently. Nor did Qwest offer anything to controvert the facts on which the AG opinion rests – i.e., that MCI serves only a handful of buildings with its own fiber in Verizon California's region and that there are no barriers to entry in those areas. Qwest's claims that the draft decision committed error by relying on the AG opinion are thus baseless.

As a result, we find no merit to the arguments of ORA, CALTEL, Level 3 and Qwest concerning special access, and no rational basis for adopting the restrictions that they propose. There is no rational basis for either rejecting or modifying the Advisory Opinion's findings that no merger conditions are necessary in this market. We therefore conclude that the proposed merger will have no anticompetitive impact in this market.

6.5. Internet Backbone

The Advisory Opinion concludes that a relevant market for Internet backbone services can be defined.[183] Following the sequence in the Advisory Opinion, we next address the effects of this transaction on this market.

6.5.1. Advisory Opinion finds markets "are unconcentrated and will remain so after completion of the merger."

The Advisory Opinion notes that several parties to this proceeding have challenged the integration of Verizon's Internet access services into MCI's Internet backbone, but that they have not alleged specific competitive effects for

[183] Advisory Opinion, p. 10.

either the access or backbone service.[184] The Advisory Opinion, however, finds that "both of those markets are unconcentrated and will remain so after the merger."[185]

The Advisory Opinion states that the Internet combines three types of participants: end users, Internet service providers (ISPs) and Internet backbone providers (IBPs). It notes that Verizon is a vertically integrated ISP that also provides Internet backbone services, while MCI is a Tier 1 IBP and is not involved in retail broadband service markets.[186]

The Advisory Opinion finds that the market for ISP services is "highly unconcentrated, and will remain so post-merger."[187] The Advisory Opinion notes that post-merger, "the combined firm would account for at most only 9.5% of the total Internet traffic in North America."[188] The Advisory Opinion also concluded "the combined Verizon-MCI would not have the market share necessary to successfully engage in anticompetitive activities in such an unconcentrated Internet backbone market."[189]

The Advisory Opinion discusses the contention of Intervenors, specifically Pac-West, that combining Verizon with MCI, a Tier 1 peering provider would raise prices for IP-based services or induce degraded services. The Advisory Opinion finds these scenarios "unlikely" and notes that the mechanism by which

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[184] Advisory Opinion, p. 21.

[185] *Id.*

[186] Advisory Opinion, p. 22.

[187] Advisory Opinion, p. 23.

[188] *Id.*

[189] Advisory Opinion, p. 23.

these outcomes would occur is not explained.[190] The Advisory Opinion finds even the "hypothesized motivation to predatorily degrade rivals' ISP traffic" to be "unclear."[191]

6.5.2. Position of Parties

The Applicants strongly support the conclusion of the Advisory Opinion that the transaction will not adversely affect Internet backbone services.[192] The Applicants state that:

> While Verizon will become a Tier I Internet backbone provider after it acquires MCI, that status, in itself, says nothing about whether Verizon would have market power … the transaction will have little effect on concentration levels in the Internet backbone market, because Verizon currently has a very limited Internet backbone.[193]

The Applicants argue that in light of their low market share, any attempt by them to engage in anticompetitive actions would "expose the merged company to retaliation by other providers who collectively carry more than 90% of the Internet traffic in North America.[194] The Applicants conclude by arguing that Verizon and MCI "would not have a rational incentive to engage in the anticompetitive behavior hypothesized by these intervenors …"[195]

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190 Advisory Opinion, pp. 23-24.

191 Advisory Opinion, p. 24.

192 Joint Applicants Opening Brief, p. 41.

193 Joint Applicants Opening Brief, pp. 41-42.

194 Joint Applicants Opening Brief, p. 42.

195 Joint Applicants Opening Brief, p. 43.

CALTEL and Covad (joint testimony), Cox, and ORA claim that following the transaction, Verizon will lack the incentive to exchange Internet traffic through peering arrangements with other backbone providers on reasonable terms (as it now does), and that the Commission should order it to continue to do so.[196] In addition, ORA, CALTEL and Covad (joint testimony), Level 3 and Pac-West claim that, post-transaction, Verizon would engage in discrimination, in terms of price and quality, for Internet traffic it exchanges with other networks.[197]

6.5.3. Discussion

We find no reasonable basis upon which to reject the Attorney General's Advisory Opinion that concludes that the Internet backbone and ISP markets are highly unconcentrated and will remain so after the merger. Post-transaction, MCI will remain the fourth largest IBP, with less than a 10 percent share of the traffic. MCI will face competition from SBC/AT&T, Sprint, Qwest, SAVVIS, AOL, and others. Thus, we conclude that this transaction will not adversely affect the market for Internet backbone services or ISPs.

The scenarios painted by CALTEL, Covad, Cox, Pac-West, Level 3, and ORA concerning possible discriminatory treatment and anticompetitive pricing have no basis in fact. Indeed, in light of the small percentage of the Internet backbone that the merged company will control, discriminatory actions by the merged company would invite retaliation and therefore eliminate any incentive to engage in such behavior, which would jeopardize Verizon's access to 90% of

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[196] CALTEL 1 (including Covad) at 45-48; Cox 1, pp. 13-14.

[197] ORA 1 at 70-71; CALTEL 1 (including Covad) pp. 45-46; Level 3 Ex. 1 pp. 28-31; Pac-West 1 pp. 25-28.

the Internet.[198] For similar reasons, there are no incentives for the combined company to selectively downgrade packets exchanged with competitive networks.

Thus, we reach the same result as the Advisory Opinion – the proposed merger will not produce anticompetitive outcomes in this area.

7. Do the Proposed Transactions Meet the Public Interest Tests Contained in § 854(c)?

As noted above, we have elected to conduct a review using the § 854(c) to guide our determination of whether this transaction is in the public interest. The § 854(c) criteria cause us to ask whether this transaction:

1. Maintains or improves the financial condition of the resulting public utilities doing business in California?
2. Maintains or improves the quality of service to California ratepayers?
3. Maintains or improves the quality of management of the resulting utility doing business in California?
4. Is fair and reasonable to the affected utility employees?
5. Is fair and reasonable to a majority of the utility shareholders?
6. Is beneficial on an overall basis to state and local economies and communities in the area served by the resulting public utility? And
7. Preserves the jurisdiction of the Commission and its capacity to effectively regulate and audit public utility operations in California?[199]

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[198] Advisory Opinion, p. 24.

[199] As noted earlier, § 854(c)(8) enables the Commission "Provide mitigation measures to address significant adverse consequences that may result." Since this does not create

Footnote continued on next page

Finally, the Commission must consider the implications for competitive markets of the application as well as any environmental impacts.

7.1. Will the Change of Control Maintain or Improve the Financial Condition of the Resulting Utilities Doing Business in California?

Section 845(c)(1) requires that we determine the effect of the proposed merger on the financial condition of the resulting utilities doing business in California.

7.1.1. Position of Parties

The Applicants state that "because this transaction will occur at the level of the parent holding companies, it will have no structural impact on any of the MCI subsidiaries. The transaction will maintain or improve the financial condition of the MCI subsidiaries," since the new company will have the resources to invest in MCI's facilities.[200] Beyond this, Verizon is an established communications provider with a strong balance sheet, investment grade credit and the financial, technological and managerial resources to invest in MCI's network and systems.

MCI states that "the combined company will be in a strong financial position to invest in the existing IP network at a lower cost of capital than MCI

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a standard of review, but provides authority to impose mitigation measures, we will not address this section explicitly here. Instead, we will use the authority to propose any needed mitigation measures in conjunction with our review of criteria 1 through 7. In addition, we will also explicitly address § 854(c)(8) in section 10 (below) in conjunction with our § 854(d) analysis, which gives us the authority to consider "reasonable options" offered by other parties.

[200] Application Section X(A) and Verizon/MCI 3 Section VII(A).

could obtain on its own,"[201] and Verizon states that "absent this transaction, Verizon would have to spend its resources duplicating, at least to some extent, the presence and network assets MCI already has in place."[202] They add that "the combined company will have greater financial strength and flexibility than either company could achieve alone because of its greater size and complementary strengths and assets."[203]

Applicants also state that "with respect to the mass market, MCI's business is already in decline due to a variety of factors unrelated to this transaction, and MCI would not, absent its deal with Verizon, be one of the more significant competitors going forward for mass market customers."[204] The decline of MCI's mass market business is explained in detail in Ex. Verizon/MCI 4, Section IV.

In addition, Applicants state that the increased financial strength of the combined company will support additional investments in advanced technologies. Verizon notes a commitment to invest $2 billion in MCI's networks and information technology systems, including its Internet backbone.[205] In addition, Verizon states that it examined whether this transaction would be expected to impair the parent company's ability to attract capital, and determined that it would not.[206] No credit downgrade has occurred and Verizon

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[201] Verizon/MCI 4 Section VI #61.

[202] Verizon/MCI 3 Section V(A).

[203] Verizon/MCI 3 Section VII(A).

[204] Verizon/MCI 3 Section VI #64.

[205] Ex. Verizon/MCI 1, ¶ 17.

[206] Ex. Verizon/MCI 23, p. 19.

reports that none is expected.[207] Applicants conclude that: "consistent with Commission precedent, the transaction will maintain or improve the financial condition of the affected California utility subsidiaries and thus satisfies the concerns of § 854(c)(1)."[208]

ORA argues that the merger may increase the potential for the parent company and affiliates to exploit the regulated utility and cause the latter financial harm.[209] ORA states that Verizon CA's revenues make up only a small percentage of its parent company's revenues and that after the merger, that percentage will be even smaller. Therefore, ORA concludes that is unlikely the holding company will make decisions based on the interests of Verizon CA and its California ratepayers. In particular, this proposed merger is likely to increase demand on Verizon CA's capital, and would elevate the risk that the regulated utility's revenue streams may be exploited for the benefit of the parent company. In ORA's view, inappropriate cost allocation and the overcharging of regulated entities by their unregulated affiliates have occurred in the past.[210]

ORA argues that the Commission should seek to ensure that a merger that may benefit Verizon's holding company does not result in long-term harm to the subsidiaries providing telecommunications services in California. In particular, ORA recommends that the Commission require the imposition of a "first priority

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[207] *Id.*

[208] Joint Applicants Opening Brief, p. 46.

[209] ORA, Opening Brief, page 38.

[210] ORA 3.

condition" for Verizon to mitigate possible exploitations that affiliates may place upon Verizon CA."[211]

TURN argues that the Applicants have failed to show that the proposed merger will maintain or improve the financial condition of the resulting public utility doing business in California.[212] In particular, TURN notes that the Applicants merger will have a negative financial impact on the merged entity for several years. TURN concludes that it is "implausible that the merger could improve the financial condition of the Verizon-CA utility in the short-run and it is likely to do at least some harm."[213]

7.1.2. Discussion: The Merger Will Maintain or Improve the Financial Condition of the Resulting Public Utility.

We find that this merger will maintain or improve the financial condition of the resulting public utility. First, the transaction, with the resulting influx of $2 billion investment into MCI, will improve the financial condition of that utility. Second, Verizon has demonstrated that the transaction will not impair the holding company's ability to attract capital, and on credit downgrade has occurred or is expected.[214]

ORA's financial concerns largely focus on the holding-company structure of organization rather than the specifics of the transaction. ORA claims that the

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[211] ORA, Opening Brief, p. 41, citing Ex. ORA 3, pp. 12-13.

[212] TURN, Opening Brief, p. 69.

[213] TURN, Opening Brief, p. 71.

[214] See Applicants Reply Brief, p. 46.

holding company structure will lead to adverse financial consequences for the California utilities owned by Verizon.

ORA fails to note that Verizon's California utility is already a small part of a large holding company, and thus ORA's concerns are largely unrelated to this transaction. Despite the fact that this holding company structure has been in place for some time, the Commission has seen no negative consequences for the Verizon California utility that have resulted. Moreover, ORA has not demonstrated that any adverse consequences are even plausible. Thus, ORA's concerns that this transaction will have adverse financial consequences has no credible basis. As a result, there is no reasonable basis for imposing ORA's recommendation that the Commission impose a "first priority condition" on Verizon.

TURN's objections are more subtle. TURN claims that Verizon has simply failed to demonstrate that the merger will produce no adverse consequences, and notes that the initial impact of the merger is projected to have negative consequences on finances.

As noted above, our examination of the facts in this record leads to a different result. We find that Verizon has demonstrated that this transaction will improve the financial situation of MCI's California utilities and that the transaction will not have an adverse impact on Verizon's California utilities. Thus, we conclude that the merger will meet the standard of § 854(c)(1). Moreover, we note that TURN's focus on short term financial flows adopts a "cash" approach, which treats investments as an expense in the year in which it they are made, instead of converting investments into an annual expense based on depreciation and a return on unamortized investment. This later approach is the one more typically used by the Commission.

7.2. Will the Merger of the Parent Companies and the Change of Control Maintain or Improve the Quality of Service to California Ratepayers?

Section 854(c) (2) provides calls for the Commission to examine whether the transaction is likely to "maintain or improve the quality of service to public utility ratepayers" in California.

7.2.1. Position of Parties

Verizon California, citing D.03-10-088, notes that the Commission has found that Verizon provides exceptional and high-quality service, and that its overall service is consistent with the Commission standards set forth in General Order 133-B. It further states that its continuing commitment to providing high quality service will not be affected by the transaction.[215] In support of this position, the Applicants state that the "structure and operation of the various utility subsidiaries will remain in place, as will the skilled workforce required to operate them."[216] The Applicants note that the current companies are the products of numerous prior mergers, and therefore "possess the technical and managerial expertise to maintain focus on customer service and service quality both during and after corporate reorganizations."[217] The Applicants further state that the increased financial strength and the investments that will follow the merger will support future service quality.[218] Finally, the Applicants cite

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[215] Joint Applicants' Opening Brief, p. 46.

[216] Joint Applicants' Opening Brief, p. 47.

[217] *Id.*

[218] Verzion/MCI-3, ¶ 47.

testimonials given at the public participation hearings as supporting its view that the stronger company will be able to provide better service quality.[219]

ORA states that it does not dispute Verizon's claim that it had excellent service quality in the period 1990-2001, but argues that service quality, especially as measured by "residential repair interval," has declined since 2001.[220] ORA also states that there has been "a substantial volume of customer complaints about MCI's service"[221] and recommends an investigation of MCI's local service quality. In addition, ORA recommends the imposition of penalties for service outages and a requirement to maintain or improve service quality. In addition, ORA recommends an investigation of service quality in the Verizon West Coast service territory.

TURN argues that the Applicants have failed to prove that the merger will maintain or improve the quality of service provided to California ratepayers.[222] TURN cites apparent contradictions in the testimony of Verizon's witness. TURN speculates that MCI's poor practices will infect Verizon and states that the Applicants' assertions concerning quality as vague.[223] TURN further argues that the "best practices" improvements could be made without a merger. TURN also argues that the poor financial situation of MCI is more likely to be a drag on

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[219] Joint Applicants' Opening Brief, p. 47.

[220] ORA Opening Brief, p. 43.

[221] ORA Opening Brief, p. 47.

[222] TURN Opening Brief, p. 71.

[223] TURN Opening Brief, p. 72.

investment by Verizon and more likely to slow down Verizon's network investments.[224]

DRA states the merger is "not in the interests of public utility ratepayers with disabilities."[225] DRA alleges that a shift in focus to the enterprise market "threatens service quality for people with disabilities."[226]

7.2.2. Discussion: Merger Will Maintain or Improve Service Quality

We find that the merger will maintain or improve service quality. Current operations and networks are largely complementary, with little overlap. No integration of the two companies at the operational level is contemplated at this time. As a result, it is unlikely that the merger will have any impact on service quality in the short run.

Furthermore, as this Commission has previously found, Verizon has a record of excellent service quality, and it is more likely that the service quality orientation of the larger acquiring entity will cause a cultural change in the acquired company. Verizon's record concerning the provision of telecommunications services to the disabled community and its demonstrated commitment to disabled access make the concerns raised by DRA highly dubious. DRA's argument rests heavily on the assumption that a company can do only one thing well, and that by entering the enterprise market, service will slip to Verizon's disabled customers. This argument lacks a credible basis. In

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[224] ORA Opening Brief, p. 73.

[225] DRA Opening Brief, p. 2.

[226] DRA Opening Brief, p. 3.

the long run, we are confident that the merger will result in improved service quality for both the general customer base and the disabled community.

Finally, there is no credible basis for ordering investigations into service quality that ORA recommends.

7.3. Will the Merger of the Parent Companies and Changes of Control Maintain or Improve the Quality of the Management of the Resulting Utility Doing Business in California?

Section 854(c)(3) calls for an examination as to whether the transaction will "maintain or improve the quality of management of the resulting public utility" subsidiaries.

7.3.1. Position of Parties

Applicants state that, since the transaction takes place at the holding company level, the merger "will have no immediate effect on the management of Verizon's California subsidiaries." [227] Applicants also state that likewise there will be "no diminution in the management quality of MCI's subsidiaries because gaining access to MCI's skills and expertise, particularly those addressing the enterprise market, is one of the reasons Verizon entered into the Agreement."[228] Verizon further notes that the management of the combined company will be drawn from the current management of both companies, and states that the "experience and expertise will benefit the combined companies and its California subsidiaries."[229]

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[227] Joint Applicants Opening Brief, p. 48.

[228] *Id.*

[229] Joint Applicants Opening Brief, p. 48.

Verizon also states that it will draw on its previous experience and success in past transactions to ensure a smooth transition.[230]

Our review of the record in this proceeding cannot find any allegation that the merger would have an adverse impact on the management of the California subsidiaries of the resulting company.

7.3.2. Discussion: Proposed Transaction Will Maintain or Improve Management Quality

We find that the new company will maintain the quality of its management. First, there is no reason to doubt the statements of the Applicants that a goal of the transfer is to acquire the expertise of MCI in the enterprise market. Moreover, the proposed transfer of control will have no immediate impact on the management of the subsidiaries offering telecommunications services within California. Second, we find no evidence in the record that the proposed transaction will have an adverse impact on management. Thus, the Applicants' statements that there will be no diminution of managerial quality stand unrebutted.

In summary, we find that the proposed transaction will maintain or improve the quality of management.

7.4. Will the Merger of the Parent Companies and Change of Control Be Fair and Reasonable to the Affected Employees?

Section 854(c)(4) provides for an examination as to whether the transaction will be fair and reasonable to the affected utility employees.

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[230] Verizon/MCI 3 ¶ 48.

7.4.1. Position of Parties

The Applicants state that the transaction will not have any direct impact on either Verizon's or MCI's California operations because the amended Agreement does not call for a combination of the companies' operating subsidiaries.[231] The Applicants state that "Approximately one-half of MCI's employees in California at the time of closing will be in the U.S. Sales and Service organization, which encompasses MCI's enterprise sales and support teams."[232] The Applicants note that since gaining MCI's enterprise sales and support expertise is a principal rationale for the transaction, material cutbacks are unlikely.[233] MCI's witness notes that MCI has few California employees in corporate overhead functions or mass market activities, which are the areas most subject to cutbacks.[234] Applicants further argue that the transaction should actually benefit employees by providing more opportunities for employment.[235] Finally, Applicants envision that the stronger company emerging from the transaction will have better growth opportunities and financial stability, and this should result in a higher degree of stability for employees than either company could provide standing alone.[236]

ORA argues that the transaction, as proposed, will have a negative effect on employees and recommends the imposition of a merger condition that the

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[231] Verizon/MCI 3, ¶ 50.

[232] Joint Applicants Opening Brief, p. 49.

[233] *Id.*

[234] *Id.*

[235] Ex. Verizon/MCI 3 ¶ 51 and Ex. Verizon/MCI 23 p. 28-29.

[236] Joint Applicants Opening Brief, p. 50.

Commission "limit California job counts to no more than 5% of MCI's total headcount reductions."[237] ORA argues that to achieve the contemplated merger synergies, that the Applicants "will be eliminating thousands of jobs nationally across both companies."[238] ORA further argues that the proposed merger has the potential to eliminate "hundreds of high-paying California jobs."[239]

TURN argues that the Applicants "have failed to prove that the proposed merger will be fair and reasonable to the affected utility employees."[240] TURN argues that "Having one's job transformed from useful to redundant overnight through no fault of one's own hardly seems a model of fair or reasonable treatment."[241]

7.4.2. Discussion: Changes will be Fair to Utility Employees

The changes proposed will be fair to utility employees. First, the transaction will have no direct impact on either Verizon's or MCI's California operations because it does not call for a combination of the companies' operating subsidiaries.[242] Both ORA and TURN fail to acknowledge that much of MCI's business is in irreversible decline and, consequently, the emergence of a stronger

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[237] ORA Opening Brief, p. 58.

[238] *Id,*, citing Ex. ORA 1 at 60.

[239] *Id.*

[240] TURN, Opening Brief, p. 75.

[241] *Id.*

[242] Ex. Verizon/MCI 3 ¶ 50.

company with the ability to grow will result in a higher degree of stability for employees, particularly for those employees working for MCI.[243]

For these reasons, we find that that the changes resulting from the merger will be fair to employees.

7.5. Will the Merger of the Parent Companies and Change of Control Be Fair and Reasonable to a Majority of the Utility Shareholders?

Section 854(c) (5) provides for an examination as to whether the transaction will be fair and reasonable to the majority of affected utility shareholders.

7.5.1. Positions of Parties

Applicants state that they "have every expectation that the benefits of this merger will enhance the combined entity's prospects for long-term viability, stability and growth, which will benefit all shareholders, and no party has alleged otherwise."[244] The Applicants state that the transaction is expected to eliminate duplicative expense and create operational efficiencies. The Applicants further state that the Boards of Directors of both Verizon and MCI concluded that the transaction is in the best interest of their respective shareholders. On October, 6, 2005, MCI shareholders voted to approve the merger.

Although TURN's protest to the merger raised questions concerning whether the offer of Qwest would be better for MCI's shareholders, TURN submitted no testimony or evidence pursuing this part of its protest.

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[243] Ex. Verizon/MCI 23 at 28-29.

[244] Joint Applicants Opening Brief, p. 50.

7.5.2. Discussion: Transaction is in the Interest of Shareholders

In the GTE/Bell Atlantic merger, the Commission found that the approval of boards of directors, financial advisors and shareholders meets the test of "preponderance of evidence."[245] Further, the proposed merger was accepted by a majority of MCI shareholders on October 6, 2005. There is no evidence in the record alleging that the merger conditions will not be "fair and reasonable to a majority of the utility shareholders."

Thus, we find that the proposed transaction is fair and reasonable to shareholders.

7.6. Will the Proposed Merger of the Parent Companies and Change of Control Be Beneficial on an Overall Basis to State and Local Economies and the Communities Served by the Resulting Utility?

Section 854(c)(6) calls for the Commission to consider whether the merger will be "beneficial on an overall basis to state and local economies, and the communities in the area served by the resulting utility."

7.6.1. Position of Parties

The Applicants argue that the transaction "will result in overall benefits to the State of California and all of its constituencies."[246] The Applicants state that the transaction will promote competition and result in improved service quality and more competitive prices. The Applicants further state that the transaction will be beneficial on an overall basis to state and local economies, and the communities in the areas served by the resulting public utility. Specifically, the

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[245] D.00-03-021, 2000 Cal. PUC LEXIS 398 *218-19 (March 2, 2000).

[246] Joint Applicants Opening Brief, p. 51.

Applicants state that the merger will produce cost savings and other synergies that will be passed through to California customers through competition and market forces. They also state that transaction will also result in the combined company's ability to offer a broader range of services, and more advanced services, to California consumers. The Applicants also argue that the transaction will promote competition in communications in California, resulting in improved quality of service, more competitive prices, and greater technological innovation that will inure to the benefit of customers.

The Applicants further note that during the public participation hearings held throughout the state, many customers and community groups expressed this view. Applicants dispute ORA's estimates of job losses, which we have discussed elsewhere.

Furthermore, the Applicants note that Verizon has a strong tradition of community support, community service, and corporate philanthropy, which it states it "will continue after this transaction."[247] The Applicants state further that the Greenlining Agreement further demonstrates the Applicants' commitment to the community. The Applicants note that under the Greenlining Agreement, they will:

- Participate in a statewide Broadband Task Force.

- Increase corporate philanthropy over the next five years by an additional $20 million above current levels, with a good faith effort to maintain the aggregate contributions to minorities and underserved communities in a manner consistent with its past practice.

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[247] Joint Applicants Opening Brief, p. 52.

- Make a good faith effort to increase the supplier diversity goal for minority business enterprises from the current 15% to 20% by 2010. To achieve this goal, Applicants anticipate spending $1 million over five years in technical assistance to minority businesses and another $1 million to develop Verizon's internal infrastructure devoted to such efforts.

Greenlining supports the Greenlining Agreement, and urges that it be considered in the Commission's determination of whether the transaction meets its general public interest standards as required by § 854. In addition, Greenlining links this Agreement to the one it earlier reached with SBC, and states that "Verizon, to its credit, has agreed to join SBC in jointly leading the efforts to create this Statewide Broadband Task Force."[248]

LIF also supports the Greenlining Agreement, and urges the Commission to approve the pending merger and Greenlining Agreement.[249] LIF believes that the merger and Greenlining Agreement "promotes sound public policy and meets § 854 benefits tests."[250] LIF cites demographic evidence that it states "dictates that a significant part of § 854 benefits should be directed at low-income communities."[251] LIF cites evidence of the digital divide as demonstrating a need for the initiatives contained in the Greenlining

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[248] Greenlining, Opening Brief, p. 4.

[249] LIF, Opening Brief, p. 2

[250] LIF, Opening Brief, p. 4.

[251] *Id.*

Agreement.[252] Finally, LIF cites a variety of Commission decisions that it argues constitute precedents for adoption of the Greenlining Agreement.[253]

ORA, in contrast, argues that the transaction will have a negative effect on the California economy, citing its testimony and arguments concerning employment.[254] ORA argues that the Greenlining Agreement is "procedurally defective,"[255] citing Rule. 51.1(b) of the Commission's Rules of Practice and Procedure, which it says "specifies that the proper way to introduce a proposed settlement is to file a motion …"[256]

TURN argues that the Applicants have failed to "meet a reasonable burden of proof that the proposed [merger] will not harm the state and local economies in California."[257] TURN also argues that that the Greenlining Agreement requires a conference under Rule 51.1(b) and states that the Commission should defer action on the Greenlining Agreement.[258] TURN then raises a series of questions concerning terms of the Greenlining Agreement and the targeting of philanthropic giving by Verizon.

7.6.2. Discussion: Transaction Will Benefit Californians

We find that the transaction will benefit Californians particularly in light of the Greenlining Agreement.

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[252] Exhibit LIF 1 and Exhibit LIF 2.

[253] LIF, Opening Brief, pp 7-10.

[254] ORA, Opening Brief, p. 48.

[255] ORA, Reply Brief, p. 38.

[256] ORA, Reply Brief, p. 39.

[257] TURN, Opening Brief, pp. 76-79; TURN, Reply Brief, p. 50.

[258] TURN, Opening Brief, p. 84.

Pub. Util. Code § 709 identifies access to advanced telecommunications service as a key public policy objective[259]. Several parties to the proceeding identified enhanced access to high speed Internet (broadband) and advanced telecommunications services as a primary benefit to consumers embodied in this transaction. Applicants state that "the transaction is intended to complement and accelerate Verizon's continuing transformation into a premier wireless and broadband provider," and will "further its investment strategy to bring enhanced broadband capabilities to the mass market." [260]

Greenlining and LIF and their respective affiliates intervened in the instant proceeding primarily to ensure that underserved communities receive benefits as a result of the proposed change of control between Verizon and MCI and to ensure that the merger is not adverse to the public interest.

As briefly noted above, on September 15, 2005, Greenlining, LIF and Verizon California entered into the Greenlining Agreement reflecting a five-year commitment by Verizon California to increase corporate philanthropy in California by $20 million above current levels over five years and continue to be a leader in serving underserved communities with a focus, among other things, on bridging the digital divide.

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[259] California Public Utilities Code §709 says in relevant part: "The Legislature hereby finds and declares that the policies for telecommunications in California are as follows: (c) To encourage the development and deployment of new technologies…(d) To assist in bridging the "digital divide" by encouraging expanded access to state-of-the-art technologies for rural, inner city, low income and disabled Californians."

[260] Joint Application of Verizon Communication Inc. and MCI, Inc. at pp. 12 & 13.

As part of the Applicants' commitment to fulfilling state policy objectives and the Commission's goal of achieving ubiquitous availability of broadband and advanced services in California, and to enhance the broadband connectivity section of the Greenlining Agreement, thus ensuring that this transaction is beneficial on an overall basis to communities served, we order that Applicants commit $3 million per year for five years in charitable contributions ($15 million total), to a non-profit corporation, the California Emerging Technology Fund (CETF), to be established by the Commission for the purpose of achieving by 2010 ubiquitous access to broadband and advanced services in California, particularly in underserved communities, through the use of emerging technologies. No more than half of Applicants' total commitment to the CETF may be counted toward satisfaction of the Greenlining Agreement to increase charitable contributions by $20 million over five years.

The CETF will be organized under the Nonprofit Public Benefit Corporation Law for charitable and public purposes as a nonprofit public benefit corporation, and not organized for the private gain of any person or entity.

In addition to the goal of providing ubiquitous access to broadband and advanced services in California, the CETF should also have its goals expanded to include adoption and usage. We note that the Greenlining Agreement and SB 909, proposed legislation sponsored by Senator Escutia, included these components in the broader vision for addressing the Digital Divide and believe that we should do so as well.

Consistent with the diverse needs of California's low income, ethnically diverse, rural and disabled communities, the members of the Governing Board should have a broad array of backgrounds, experiences and expertise. SB 909

proposed the establishment of a California Broadband Access Council, and we will use this as a guide in constituting the Governing Board of CETF.[261]

The Commission will bring together representatives of this Commission, authors of the Broadband Task Force concept and the Broadband Access Council proposal, and CETF to work collaboratively from the outset to maximize effectiveness. In order to facilitate implementation of this program, our Telecommunications Division will assist in the logistics of collecting the names of the appointees and arranging the initial meeting. The Applicants should forward the list of appointees and their availability to the Director of the Telecommunications Division. There is no additional role for the Telecommunications Division after the initial meeting occurs.

The governing board of the CETF will be composed as follows: The Commission will select four appointees. Assuming that this proposal is also adopted in the pending proposed merger of SBC and AT&T, Verizon will nominate one appointee and SBC will nominate three. These eight appointees shall determine the remaining four appointees to the governing board.

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[261] Consistent with the vision of SB 909, the governing board should consist of representatives of a broad range of interests. In particular, the composition of the governor board should include, to the extent possible consistent with the size limitations of the governing board, representatives of this Commission, the Legislature, SBC-AT&T, Verizon-MCI, Greenlining, Latino Issues Forum, consumer advocates, groups supporting rural economic development (such as the Great Valley Center), the small business community (such as the California Small Business Association), the disability community (such as the World Institute on Disability), computer and equipment manufacturing, high-technology corporations, Broadband Institute of California, California Telemedicine and ehealth Center ("CTEC"), the Corporation for Education Network Initiatives in California ("CENIC"), the California Business, Housing and Transportation Agency ("BTH"), as well as individuals with experience in grant making and non-profit management.

Funds dedicated to the CETF will be used to attract matching funds in like amounts from other non-profit public benefit corporations, corporate entities or government agencies. It is anticipated that initial funding provided by the Applicants in this proceeding ($15 million) will be combined with funds from other sources for a total initial endowment for the CETF of $60 million over five years. It is further anticipated that a majority of CETF funds will be used to seek matching funds from other private or non-profit entities for specific projects to reach a total goal of at least $100 million in funding over five years.

The CETF should earmark at least $5 million to fund telemedicine applications that serve California's underserved communities, particularly those that serve rural areas of the state or serve a large number of indigent patients. Grants for telemedicine applications may be made directly to health care providers that operate under a not-for-profit structure or not-for-profit public charities that provide telecommunications or technology grants. Such grants shall be used to provide telemedicine applications for the direct benefit of underserved communities and may not be used for policy advocacy work in any area including telecommunications or heal care policy. Consistent with the federal telemedicine program, the funds earmarked for telemedicine applications should not be used to construct broadband transmission facilities outside of the consumer's premise, although the CETF may fund such investments with other funds.

The Articles of Incorporation, Bylaws and Charter for the CETF will be established by the governing board. The Charter will specify that the purpose of the CETF is to fund deployment of broadband facilities and advanced services to underserved communities. "Underserved communities" are defined as communities with access to no more than two broadband service providers,

including satellite, or below-average broadband adoption rates. Communities with below average broadband adoption rates primarily include: low-income households, ethnic minority communities, disabled citizens, seniors, small businesses and rural or high-cost geographic areas.

The CETF will form advisory groups on deployment of broadband facilities and access to advanced services, such as online education and telemedicine, in rural and high-cost areas. The advisory groups, to the extent possible, shall incorporate the goals and intent of the Broadband Taskforce (as outlined in the Commission's Broadband Report) and the involvement of impacted communities as proposed in SB 909. The CETF will work with these advisory groups as well as organizations and agencies such as Greenlining, the California Telemedicine and eHealth Center (CTEC), the Corporation for Education Network Initiatives in California (CENIC), the California Business and Transportation Agency (BTH), the Broadband Institute of California and others to identify ways in which the CETF can coordinate and fund projects to link primary care health clinics and educational facilities in rural and high-cost areas to high-speed broadband networks.

It is the intent of this Commission that broadband facilities funded by the CETF will be owned and operated by private corporations, non-governmental organizations (such as universities or health facilities) and/or local governments, or some public-private partnerships involving a combination of these entities, and not owned and operated by the CETF. Any remuneration for CETF facilities transferred to other entities will be returned to the CETF fund for use in future projects.

In D. 03-12-035, the Commission established a similar fund as part of the PG&E bankruptcy reorganization plan. The California Clean Energy Fund

(CalCEF), a non-profit public benefit corporation, was established by the Commission for the purpose of supporting research and investment in clean energy technologies in California.

We find that this structure will ensure fidelity to the vision and goals contained in the Greenlining Agreement while fulfilling this Commission's mandate to pursue widespread availability of high-quality telecommunications services to all Californians under §709 of the Public Utilities Code.

In summary, we find that the Greenlining Agreement, combined with the commitment to focus on broadband deployment in underserved communities pursuant to the discussion above establishing the CETF, will ensure that the merger transaction produces benefits to state and local economies and is consistent with overall state telecommunications goals.

Finally, we find little merit in the procedural and substantive objections of TURN and ORA. First, we do not deem the Greenlining Agreement to be a "Settlement" governed by Rule 51. Rule 51(c) defines a "Settlement" as "an agreement … on a mutually accepted outcome to a Commission proceeding." An outcome to the proceeding would be a decision to approve or deny the application.

The Greenlining Agreement constitutes little more than a common position by certain parties and their experts that offers an appropriate way to address issues of specific concern to California communities, including those issues know as "digital divide issues."

Moreover, as noted above, we have used our oversight to add another condition to specifically address issues relating to the digital divide and this Commission's obligations pursuant to § 709 in the context of the merger. Thus, not only is the Greenlining Agreement not a "Settlement within the meaning of

Rule 51," we have not given it the deference reserved for a Settlement. We have treated it for what it is – a an agreement among parties and their experts that participating in a broadband task force, targeting philanthropy, and contracting practices can address specific needs of California communities.

7.7. Will the Proposed Merger of the Parent Companies and Change of Control Preserve the Jurisdiction of the Commission and its Capacity to Effectively Regulate and Audit Public Utility Operations in California?

Section 854(c) (7) provides that the Commission should consider whether the change of control preserves the jurisdiction of the Commission and its capacity "to effectively regulate and audit public utility operations in the state."[262]

7.7.1. Positions of Parties

Applicants state that because the transaction will not affect the structure of MCI Subsidiaries, the Commission's ability to regulate those subsidiaries will not be diminished in any respect. Applicants state that all MCI subsidiaries will continue to be subject to all the terms and conditions that the Commission previously required.[263] Applicants further state that the transaction will not adversely affect the Commission's jurisdiction nor its ability effectively to regulate the combined company's public utility operations in California.

Although no party alleges that the transaction diminishes the Commission's jurisdiction, several raise questions concerning the capacity of the Commission to continue to regulate utility operations in a new market

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[262] § 854(c)(7).

[263] Verizon/MCI 3 ¶ 58.

environment. ORA states that "MCI, with AT&T, has been one of the most vigorous CLEC voices in Commission proceedings, frequently representing interests in conflict with those of SBC and Verizon."[264] In addition, both ORA and TURN claim that the regulatory task of auditing will become more complex, and then proposes that the Applicants fund two $1 million audits post merger.[265] TURN further argues that the merger "will complicate discovery processes."[266]

7.7.2. Discussion: Transaction Will not Diminish Jurisdiction of Commission or its Capacity to Regulate and Audit Utility Operations in California.

We find that the transaction will not diminish the jurisdiction of the Commission or its capacity to regulate and audit utility operations in California. First, we note that nothing in this transaction in anyway affects the jurisdictional authority of this Commission.

Second, the allegations by TURN and ORA that the merger will decrease the Commission's regulatory capacity are unsubstantiated. Monitoring the compliance of the merged company with applicable laws and regulations will certainly require no more Commission resources than monitoring the separate companies and could require fewer such resources as it is likely that fewer separate proceedings will be initiated.

Similarly, concerning audits, we note that this Commission's decisions in D.04-02-063 and D.04-09-061 demonstrate that changes in industry structure have not diminished the Commission's authority or capacity to audit utility

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[264] ORA Opening Brief, p. 50.

[265] ORA Opening Brief, p. 51; TURN Opening Brief, p. 79.

[266] TURN Opening Brief, p. 80.

operations. Thus, even as corporate structures have become more complex, the ability of the Commission to exercise regulatory oversight has adapted with regulatory structures more attuned to the competitive environment, including a shift from traditional rate-of-return regulation to price cap regulation in the telecommunications industry, while at the same time maintaining the Commission's auditing authority.

8. Does the Proposed Merger of the Parent Companies and Change in Control Create Environmental Issues of Concern?

The Applicants state "this transaction is occurring at the parent, holding company level and involves no creation or consolidation of existing physical assets."[267] The Applicants state that "The Commission has consistently held that the indirect transfer of ownership of facilities, as is the case with this transaction, does not raise significant environmental concerns."[268]

No party raised any environmental issues concerning the proposed financial transaction.

Pursuant to state law and Commission precedents we find this application raises no environmental issues of concern.

9. Other Issues § 854(c) (8) § 854(d)

Section 854(c) (8) states that the Commission shall "Provide mitigation measures to prevent significant adverse consequences which may result." Unlike the other sub-sections of § 854, § 854(c)(8) does not establish criteria for

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[267] Joint Applicants Opening Brief, p. 55.

[268] Joint Applicants Opening Brief, p. 56, footnotes eliminated.

reviewing the transaction, other than ordering that we provide mitigation measures to prevent "significant adverse consequences."[269]

Section 854(d) states that:

> When reviewing a merger, acquisition, or control proposal, the commission shall consider reasonable options to the proposal recommended by other parties, including no new merger, acquisition, or control, to determine whether comparable short-term and long-term economic savings can be achieved through other means while avoiding the possible adverse consequences of the proposal.[270]

Consistent with the provision of this section, we will therefore consider whether there are "reasonable options" to the merger, including modifying conditions.

9.1. Position of the Parties

The Applicants argue that, consistent with the wording of the statute, "mitigation measures should be imposed only if necessary to mitigate some 'significant adverse consequences that may result' from the transaction."[271] The Applicants argue that the Commission has "consistently refused to approve merger conditions unrelated to the issues raised by the merger itself."[272] The Applicants accuse the Intervenors of using this proceeding "as an opportunity to satisfy their own agendas by attempting to impose merger conditions unrelated to the transaction itself."[273] The Applicants argue that the "Commission should

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[269] As noted previously, for §§ 854(c)(1) through (7), we have considered mitigation measures at the same time as we have assessed the transaction against the criteria.

[270] § 854(d).

[271] Joint Applicants, Opening Brief, p. 56.

[272] *Id.*

[273] *Id.*

not accede to intervenors' attempts to fulfill their wish-lists by imposing conditions that have little or nothing to do with the transaction itself."[274] Applicants claim that since the transaction does not produce significant adverse consequences, no conditions are appropriate.

The Applicants further argue that the Commission lacks authority to impose specific conditions proposed by the Intervenors.[275]

CALTEL proposes a series of mitigation measures, including: 1) a price cap plan for Verizon's wholesale network elements; 2) a requirement that Verizon provide fair interconnection prices, terms and conditions for IP facilities and capabilities; 3) the imposition of a cap on Verizon's intrastate special access rates for five years (discussed above).[276]

Cox cites § 854(c)(8) and argues that the Commission "is required to provide mitigation measures."[277] Cox then argues that three conditions are needed: 1) a condition allowing CLECs to opt-in to interconnection agreements that Verizon has negotiated and/or interconnection agreement provisions that Verizon has arbitrated in California; 2) a condition requiring Verizon to transit traffic consistent with TELRIC pricing and free of burdensome and unnecessary restrictions; and 3) a condition requiring Verizon to offer extension on existing IP backbone agreements.

Level 3 asks for 1) divestiture of overlapping in-region facilities (discussed above); 2) a series of conditions on special access pricing (discussed above); 3)

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[274] Joint Applicants Opening Brief, p. 57.

[275] Joint Applicants Opening Brief, pp. 57-61.

[276] CALTEL, Opening Brief, p. 8.

[277] Cox, Opening Brief, p. 18.

require Verizon to exchange all VoIP traffic at the local compensation rate; 4) require the merged company to return unused telephone number blocks; and 5) require that Verizon offer "stand-alone" DSL (discussed above).

ORA proposes an extensive set of requirements tied specifically to the various elements of § 854(b) and § 854(c). An extensive summary is provided on pages 54-59 in ORA's Opening Brief.

Pac-West proposes a merger condition to "ensure the availability of non-discriminatory interconnection with the packet-switched network facilities of Verizon."[278] The condition is:

> In the absence of a negotiated agreement acceptable to any requesting CLEC, Verizon's affiliates certificated as public utilities in California shall consent to participate in arbitration proceedings conducted by this Commission pursuant to Section 252 of the Communications Act, the purpose of which shall be to establish reasonable and non-discriminatory terms and conditions of interconnection between the networks of Verizon's certificated affiliates in California and the network of the requesting CLEC. This interconnection shall include all technologies and network architectures deployed by the Verizon affiliates in California, including but not limited to all packet-switched network technologies. As a condition of this merger, Verizon shall further waive any claims that such interconnection obligation involving all of its deployed network architectures exceeds the scope of permissible arbitration under Section 252.[279]

Qwest proposes six conditions for the merger: 1) divest all overlapping facilities; 2) institute a price freeze on special access; 3) show no favoritism post-merger to new affiliates; 4) agree to resell services purchased from other ILECs

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[278] Pac-West, Opening Brief, p. 25.

[279] Pac-West, Opening Brief, p. 25, citing Pac-West Ex. 1, p. 28.

out of region; 5) give a "fresh look" right for customers to terminate all contracts; 6) agree to offer "stand-alone" DSL.[280]

Telscape asks that the Commission require Verizon to sell its UNE-L facilities at a 50 percent discount.[281]

TURN's chief focus is to fight approval of the merger, and proposing conditions is a minor part of TURN's showing. In a 170-page brief, only 8 pages focus on merger conditions.[282] Nevertheless, the litany of conditions is extensive and includes:

1. A five-year rate freeze for residential and small business basic exchange rates;
2. A requirement that the 1FR, 1MR, 1MB, and local measured usage and ZUM services be available on a stand-alone basis.
3. A requirement that Applicants agree to prominently list the availability of these services in phone books, on the web, and in bill inserts;
4. A requirement that Applicants offer an intrastate long distance calling without a minimum monthly fee;
5. A requirement that Verizon provide a competitive alternative for residential and small business customers in SBC's service territory no later than 18 months from the consummation of the merger. This alternative must be made available at prices comparable to or less than SBC's.
6. The submission of quarterly reports on the progress of competitive offerings in SBC's territories.
7. The imposition of a non-trivial penalty, "e.g., $10 million," each month if Verizon fails to meet a "target of providing meaningful competitive alternative within 18 months."[283]

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[280] Qwest, Opening Brief, pp. 48-49.

[281] Telscape, Opening Brief, p. 3.

[282] TURN, Opening Brief, pp. 162-169.

[283] TURN Opening Brief, p. 166.

8. Adopt a cost of capital now for use in upcoming UNE proceedings (the specific figure is confidential);
9. Make approval conditional upon Applicants' agreement to fund independent third-party monitoring of competitive conditions in California;
10. Require corporate affiliates to cooperate with third-party monitoring;
11. Require Applicants to agree to the service quality monitoring recommendation outlined in TURN's Comments in the Rulemaking on General Order 133-B;
12. Adopt further conditions to require the tracking of the deployment of new technology by wire center, along with statistics about wire center demography;
13. Make Commission approval contingent on Applicants' agreement to fund two independent audits of Verizon's affiliate transactions;
14. Require Applicants to commit in writing that all corporate affiliates of Verizon will make their books and records available for inspection by Commission staff and the third-party auditor;
15. Require that Applicants modify their standard non-disclosure and protective agreement so that it allows parties to use material obtained in one Commission docket in any other regulatory proceeding as long as the confidentiality of the information is maintained.

DRA argues that the Commission should adopt merger conditions in six areas: 1) ensure that Applicants maintain and improve customer service for customers with disabilities; 2) require that Applicants renew their commitment to universal design principles; 3) require improvements in accessibility of all communications; 4) improve polices related to bundled services and basic phone service; 5) ensure that an internal committee for voicing the concerns of the disability community is created; 6) establish auditing and reporting requirements.

Finally, we note that the Advisory Opinion expresses a concern arising from the merger: that the merger will "produce incentives for the two

'independent' entities to engage in anticompetitive cross-subsidization that could occur in which Verizon ratepayers end up paying for purchases made by MCI at inflated prices."[284] The Advisory Opinion makes no recommendation on mitigation measures, but admonishes the Commission to "scrutinize post-merger transactions between Verizon's regulated and non-regulated affiliates"[285] to ensure that anti-competitive cross-subsidization does not occur.

9.2. Discussion

The Intervenors in this proceeding have proposed a litany of conditions that they ask the Commission to apply to this transaction. To the extent possible, we have considered each proposed condition in the context of the adverse consequences that the Intervenors allege would result from the proposed transaction. As discussed at length in prior sections of this decision, we find no basis upon which to conclude that such adverse consequences which these conditions are designed to mitigate would result from this transaction. Therefore the requests for conditions recommended by Intervenors have little merit.

For example, Cox's conditions that the Commission regulate Internet peering arrangements and transit traffic are unsupported by any compelling evidence that failure to do so will result in an adverse consequences. This is not surprising in light of the small percentage of the Internet backbone that Verizon will control after the merger. Thus, there is no evidence of a potential adverse consequence of the merger that warrants imposition of these conditions.

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[284] Advisory Opinion, p. 24.

[285] *Id.*

Concerning Pac-West's proposed condition of non-discriminatory interconnection with ILEC networks, it is unclear to us that such a condition is needed. Although we reach no legal conclusion on this matter, on first impression it appears that § 251 of the Communications Act applies to the packet-switched network facilities of ILECs. Moreover, Verizon states that it has never taken a position that § 251 does not apply to packet networks, and asserts that the FCC has already ruled that §§ 251(a) and 251(c)(2) obligations apply to an ILEC s packet-switched network and notes that Pac-West cannot cite a refusal by Verizon to provide this type of interconnection. For this reason, we see no dispute over this matter and no reason to impose a new merger condition concerning interconnection. This is a matter better left to a § 251 proceeding.

There are still other conditions that we have not listed above. The voluminous record in this proceeding makes it clear that the proposed transaction will not produce adverse anticompetitive consequences, and that the merger, when combined with the conditions set forth herein and the agreement reached by the Applicants, Greenlining and LIF, is in the public interest. There is therefore no rational basis for imposing any of the additional conditions on this transaction that are proposed by TURN, ORA, Telscape, CALTEL (with Covad), Cox, Pac-West, Level 3 or Qwest. Since these parties have failed to make a convincing case that the transaction will produce adverse consequences, then these proposed conditions cannot be justified for they are neither needed to

"prevent serious adverse consequences"[286] nor do they represent "reasonable options."[287]

Concerning the proposals of DRA, we find no reasonable basis to adopt the mitigation measures that it proposes. The acquiring entity, Verizon, recently earned an award from DRA for its "ten year commitment of providing high-quality service"[288] to the disabled community. According to Verizon's testimony, DRA honored the company in 2004 with its "Eagle Award" for "leadership in developing products that enhance the accessibility of its communications products for a broad range of users."[289] Based on the record in this proceeding, we have no reason to believe Verizon will not continue this level of service after the transaction.

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[286] § 854(c)(8).

[287] § 854(d).

[288] Rebuttal testimony of Timothy McCallion, pp. 25-26.

[289] *Id.*

The Advisory Opinion, to which we give great weight, identified two issues that we will now discuss. Concerning the issue of "anti-competitive cross-subsidies," we note that the Commission has in place safeguards to protect against anti-competitive cross-subsidization by current affiliates of Verizon, and these existing safeguards automatically cover these new affiliates. Any modifications that are necessary to guard against anticompetitive actions by the new entity will be considered in separate and subsequent proceedings to ensure that that they remain effective and appropriate in a converging industry.

10. The Commission Should Approve this Application for a Proposed Merger of the Parent Companies and Change in Control at this Time

In summary, we find that the proposed merger of the parent companies and resulting change of control is in the public interest pursuant to § 854(a). In addition, in the course of our § 854(c) examination and our examination of the competitive impacts of this merger, we have reviewed proposals recommended by other parties and find that the transaction as proposed and modified herein best serves the public interest.

11. Comments

The draft decision of Commissioner Susan P. Kennedy in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule77.7 of the Rules of Practice and Procedure.[290]

On November 8, Applicants, Greenlining, LIF, Pac-West, Qwest, Earthlink (Motion to Intervene), CISPA, ORA, DRA, Cox, and TURN filed Comments. On

[290] *See* Pub. Util. Code § 311(g), and Rule 77.

November 14, the Applicants, CALTEL, Qwest, Greenlining, ORA, LIF, CISPA filed Reply Comments.

11.1. Position of the Parties

The Applicants argue that the U.S. DOJ's and the FCC's approvals of the proposed transaction confirm the draft decision's finding that the analysis will not harm competition and support the draft decision's approval of the merger. The Applicants further argue that the Commission should not adopt the conditions proposed in the draft decision. In particular, concerning DSL condition, the Applicants note that they have agreed with the FCC to provide naked DSL within 12 months of the close of the merger. The Applicants ask that if the Commission elects to retain this DSL condition, that the requirement be made consistent with the FCC's requirement, including the sunset of the condition after two years.

Greenlining and LIF express support for the draft decision and urge its adoption by the Commission.

Pac-West renews its request that the Commission impossible a condition that requires the non-discriminatory interconnection of packet networks by ILECs, and then expand this condition to all subsidiaries of the merged entity.

Qwest argues that the reliance of the draft decision on the AG's Opinion commits legal error by ignoring compelling evidence in the record of this proceeding. In addition, it reasserts its argument that remedies are needed to guard against the anticompetitive effects of the merger.

CALTEL states that it does not support this draft decision, but asks that in the event of its adoption that the Commission open a rulemaking proceeding to adopt a form of price caps for wholesale services.

Cox argues that the draft decision commits legal error by failing to adopt the conditions that it proposed and by failing to discuss its proposals extensively.

Earthlink filed a motion to intervene (which Applicants opposed), and filed comments requesting that the draft decision expand its regulation of DSL. CISPA, a party to the proceeding, filed similar comments.

DRA renews its arguments that the merger should be subject to a § 854(b) review and that mitigation measures are needed to protect the disabled community.

ORA renews its earlier arguments that the transaction should be subject to § 854(b) and that reliance on the AG's Opinion is misplaced. TURN further argues that evidentiary hearings are needed.

TURN similarly argues that exempting the transaction from § 854 (b) constitutes legal error and that evidentiary hearings are needed. TURN further alleges that the draft decision has ignored TURN's evidence, and that under §853(b) the Commission can award benefits, thereby making TURN's analysis of benefits critical. Finally, TURN argues that the draft decision errs in failing to adopt its merger conditions.

11.2. Discussion

We find the Applicants' request that this Commission conform its DSL requirement to that of the FCC to be premature at this time, particularly since the final order of the FCC is not yet available. When the FCC's order is available, Applicants may bring this before the Commission through a petition for modification. In addition, as the discussion in this decision makes clear, this condition is necessary to ensure that the intermodal competition will remain viable.

Concerning Pac-West's request for non-discriminatory interconnection of packet networks, we note that Verizon does not dispute that its ILEC must provide non-discriminatory interconnection of packet networks. We see no reason, however, to extend this condition to other subsidiaries of the merged entity.

Qwest's argument that we have ignored substantial evidence in this record is wrong. We have revised this draft to make clear that we have considered the evidence that Qwest has offered, but found it unpersuasive, particularly when compared to the analysis provided in the AG's Opinion and to the evidence provided by the Applicants. In particular, we have revised the

Concerning CALTEL's request that the Commission open a rulemaking proceeding to establish price caps for wholesale services, we do not see any adverse consequences from this merger that would necessitate such a set and we decline to do so at this time.

Concerning Cox's argument that the draft decision failed to consider its proposals, we have expanded our discussion to make clear that we have rejected its conditions as unmerited and unjustified by any plausible adverse consequences from the merger.

Concerning Earthlink, we grant its motion to intervene in order to ensure a full record. However, we decline to adopt the conditions proposed by Earthlink and CISPA to regulate DSL for we see no specific adverse consequence that would warrant such an expansion of regulation.

The arguments of DRA and ORA add nothing that was not already covered in their briefs, and we do not address their points in detail.

TURN also follows the arguments of its briefs in the main part, but raises an new issue, that § 853(b) requires exactly the same analysis of merger benefits

as required under § 854(b), and that the draft decision has ignored factual evidence in the record. In both these points, TURN errs. Section 853 (b) permits only requires that we determine that a proposed transaction is in the public interest, not a dollar-by-dollar assessment and enumeration of total of benefits. This draft has examined the evidence provided by TURN, but finds that the evidence provides nothing of value in our determination that the transaction is in the public interest, and that much of its elaborate methodology and analysis is rendered moot by our decision not to apply § 854 to the transaction. In addition, TURN's HHI analysis depends entirely on its definition of the market, and it finds that AG's Opinion, which does not rely on an HHI analysis to be "misguided." As noted in the discussion above, we have found the AG's Opinion more consistent with standard economic analysis and more appropriate for the analysis of this market. Our rejection of TURN's argument stems not from a failure to review its evidence, but from a decision that finds the evidence weak and the analysis faulty.

12. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Principal Hearing Officer for this proceeding. Administrative Law Judge Glen Walker is assigned to this proceeding.

Findings of Fact

1. This application was filed pursuant to Pub. Util. Code §§ 851-856.

2. On April 21, 2005, Verizon Communications Inc. and MCI, Inc. filed a joint application to transfer control of MCI's California subsidiaries to Verizon. This transfer will occur indirectly as a result of Verizon obtaining direct control of MCI, neither of which is regulated by the Commission as a public utility, and indirect control of MCI's certified and public utility subsidiaries in California.

3. When the transaction is completed, MCI will become a subsidiary of Verizon. The MCI Subsidiaries in California will still be subsidiaries of MCI, and the authorizations and licenses currently held by the MCI Subsidiaries will continue to be held by the respective entities. The transaction does not involve the merger of any assets, operations, lines, plants, franchises, or permits of the MCI Subsidiaries with the assets, operations, lines, plants, franchises, or permits of any Verizon entity.

4. The parties to the merger transaction are Verizon Communications Inc. and MCI, Inc. Neither party is a California utility. The California utilities that are subsidiaries of Verizon and MCI are not parties to the transaction. Those California subsidiaries are not being utilized to effectuate the transaction, nor are they using their respective parents to effectuate the transaction.

5. No single MCI subsidiary has annual California gross revenues in excess of $500 million.

6. Verizon's California subsidiaries account for approximately 3% of Verizon's annual revenues.

7. In Resolution ALJ 176-3152 on May 5, 2005, the Commission preliminarily determined that this is a ratesetting proceeding and that hearings would be needed to resolve this matter.

8. On August 15, 16, and 18, 2005, the Commission conducted six Public Participation Hearings, in Whittier, Long Beach and San Bernardino, California, to take comments from the public on the proposed merger. These hearings demonstrated broad consumer and community support for the merger.

9. MCI's operations in California account for less than 3% of MCI's overall business.

10. MCI's California subsidiaries are non-dominant and not traditionally regulated utilities.

11. The Commission lacks effective ratemaking authority over MCI and its California subsidiaries.

12. Verizon's California subsidiaries are no longer regulated under traditional cost-of-service regulation.

13. MCI has grown and shrunk under competitive conditions without a guaranteed franchise.

14. This transaction will likely produce significant cost savings and other synergies for the combined firm. These transaction-related benefits will be passed through to customers through competition and market forces.

15. The shareholders of MCI approved the merger on October 6, 2005.

16. On September 16, 2005, the California Attorney General filed an Opinion on the competitive effects of the proposed merger, in which he found that the proposed merger will not adversely affect competition in any relevant market.

17. On September 19, 2005, the Assigned Commissioner issued a ruling denying motions for evidentiary hearings and reached a determination that there are no factual disputes that require evidentiary hearings to resolve and evidentiary hearings are not needed in this proceeding.

18. The Attorney General found that the relevant markets at issue in this transaction are the markets for: (1) local exchange services and long distance services for residential and small business customers (part of the mass market); (2) long distance services for residential and small business customers (part of the mass market); (3) business applications sold to medium- to large-business and government customers (the enterprise market); (4) special access services; and (5) Internet backbone services.

19. HHI analysis does not provide relevant insight into the dynamics of the mass market, and is not needed to perform a competitive analysis.

20. MCI's mass market business consists of the provision of local and long distance services, using leased facilities rather than MCI-owned facilities to furnish the local components of its service offerings.

21. MCI's mass market business is in an irreversible decline, due to marketplace developments, recent changes in regulation, and increasing competition in its core long distance business.

22. MCI currently serves relatively few mass market customers in Verizon California's service area.

23. Due to this decline in its mass market business, MCI is not and would not be a meaningful competitor to Verizon California in the mass market absent the transaction.

24. As a non-facilities-based provider, MCI's provision of mass market service does not affect industry output.

25. Intermodal competition, principally from cable, wireless, and voice over Internet Protocol (VoIP) is intensifying in the mass market in California. Intermodal alternatives have displaced and are continuing to apply competitive price pressure on and continuing to displace a significant amount of traditional wireline service and usage.

26. Mass market consumers' willingness to purchase intermodal alternatives instead of traditional landline service constrains Verizon's wireline service rates for many telecommunications services.

27. Wireless service has displaced a significant amount of long distance and local calling from landlines by consumers with wireless phones. In addition to

using wireless phones to complete many long distance and local calls, a significant number of consumers are relying solely on wireless service.

28. Intermodal competition will continue to provide a check on future anticompetitive outcomes in the local exchange market, but for this to remain a viable check in a consolidating and converging industry, consumers must have unfettered access to competitive VoIP services.

29. If consumers have unfettered access to competitive VoIP services, then the merger will have no anticompetitive impacts in the mass market for local exchange services.

30. Without unfettered access to competitive VoIP services, the anticipated benefits of this transaction to consumers and the Commission's statutory obligation to promote access to advanced telecommunications services will be frustrated.

31. Verizon does not have a long-haul backbone of its own or significant long distance facilities.

32. Verizon's purchases of long distance services account for only about 3 percent of that market.

33. MCI has elected to exit the mass market for long distance services.

34. Significant intermodal competition from wireless services is already present in the mass market for long distance services.

35. The merger will have minimal effects on the levels of concentration in the market for long distance services.

36. The proposed merger will have no anti-competitive effects in the mass market for long distance telecommunication services.

37. The market for enterprise services includes the full array of highly differentiated advanced information services, including voice and data services that large businesses and governmental users demand.

38. The enterprise market is highly competitive and includes IXCs (e.g., AT&T, MCI and Sprint), global network service providers (such as Deutsche Telekom and BT), system integrators, CLECs and DLECs, cable companies and equipment vendors.

39. The enterprise market has been competitive for some time and is not highly concentrated.

40. Verizon and MCI focus their marketing efforts on different sectors of the enterprise market.

41. MCI is a leading provider of enterprise services to large national customers. Verizon has had difficulty attracting the type of large enterprise customers MCI serves, particularly those based or with communications needs outside of Verizon s traditional service area.

42. The Federal Communications Commission has repeatedly deemed this market competitive.

43. The merger will not produce anticompetitive effects in the enterprise market.

44. The market for special access involves dedicated point-to-point facilities that are primarily high capacity (e.g. DS1 or greater) connections that can be used to connect an end user to an IXC's point of presence, to connect two end user locations, and to connect end users to CLEC, ISP, wireless or other competitive networks.

45. MCI has few special access facilities in Verizon California's service areas and does not provide a significant level of services in those areas at either the wholesale or retail level.

46. MCI provides only a very limited number of special access circuits on a wholesale basis to CLECs in Verizon California's service areas.

47. MCI serves only a very small number of buildings in Verizon's California territory with its own facilities. MCI fiber facilities in Verizon California's service territory are overwhelmingly located in areas that meet the FCC's criteria for determining that it is economic for competing carriers to deploy new facilities and where competitors have in fact deployed fiber facilities.

48. In the limited number of Verizon California wire center clusters where both Verizon and MCI have fiber facilities, there is at least one competitor other than MCI which has also deployed fiber facilities. In all but one of these clusters more than one additional competitor has deployed fiber.

49. At the level of individual wire centers, there are, on average, more than three competitors with fiber facilities deployed in wire centers in which Verizon and MCI fiber facilities overlap. Each of these overlapping wire centers is located in MSAs that the FCC has declared to be substantially competitive, as reflected in its treatment of MSAs under its pricing flexibility rules.

50. Due to low barriers of entry, loss of MCI as an independent competitor in the market for special access services would have no impact on the current constraints on Verizon's pricing.

51. The Internet backbone and ISP markets are highly unconcentrated and will remain so after the merger.

52. Post-transaction, MCI will remain the fourth largest provider of Internet backbone services, with less than a 10 percent share of the traffic. MCI will face competition from SBC/AT&T, Sprint, Qwest, SAVVIS, AOL, and others.

53. There are strong incentives for the combined company to peer on reasonable terms, as to take the opposite course would invite retaliation from providers who collectively carry more than 90 percent of the Internet traffic in North America. For similar reasons, there are no incentives for the combined company to selectively downgrade packets exchanged with competitive networks.

54. The merger will maintain or improve the financial condition of the affected California utility subsidiaries.

55.There is no rational basis for imposing new quality control conditions because of the proposed merger.

56.The transaction will maintain or improve the quality of management of the affected California utility subsidiaries.

57.The transaction will be fair and reasonable to affected California utility employees, both union and non-union.

58.The transaction will be fair and reasonable to the majority of all affected shareholders.

59. The transaction will be beneficial on an overall basis to state and local economies, and the communities in the areas served by the resulting public utility. Specifically, the merger will produce cost savings and other synergies that will be passed through to California customers through competition and market forces. The transaction will also result in the combined company s ability to offer a broader range of services, and more advanced services, to California consumers. The transaction will promote competition in communications in

California, resulting in improved quality of service, more competitive prices, and greater technological innovation that will inure to the benefit of customers.

60. The Greenlining Agreement, in combination with the California Emerging Technologies Fund, ensures that the transaction will be beneficial to the local communities in California.

61. This transaction will not affect the structure of MCI's California subsidiaries and the Commission's ability to regulate those subsidiaries will not be diminished. The MCI subsidiaries will continue to be subject to all the terms and conditions that the Commission has previously required. The transaction will therefore not adversely affect the Commission's jurisdiction, nor its ability to regulate effectively the combined company's public utility operations in California.

62. The transfer of MCI's California subsidiaries takes place at the holding company level and will not result in any incremental impact on the environment.

63. Aside from the three conditions imposed on the merger, no other conditions are reasonable nor in the public interest.

64. The material presented by the Applicants and parties to this proceeding has enabled us to reach findings on all issues discussed in § 854.

Conclusions of Law

1. This proceeding is a ratesetting proceeding.

2. No evidentiary hearings are necessary in this proceeding.

3. Consistent with the Commission's Rules of Practice and Procedure, Rule 6.5(b), it is reasonable to affirm the Assigned Commissioner's Ruling of September 19, 2005 that determined that evidentiary hearings were not necessary in this proceeding.

4. The proposed transaction is subject to scrutiny under Pub. Util. Code § 854(a).

5. Pursuant to § 854(a), Applicants must demonstrate, by a preponderance of the evidence, that the proposed transaction is, on balance, in the public interest.

6.

7. Section853 (b) grants the Commission the authority to determine that §§ 854(b) and (c) do not apply to a transaction if application of the subsections is not necessary in the public interest.

8. In order to determine whether the transaction is in the public interest pursuant to § 854(a), it is reasonable for the Commission to assess the public interest factors enumerated in § 854(c) and undertake an analysis of antitrust and environmental considerations.

9. Applicants have demonstrated that all of the criteria enumerated in § 854(c) are satisfied by this transaction.

10. In order to determine if the transaction will have an adverse effect on competition, the sole material question is whether the elimination of MCI as an independent competitor in any properly defined markets would confer market power on Verizon or enhance any market power it currently possesses.

11. The transaction will not cause an adverse effect on competition in the mass market for local exchange telecommunications services.

12. The transaction will not cause an adverse effect on competition in the mass market for long distance telecommunications services.

13. The transaction will not cause an adverse effect on competition in the enterprise market.

14. The transaction will not cause an adverse effect on competition for the provision of special access services.

15. The transaction will not cause an adverse effect on competition in the market for Internet backbone services.

16. The transaction will not have an adverse effect on competition in any properly defined market and it therefore raises no antitrust concerns.

17. Cross-subsidization is unlikely because Verizon California's rates are not set with reference to its costs and because the Commission will continue to enforce affiliate transaction rules.

18. The California Environmental Quality Act (CEQA) requires that the Commission consider the environmental consequences of projects that are subject to the Commission's review and approval.

19. There are no environmental consequences of this merger.

20. It is reasonable for the Commission to approve this transaction, subject to the two conditions proposed herein.

ORDER

IT IS ORDERED that:

1. The Assigned Commissioner's Ruling of September 16, 2005 that determined that this proceeding did not require evidentiary hearings is affirmed. Under Rule 6.6 of the Commission's Rules of Practice and Procedure (Rules), this order is a final determination that evidentiary hearings should not be set in this ratesetting proceeding.

2. The ORA Motion of September 28, 2005 requesting a full Commission confirmation of the Assigned Commissioner's Ruling of September 16, 2005, among other things, is granted consistent with Ordering Paragraph 1 above. In all other respects, the motion is denied.

3. The joint application of In the Matter of the Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc. (MCI) to transfer control of MCI's California utility subsidiaries to Verizon, which will occur indirectly as a result of Verizon's acquisition of MCI is granted subject to three conditions. Those conditions are:

a) Verizon shall, by February 28, 2006, cease forcing customers to purchase separately traditional local phone service as a condition for obtaining DSL (this condition is commonly known as a requirement to provide "naked DSL"). We further order that no later than February 28, 2006 Verizon shall submit an affidavit evidencing compliance with this condition of the merger.

b) Applicants shall adopt the agreement that Verizon California negotiated with The Greenlining Institute (Greenlining) and Latino Issues Forum (LIF) (The Greenlining Agreement). Under the key terms of this agreement, the Applicants agree to:

    i. Participate in a statewide Broadband Task Force.
    ii. Increase corporate philanthropy over the next five years by an additional $20 million above current levels, with a good faith effort to maintain the aggregate contributions to minorities and underserved communities in a manner consistent with its past practice.
    iii. Make a good faith effort to increase the supplier diversity goal for minority business enterprises from the current 15% to a minimum of 20% by 2010. To achieve this goal, Verizon California anticipates spending $1 million over five years in technical assistance to minority businesses and another $1 million to develop Verizon's internal infrastructure devoted to such efforts.

c) Applicants shall commit $3 million per year for five years in charitable contributions ($15 million total), to a non-profit corporation, the California Emerging Technology Fund (CETF), to be established by the Commission for the purpose of achieving ubiquitous access to broadband and advanced services in California, particularly in underserved communities, through the use of emerging technologies

by 2010. No more than half of Applicants' total commitment to the CETF may be counted toward satisfaction of the Applicants' commitment in the Greenlining Agreement to increase charitable contributions by $20 million over five years.

d) The Commission shall appoint four members to the CETF, SBC shall appoint three members to the CETF (with no more than one of those appointments being an SBC employee), and Verizon shall appoint one member to the CETF (pending resolution of Verizon/MCI proceeding). The original eight members of the CETF shall be organized as a body no later than 90 days after the effective date of this order. These eight members will select the remaining four members to complete the CETF governing board. Consistent with the discussion herein, the Director of the Telecommunications Division will help coordinate with the logistics of organizing this board but will have no responsibilities after the initial meeting occurs.

3. Applicants shall file and serve a written notice in this proceeding of the transfer of control and merger of their companies as set forth in this order. The authority to transfer control and merge granted herein shall expire 365 days from the effective date of this order.

4. Within 30 days of the issuing date of any decision by another jurisdiction which materially changes the terms of the proposed transaction as it affects any of Applicants' California utility operations, Applicants shall file a copy of that decision with the Commission, with a copy served on the service list in this proceeding and the Director of the Telecommunications Division. The filing shall also include an analysis of the impact of any terms and conditions contained therein as they affect any of Applicants' California utility operations.

5. Applicants shall notify the Commission, with a copy served on the service list in this proceeding and the Director of the Telecommunications Division, of the date the merger is consummated. The notice shall be served within 30 days of merger consummation.

6. In the event that the books and records of Applicants or any affiliates thereof are required for inspection by the Commission or its staff, Applicants shall either produce such records at the Commission's offices, or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to any of Applicants' offices.

7. If Applicants consummate the proposed merger authorized herein, their failure to comply with any element of this order shall constitute a violation of a Commission order, and subject Applicants to penalties and sanctions consistent with law

This order is effective today.

Dated _____, at San Francisco, California.

Appendix A: Cases Exempting NDIEC and CLEC Transactions from § 854 (b) Review

1. *Re Application of Resurgens Communications Group, Inc. to Acquire Control of Comm Sys. Network Servs., Inc., TMC Communications, Inc. and TMC Communications, L.P.*, Decision 91-09-095, 41 Cal. P.U.C. 2d 429, 1991 Cal. PUC LEXIS 607 (Sept. 30, 1991).
2. *Re Joint Application of AT&T Corp., Italy Merger Corp. and Tele-Communications, Inc. for Approval Required for the Change in Control of TCI Telephony Servs. of California, Inc. That Will Occur Indirectly as a Result of the Merger of AT&T Corp. and Tele-Communications, Inc.*, Decision 99-03-019, 85 Cal. P.U.C. 2d 249, 1999 Cal. PUC LEXIS 382 (Mar. 4, 1999).
3. *Re Joint Application of AT&T Corp. ("AT&T"), Teleport Communications Group Inc. ("TCG") and TA Merger Corp. for Approval Required for the Change in Control of TCG's California Subsidiaries That Will Occur Indirectly as a Result of the Merger of AT&T and TCG*, Decision 98-05-022, 80 Cal. P.U.C. 2d 273, 1998 Cal. PUC LEXIS 533 (May 7, 1998). *Application of MidAmerican Communications Corp. to Transfer, and of LDDS Communications, Inc., to Acquire, Certain Shares and Control of MidAmerican Communications Corp., and for Permission and Approval For MidAmerican Communications Corp. to Borrow, Guaranty, and Grant a Security Interest in Collateral*, Decision 91-06-061, 40 Cal. P.U.C. 2d 637, 1991 Cal. PUC LEXIS 388 (June 24, 1991);
4. In *re Request of WorldCom, Inc. and Intermedia Communications Inc., for Approval to Transfer Control of Intermedia Communications Inc. and its Wholly-owned Subsidiary to WorldCom, Inc.*, Decision 01-03-079, 2001 Cal. PUC LEXIS 219 (Mar. 27, 2001).
5. *Joint Application of Access One Communications Corp., Formerly Known as CLEC Holding Corp., OmniCall Acquisition Corp., and OmniCall, Inc. for Approval of Transfer of Control*, Decision 00-01-059, 2000 Cal. PUC LEXIS 85 (Jan. 28, 2000).
6. *Application of American Network Exch., Inc. and its Subsidiary, Amnex (California), Inc., to Transfer, and of Nycom Info. Servs., Inc., to Acquire Control of a Certificate by Merging American Network Exch., Inc. into Amnex Acquisition Corp., a Subsidiary of Nycom Info. Servs., Inc.,* Decision 90-03-047, 35 Cal. P.U.C. 2d 664, 1990 Cal. PUC LEXIS 154 (Mar. 19, 1990). *Application of State Communications, Inc., TriVergent Communications, Inc., Gabriel Communications, Inc., and Triangle Acquisition, Inc. for Approval of a Transfer of Control*, Decision 01-02-005, 2001 Cal. PUC LEXIS 139 (Feb. 8, 2001).

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