

cases. NASUCA seeks to intervene for the limited purpose of assisting the Court in making its public interest determination, by presenting the views of state utility consumer advocates on these mergers, in the attached comments.

NASUCA seeks by this limited intervention to have entered into this record NASUCA's submissions that were included in the record of the Federal Communications Commission ("FCC") review of these merger applications. The NASUCA submission includes facts specific to this merger and this industry, e.g., what post-merger markets will look like.

The submission includes a detailed analysis of the history and nature of this industry related to the merger applications, by nationally-recognized expert Dr. Lee Selwyn and his colleagues at the firm of Economics and Technology Inc. This expert analysis, presented as a paper entitled "Confronting Telecom Industry Consolidation: A Regulatory Agenda for Dealing with the Implosion of Competition," shows how the mergers under review here translate into market concentration greater than those that the United States Department of Justice ("DoJ") has previously rejected in other industries. Dr. Selwyn and his colleagues compiled and analyzed extensive data derived from industry reports and filings submitted to regulators, reports to investors, and surveys by disinterested third parties. NASUCA's submission, and the exhibit prepared by Dr. Selwyn, are directly relevant to the questions the Court posed in its order of July 7, 2006.¹

¹ Dr. Selwyn has offered, pro bono, if the Court so desires, to review the record in this case, to appear before the Court for no more than one day, and to address, as best he can, any questions that the Court may wish to ask about the procedural, substantive or constitutional issues that may arise in connection with the Court's fashioning of an appropriate procedure for the Court's duty to make a public interest determination.

MEMORANDUM OF POINTS AND AUTHORITIES

NASUCA AND ITS INTEREST

NASUCA is a voluntary, national association of 44 consumer advocates in 41 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.² Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

NASUCA has extremely limited resources to expend on a vast number of complex proceedings at the FCC, including those resources required when seeking judicial review of FCC Orders. NASUCA's presence at the federal level is largely in the form of volunteer hours offered by NASUCA members who nonetheless retain the primary and demanding responsibility of representing consumers in proceedings in the state in which they are located. NASUCA's extensive filings at the FCC in this and other mergers (and those of its state members before state regulators reviewing these same mergers) strained resources available to the organization. In its ongoing effort to expend its limited resources prudently, NASUCA concluded that past and recent FCC and DoJ

² See, e.g., Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d).

decisions that evidence disregard for the public interest did not justify diverting additional time and effort to these mergers.

NASUCA was, however, heartened by press accounts that cited questions raised and concern about the public interested as expressed by this Court. Accordingly, NASUCA wishes to take all reasonable actions to ensure that the record here includes NASUCA's previous submissions, especially that of its expert, that were included in the FCC record.

NASUCA's members' interest in the protection of utility consumers makes NASUCA uniquely qualified to address the public interest implications of these mergers. No other party to these proceedings represents these interests.

Through various accounts, it has come to our attention that at the opening of this Court's July 12, 2006, Tunney Act hearing on the mergers of SBC/AT&T and Verizon/MCI (the "Bell mergers"), questions were raised regarding the apparent absence of consumer group representation at the hearing and the significance of that absence. We understand that some may have offered their supposition that consumer groups intended to signal to the Court by their non-presence that they were not troubled by the merger approval. NASUCA assures the Court that nothing could be further from the truth.

NASUCA and many of its individual members participated actively in state and federal proceedings **in opposition** to these Bell mergers, including the above-discussed comments filed at the FCC.³ Our submissions and advocacy were essentially ignored by the FCC, and the substantial resources we expended on our effort appeared to us to have

³ Given the nature of their formation under state law, NASUCA's members focus on activity at state and federal agencies like the FCC and the Federal Energy Regulatory Commission, hence do not typically become involved in Tunney Act proceedings.

been in vain, as the FCC imposed conditions on the mergers decidedly insufficient to protect consumer interests.⁴

We understand that the United States Department of Justice ("DoJ") has not been welcoming to consumer interests in previous telecommunications merger proceedings. We also understand that the DoJ has made clear in the instant matter its position that the Court's Tunney Act review is limited to the specific remedy adopted by the Department – a ten-year lease on facilities in a few hundred buildings across the country. The merging companies agree. All other issues, the Department and the companies have argued, are outside the scope of this proceeding – including, presumably, the numerous issues raised by NASUCA and its members in opposition to the Bell mergers. We believe that the DoJ and the companies are wrong in their interpretation of the limited scope of this review, but the DoJ's refusal to permit further examination of its failure to address consumer concerns helps explain consumers' disinclination to participate.

DISCUSSION OF RELEVANT PORTIONS OF THE LAW

Pursuant to §5(e) of the Tunney Act, 15 U.S.C. §16(e), the proposed final judgments pending in these cases may only be entered upon the Court's determination "that the entry of such judgment is in the public interest." In making its public interest determination, the Tunney Act authorizes the Court to take such action "as the court may deem appropriate," 15 U.S.C. §16(f)(5).

⁴ Our profound disappointment with the FCC's treatment of the SBC/AT&T and Verizon/MCI merger proceedings is shown clearly by the very brief comments NASUCA recently filed on the proposed AT&T/BellSouth merger. A copy of those comments is also attached to this filing.