

FCC MAIL SECTION

Federal Communications Commission

FCC 98-276

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Before the
DISTRICT FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Applications for Consent to the)	
Transfer of Control of Licenses and)	
Section 214 Authorizations from)	
)	
Southern New England Telecommunications)	CC Docket No. 98-25
Corporation,)	
Transferor)	
)	
To)	
)	
SBC Communications, Inc.,)	
Transferee)	

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 1998

Released: October 23, 1998

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

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the merger and, in order to effectively monitor the benefits, ordered SBC to provide in the future, geographically disaggregated annual reports of actual dollar investment and new products and services.²⁶ The DPUC further concluded, however, that most of the suggested service-quality concerns were premature, and that proposed conditions were unnecessary.²⁷ More specifically, the DPUC concluded that "the ability of the Telco . . . to provide safe, adequate and reliable telephone service and manner of operation will not be adversely affected by the Merger," and noted that SNET already provides service quality reports on a wire center basis.²⁸ Finally, the DPUC concluded that retail service quality concerns will also be addressed by the Telco's expected withdrawal from the retail market (because retail competition will permit customers to switch carriers if they are unsatisfied with the quality of service). In this regard, the DPUC noted that the Telco will be subjected to service quality standards for resale and unbundled elements and financial remedies for failure to meet those standards.²⁹

11. The DPUC proceedings also focused on the future status of the SPV cable system. The AG argued that SBC was not a suitable owner of SPV because of SBC's past behavior and its failure to explain "how it will efficiently provide cable service."³⁰ The DPUC found that the Applicants' "noncommittal approach" was of concern,³¹ and accordingly conditioned its approval of the merger on SBC's continued compliance with the terms and conditions of SPV's franchise agreement, including the "current level of capital investment, staffing, marketing, research and facility deployment proposed and accepted by the

²⁶ *Id.* at 47.

²⁷ *Id.* at 45-48.

²⁸ *Id.* at 45. The DPUC specifically noted that the Telco will continue to be regulated in the same manner after the merger pursuant to an alternative regulation plan, which includes "detailed service quality standards with minimum service levels that must be satisfied and associated financial penalties that would be imposed should service levels fall below these standards." *Id.* Those standards are set forth in *Application of the Southern New Eng. Tel. Corp. for Financial Review and Proposed Framework for Alt. Reg.*, Docket No. 95-03-01, Decision (Conn. Dep't of Pub. Util. Control Mar. 13, 1996).

²⁹ *Id.* at 46-47. Those standards will be adopted in *Application of the Southern New England Telephone Company's Proposed Service Standards and Financial Remedies for Resold Services and Unbundled Elements*, Docket No. 97-04-23.

³⁰ *DPUC Decision*, at 30-31.

³¹ *Id.* at 50. SBC described its cable activities in its most recent annual financial statement, where it stated that "[a]s a part of the changes in strategic direction of the post-merger initiatives [implemented after merging with PacTel], SBC announced during 1997 that it is scaling back its limited direct investment in a number of video services." *SBC 1997 Form 10-K*, at 5. As a result of this decision, SBC halted construction of the "Advanced Communications Network" in California, which was a project that promised, among other things, to bring competitive provision of multichannel video programming to customers. SBC also announced an agreement to sell its interest in cable systems in the Washington D.C. area.

local wireless services to 5,493,000 customers throughout its wireless markets," including Washington, D.C., Chicago, Illinois, and Boston, Massachusetts, in addition to many of those areas where SBC is the incumbent LEC.⁵ SBC also has investments in telecommunications businesses in selected international markets including Mexico, France, South Africa, Chile, South Korea, the United Kingdom, Switzerland, Israel and Taiwan."⁶ SBC states that it has no operations in Connecticut.⁷

3. *Southern New England Telecommunications Corporation (SNET)*. SNET is the primary incumbent LEC for most of Connecticut. SNET's principal businesses are: (1) its incumbent LEC local operations (called the Telco), which serve 2.3 million access lines covering most of Connecticut; (2) its retail affiliate, SNET America, Inc. (SAI), which provides long distance service to over 900,000 customers and sells local exchange and exchange access services it acquires from the Telco on the same terms and conditions as competitive LECs are able to acquire such services from the Telco; and (3) its wireless telecommunications operations, which operate in Connecticut, Rhode Island, and parts of Massachusetts.⁸ None of its wireless operations overlap with those of SBC.

4. In June 1997, the Connecticut Department of Public Utility Control (DPUC) approved a plan whereby SNET would establish separate wholesale and retail operations.⁹ Under the plan, SAI will be the retail arm, providing services to end users, while Telco will be the incumbent LEC and wholesale provider of "network services and functionality to retail providers," including SAI.¹⁰ Telco will cease to provide retail services to end-user customers and, as a part of the DPUC plan, customers will choose their LEC via a balloting process, which is scheduled to begin on January 4, 1999, and to be completed by May 1999.¹¹

5. SNET also has a subsidiary, SNET Personal Vision (SPV or Personal Vision), that is currently building a statewide hybrid-fiber-coaxial cable network to compete with the incumbent cable systems. SPV is operating under the trade name SNET Americast pursuant

⁵ *SBC 1997 10-K*, at 4.

⁶ *SBC 1997 10-K*, at 3.

⁷ *Application*, Exh. 1, at 5.

⁸ *Id.*

⁹ Southern New England Telecommunications Corporation, *Form 10-K, 1997*, at 4 (Mar. 20, 1998) (*SNET 1997 10-K*).

¹⁰ *Id.*

¹¹ *Id.* at 8. SNET states that this reorganization plan was challenged in federal and state courts by some parties, but reports that the federal court "denied the other parties' motion for summary judgment and granted the Corporation's motion for summary judgment." *Id.*

necessary, the Commission can attach conditions to the transfer of authorizations or licenses in order to ensure that the public interest is served by the transaction.³⁹ Finally, when assessing the potential public interest effects of this transaction between SBC and SNET, we limit our analysis to those issues that have been raised by the parties to the proceeding and those additional issues that may significantly affect the public interest. We do not address potential issues that are not raised in the record and that do not appear likely to generate public interest harms or benefits.

IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

A. Analysis of Potentially Harmful Competitive Effects

14. MCI Telecommunications Corporation (MCI), Omnipoint Communications, Inc. (Omnipoint), and Connecticut Telephone and Communications Systems, Inc. (Conn. Tel.) argue that the merger will adversely affect competition in markets currently served by SNET by eliminating a significant source of potential competition. These parties allege that, but for the merger, SBC would enter one or more of those markets and would have a significant impact on future competition in those markets.⁴⁰ MCI and Conn. Tel. also allege that the merger will harm competition in domestic long distance markets in Connecticut because it will enhance SNET's ability to engage in a predatory price squeeze against long distance competitors.⁴¹ Finally, MCI argues that the proposed merger unacceptably reduces the number of large incumbent LECs, thereby inhibiting the development of competition in local markets.⁴² For these reasons, Omnipoint asks us to deny the Applicants' request to transfer licenses and authorizations, while MCI and Conn. Tel. ask us to impose conditions to "ensure that local competition will be able to develop in Connecticut and in the SBC territories"⁴³

15. As the Commission explained in the *Bell Atlantic-NYNEX Order*, and as we recently affirmed in the *WorldCom-MCI Order* and the *AT&T-TCG Order*, we begin our analysis of potential anticompetitive effects by defining the relevant product and geographic

³⁹ *Id.* at 10 (quoting 47 U.S.C. § 214(c), 47 U.S.C. § 303(r)).

⁴⁰ MCI Comments at 4-6; Omnipoint Petition at 11-19; Letter dated May 22, 1998 from Douglas L. Povich, Squire, Sanders & Dempsey to Magalie Roman Salas, Secretary, FCC re: Written and Oral Ex Parte Presentations of Connecticut Telephone and Communications Systems, Inc. (Conn. Tel. Ex Parte) at 6.

⁴¹ MCI Comments at 7-8; Conn. Tel. Ex Parte at 5. These complaints are addressed at markets for domestic long distance services, and not at markets for international long distance services.

⁴² MCI Comments at 4-5.

⁴³ MCI Comments at 9.

8. According to filings SNET made with the United States Securities and Exchange Commission, the United States Department of Justice (DOJ) reviewed, but did not challenge, the proposed merger.¹⁸

2. State Review

9. On February 20, 1998, the Applicants filed a request that the DPUC approve the proposed merger.¹⁹ After holding public hearings, issuing a draft decision on August 5, 1998, and receiving written exceptions and oral arguments, the DPUC issued its final decision on September 2, 1998. In the course of the proceedings, the Applicants made several commitments, including commitments to: increase the number of SNET employees, maintain SNET's headquarters in Connecticut, continue SNET's charitable contributions, conduct a trial of Asynchronous Digital Subscriber Line (ADSL) service in Connecticut, contribute \$1,000,000 to institutions of higher learning in the state, and begin joint planning prior to the closing of the merger of the operational support systems (OSS) used by competitors to order facilities and services.²⁰ The DPUC accepted those commitments, and further found that SBC had the necessary financial and management qualifications to acquire SNET.²¹

10. Service quality was an issue that received particular attention in the DPUC proceedings. The Connecticut Office of Attorney General (AG), citing a petition filed by the California Office of Ratepayer Advocate with the California Public Service Commission, questioned SBC's marketing practices in California, and criticized SBC's intention to market secondary lines and vertical services more aggressively.²² The Connecticut Office of Consumer Counsel (OCC) argued that SBC's commitments to maintain service quality "lack enforceability,"²³ and that SBC would have the incentive and ability to permit service to deteriorate to those customers with the "fewest competitive options."²⁴ It further argued that SBC should therefore be required to comply with more disaggregated service standards than those currently applicable to SNET.²⁵ The DPUC agreed that consumers should benefit from

¹⁸ *SNET 1997 10-K*, at 3; *SBC/So. New Eng. Sought HSR OK For Deal on 1/22, 2/9/98* Select Fed. Filings Newswires 11:55:00.

¹⁹ DPUC Decision, at 3.

²⁰ *Id.* at 19-20.

²¹ *Id.* at 58-62, 39-44.

²² *Id.* at 27-30.

²³ *Id.* at 25.

²⁴ *Id.*

²⁵ *Id.* at 24-25.

plainly dominated by SNET. Applicants themselves acknowledge that competitors currently are providing local exchange and exchange access services to no more than two-to-three percent of customers generally in Connecticut,⁴⁷ and it appears likely that SNET has an even greater share of the mass market customers. Thus, a merger that would eliminate a significant potential competitor from Connecticut would raise significant public interest concerns. There is no evidence in the record, however, that SBC is one of the firms most likely to have substantial future competitive significance in the Connecticut market in the absence of a merger or acquisition, much less that it is among a limited number of such significant competitors.

19. Applicants assert that SBC had no plans to enter local markets in Connecticut as a competitor to SNET,⁴⁸ and there is no evidence in the record that would cause us to question that assertion. It may well be that the most likely entrants into any incumbent LEC's territory will include one or more incumbent LECs from other territories. In this particular case, however, there is no evidence in the record that SBC was particularly likely to enter Connecticut on its own. Although SBC possesses significant financial resources and expertise, it does not appear to have substantial telecommunications assets or brand name reputation in Connecticut. Moreover, even if SBC has some brand name reputation through its Cellular One wireless operations in areas adjacent to SNET's territory, it appears no more strongly positioned to enter the local residential and small business market in Connecticut than is any other wireless carrier that operates in Connecticut or adjacent areas. Based on these facts, we conclude that SBC is not among the firms that are likely to have the greatest future competitive significance in the Connecticut market for local exchange and exchange access services, and accordingly, the merger of SBC and SNET should not eliminate one of among a limited number of most significant participants from the Connecticut market.⁴⁹

20. *Local Exchange and Exchange Access Services Sold to Larger Business Customers.* Just as SNET dominates the market for local exchange and exchange access services sold to residential and smaller business customers, it also clearly dominates the market in Connecticut with respect to larger business customers. As we found in the *AT&T-TCG Order*, however, incumbent LECs are facing increasing competition in these business markets, and "numerous new entrants are rapidly entering this market, especially in central

⁴⁷ Application, Exh. 1, at 30.

⁴⁸ Application, Exh. 1, at 40-41, Att. F; Joint Opposition of SBC Communications Inc. and Souther New Eng. Tel. Corp. to Petitions to Deny and Reply to Comments (Applicants' Reply), at 11-13, Affidavit of James S. Kahan. The Commission previously has found evidence of intent to enter a relevant geographic market to be significant with respect to the likely competitive effects of a merger. *E.g.*, *SBC-PacTel Order*, 12 FCC Rcd at 2637-38 ¶¶ 25, 27; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20025-27 ¶¶ 73-75.

⁴⁹ See *WorldCom-MCI Order*, FCC 98-225, at ¶¶ 183-84; *AT&T-TCG Order*, FCC 98-169, at ¶¶ 33-34; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20035-58 ¶¶ 95-146.

Department," for at least 24 months.³² Notwithstanding this condition, the DPUC acknowledged SBC's concerns about the continued viability of the current SPV platform, and ordered SBC to conduct a feasibility study (with a report due to the DPUC on April 2, 1999), and specifically recognized SPV's continued ability to petition to DPUC to modify the SPV Franchise Agreement.³³ Finally, the DPUC conditioned its approval of the merger on SBC's commitment to expediting the deployment of real time interactivity and switched connectivity as agreed to by SPV.³⁴

12. In the course of the proceedings, the DPUC considered a number of other possible conditions, and imposed several concerning Internet access for schools and libraries, cellular service to neighborhood block watch organizations, and promotion of Lifeline service. The DPUC also considered, but rejected, requests by the AG and the OCC for: (1) rate reductions commensurate with the anticipated cost savings and synergies created by the merger and (2) conditions requiring compliance with the competitive checklist in Section 271 of the Telecommunications Act of 1996.³⁵

III. LEGAL STANDARDS

13. As we explained in the recent *WorldCom-MCI Order*, before the Commission can approve the transfer of control of authorizations and licenses in connection with a proposed merger, Sections 214(a) and 310(d) require the Commission to find that the proposed transfers serve the public interest.³⁶ The legal standards of Sections 214(a) and 310(d), which we must apply to the transfers before us, require us to weigh the potential public interest harms against the potential public interest benefits and to ensure that, on balance, the merger serves the public interest which, at a minimum, requires that it does not interfere with the objectives of the Communications Act.³⁷ This analysis necessarily includes an evaluation of the possible competitive effects of the transfer,³⁸ and the applicants bear the burden of proving that the transaction, on balance, serves the public interest. Where

³² *DPUC Decision*, at 51, 62.

³³ *Id.* at 62.

³⁴ *Id.*

³⁵ *Id.* at 51-58.

³⁶ *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, FCC 98-225, ¶¶ 8-14 (Sept. 14, 1998) (quoting 47 U.S.C. § 214(a)) (*WorldCom-MCI Order*).

³⁷ *WorldCom-MCI Order*, FCC 98-225, at ¶ 9.

³⁸ *Id.* at 12 (quoting *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953)).

of SBC, SNET, or any other incumbent LEC to resist the implementation and enforcement of the market-opening process.

22. *Domestic Long Distance Services in Connecticut and SBC's Current In-Region States.* As mentioned above, MCI and Conn. Tel. contend that the proposed merger will harm long distance competition by making SBC the incumbent LEC in both Connecticut and in SBC's current region. Neither party alleges that the elimination of SNET as a long distance provider in SBC's current region, however, will materially affect competition in those markets, and we see no reason to draw such a conclusion.⁵⁶ Although SNET did have some customers in SBC service territories, it has exited those markets in order to comply with the provisions of the Communications Act should the merger be approved. Its share of the market for long-distance services in SBC's territories was negligible.⁵⁷ Furthermore, based on the number of long distance providers competing today and the amount of transport capacity that is currently available, or is likely to become available in the near future, it appears that barriers to entry in these markets are quite low.⁵⁸ We thus conclude that it is unlikely that SNET's exit as a provider of long-distance services in SBC's service territories will result in any adverse effect on competition.

23. MCI and Conn. Tel. further argue that the merger will enable the merged entity to engage more effectively in predatory price squeezes.⁵⁹ They argue that the merger will

⁵⁶ We note that the merger will not affect SNET's participation as a provider of long-distance services to both mass market and larger business customers in SNET's own service territory.

⁵⁷ Application, Exh. 1, at 38-39; Letter dated August 24, 1998 from Anne U. MacClintock, Vice President Regulatory Affairs & Public Policy, SNET, to Magalie Roman Salas, Secretary, FCC (SNET Aug. 24 Ex Parte).

⁵⁸ See, e.g., *WorldCom-MCI Order*, FCC 98-225, at ¶¶ 36-64; *AT&T-TCG Order*, FCC 98-169, at 40; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20049-51 ¶¶ 128-31.

⁵⁹ In the *Bell Atlantic-NYNEX Order*, the Commission explained MCI's predatory price squeeze argument as follows:

A price squeeze, as the term is used by MCI, refers to a particular, well-defined strategy of predation that would involve the merged entity setting "high" prices for interstate exchange access services, over which it has monopoly power (albeit constrained by regulation), while its long distance affiliate offers "low" prices for long-distance services in competition with the other long-distance carriers. Because interstate exchange access services are a necessary input for long-distance services, MCI argues that applicants can create a situation where the relationship between the merged entity's "high" exchange access prices and its affiliate's "low" prices for long-distance services forces competing long-distance carriers either to lose money or to lose customers even if they are more efficient than the merged entity's long distance affiliate at providing long-distance services. It is this unprofitable relationship between the input prices and the affiliate's prices, and not the absolute levels of those prices, that defines a price squeeze.

Bell Atlantic-NYNEX Order, 12 FCC Rcd at 20054-55 ¶ 116.

markets.⁴⁴ We then identify the market participants in those relevant markets, particularly those firms that are most likely to have substantial future competitive significance. After completing these steps, we consider whether the merger is likely to result in either unilateral or coordinated effects that enhance or maintain market power in the relevant markets. Finally, we also consider whether the merger will impair the Commission's ability to implement and enforce the Communications Act's provisions opening markets and constraining market power as competition develops.

16. *Relevant Service Markets.* The parties opposing the merger on competitive grounds raise issues concerning the future state of competition in markets for three general groups of services -- local exchange and exchange access services, domestic long distance services, and wireless services. In the *MCI-WorldCom Order*, we recently concluded that the markets for local exchange and exchange access services and for domestic long-distance services are in fact each comprised of at least two separate relevant product markets -- one market for residential and small business customers (the "mass market"), and the other for medium-sized and large business customers (the "larger business market").⁴⁵ We see no reason to alter those conclusions here. For the reasons given below, we need not decide here whether the market for wireless services needs to be further subdivided into separate relevant markets for mass market and larger business customers.⁴⁶

17. *Relevant Geographic Markets.* All of the allegations concerning the possible competitive effects of proposed merger focus on local, domestic long distance, and wireless services in Connecticut. There are no allegations in the record concerning the elimination of SNET as a competitor in current SBC markets, and we see no reason to conclude that SNET possesses any assets, capabilities, or incentives that would distinguish it from many other telecommunications firms as a likely or potential entrant in those markets. Accordingly, we limit our analysis of the effects of the merger on local and wireless services to the current SNET markets in Connecticut. In assessing the effect of the merger on long distance services, we consider the effects both in Connecticut and in SBC's current region.

18. *Local Exchange and Exchange Access Services Sold to Mass Market Customers.* The market for local exchange and exchange access services in Connecticut is

⁴⁴ *Applications of NYNEX Corp. and Bell Atl. Corp. for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20008 ¶ 37 (1997) (*Bell Atlantic-NYNEX Order*); *WorldCom-MCI Order*, FCC 98-225, at ¶¶ 15-22; *Applications of Teleport Comm. Group, Inc. and AT&T Corp. for Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, CC Docket No. 98-24, Memorandum Opinion and Order, FCC 98-169, ¶¶ 15-16 (July 23, 1998) (*AT&T-TCG Order*).

⁴⁵ *WorldCom-MCI Order*, FCC 98-225, at ¶¶ 24-26.

⁴⁶ See para. 25 *infra*.

services by permitting the Applicants to offer a larger calling area that can better match the calling areas offered by other wireless service providers.⁶⁴

B. Other Public Interest Issues Involving SBC's Acquisition of the SNET Licenses and Authorizations

1. Prior Anticompetitive Conduct

26. As part of our public interest analysis under Section 310(d), we are required to determine whether SBC has the necessary "citizenship, character, financial, technical and other qualifications."⁶⁵ In the *Bell Atlantic-NYNEX Order*, the Commission, applying prior Commission policy statements, determined that it would consider certain forms of adjudicated, non-Commission-related misconduct as pertinent to an applicant's fitness to hold licenses.⁶⁶ Such misconduct might include: (a) felony convictions, (b) fraudulent representations to governmental units, and (c) violations of antitrust or other laws protecting competition.⁶⁷

27. Omnipoint argues that the fact that SBC was found liable for violating the antitrust laws in 1995 by discriminating against a competing provider of telephone directories "raise[s] serious licensee qualifications which have not been considered with respect to radio licenses owned or controlled by SBC."⁶⁸ Applicants respond, first, by noting that the Commission, in the *SBC-PacTel Order*, found that the conduct at issue in the antitrust case was largely confined to Texas and had not recurred.⁶⁹ More importantly, Omnipoint does not dispute, and there is no evidence in the record to contravene, the Applicants' assertion that

⁶⁴ *Infra*, at para 43.

⁶⁵ *E.g., Craig O. McCaw, Transferor, and American Telephone & Telegraph Co., Transferee, For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, File No. ENF-93-44, 9 FCC Rcd 5836, 5844 ¶ 8 (1994)

⁶⁶ *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20092 ¶ 236.

⁶⁷ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1195-97, 1200-03 (1986) ("*Character Qualifications*"), *modified*, 5 FCC Rcd 3252 (1990) ("*Character Qualifications Modification*"), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564, 6566 (1992) ("*Further Character Qualification Modification*"); *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n.14 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context).

⁶⁸ Omnipoint Petition at 2-6 (*citing Great Western Directories, Inc. v. Southwestern Bell Corp.*, 63 F.3d 1378 (5th Cir. 1995)); Omnipoint Reply at 2-5.

⁶⁹ Applicants Reply at 39 (*citing SBC-PacTel Order*, 12 FCC Rcd at 2651-53 ¶¶ 58-63 (where the Commission found that although "SBC has engaged in some anti-competitive activity in Texas, there is good reason to believe that conduct will not be repeated in California or Nevada, the areas over which SBC will acquire control as a result of the proposed transfer"))).

business districts in urban areas"⁵⁰ There is no evidence in the record, and parties opposing the merger have offered no evidence, upon which we could conclude that SBC has any significant capabilities or incentives to compete in the relevant local business market in Connecticut that are not shared by many of these other entrants in local business markets throughout the country, including Connecticut. Accordingly, we conclude that the proposed merger between SBC and SNET is unlikely to adversely affect the development of competition in this market.⁵¹

21. *Effect of a Reduction in the Number of Large LECs on Local Exchange and Exchange Access Markets.* MCI argues that the proposed merger would reduce the number of "significant LECs," and that this, in turn, will reduce the Commission's ability to constrain market power and implement the 1996 Act's measures promoting competition.⁵² In the Bell Atlantic-NYNEX Order, the Commission explained that consolidation among major incumbent LECs may hinder the development of competition and harm the public interest.⁵³ We remain concerned about the consolidation among large LECs as a general matter, and we will closely review mergers involving large LECs on a case-by-case basis. Here, we conclude that the proposed merger between SBC and SNET is unlikely to affect the public interest adversely in this manner. First, SBC and SNET are not truly comparable companies. SNET is substantially smaller than the "first tier" LECs -- the BOCs and GTE -- and has long been subject to different regulatory treatment.⁵⁴ Second, the DPUC clearly expects, and SBC has committed, that it will continue with the experimentation and different approach to opening its market, through the split between retail and wholesale operations, that SNET has pioneered.⁵⁵ Finally, we are not persuaded that this merger will materially increase the incentive or ability

⁵⁰ *AT&T-TCG Order*, FCC 98-169, at ¶ 27; *WorldCom-MCI Order*, FCC 98-225, at ¶¶ 85-87.

⁵¹ *Id.*

⁵² MCI Comments at 4-5

⁵³ *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20058-62 ¶¶ 147-56. Among the reasons given were: (1) "[a] reduction in the number of separately owned firms engaged in similar businesses will likely reduce this Commission's ability to identify, and therefore to contain, market power"; (2) "mergers increase the likelihood that cooperation among incumbent LECs can effectively inhibit or delay the implementation of the 1996 Act and other pro-competitive initiatives"; and (3) the post-merger incumbent LEC [may] cooperate[] less than the pre-merger incumbent LECs would have in enabling competition to grow." *Id.*

⁵⁴ *See, e.g., Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20 ¶¶ 257-79 (1990) (large LECs, namely the BOCs and GTE, were required to move to price cap regulation whereas smaller LECs, such as SNET, were permitted to choose whether or not to move to price cap regulation); 47 U.S.C. § 251(f)(2) (Suspensions and Modifications for Rural Carriers -- permitting smaller LECs, such as SNET, to petition for suspension or modification of the interconnection requirements imposed on incumbent LECs by the Telecommunications Act of 1996).

⁵⁵ *Infra.* para. 32.

violates Commission rules adopted in the *CMRS Safeguards Order*.⁷⁵ While it appears that those rules are inapplicable here since Omnipoint is complaining about the actions of SBC's affiliate in New England instead of in places where SBC is the incumbent LEC, we take seriously allegations of unreasonable or anticompetitive conduct. In this case, however, there is no evidence in the record that SBC is acting unreasonably or anticompetitively, much less that such conduct would be more likely to occur in Connecticut if we grant the requested applications.⁷⁶

31. *Allegations that SBC Resists Opening Local Markets to Competition.* Inner City Press/Community on the Move & Inner City Public Interest Law Project (Inner City Press) alleges that SBC "has been the most resistant [of the BOCs] to opening up its local monopolies to competition" and that "SBC would foreseeably impose its anti-consumer, anti-competitive policies and practices in all the markets served by SNET."⁷⁷ Conn. Tel. also argues that SBC has resisted measures designed to permit competition, and it proposes several conditions that it argues should be imposed on the merger.⁷⁸ These are significant allegations and, but for the particular circumstances in this case, we would need to carefully consider whether the allegations were substantiated. If so, allegations of this sort could lead us to be concerned that the proposed merger would inhibit or delay the development of competition in markets currently served by SNET.

32. We need not consider whether the allegations that SBC has been the most resistant BOC to opening its markets to competition and would impose "anti-consumer, anti-competitive policies and practices" are substantiated in this case because we believe that Connecticut has gone a long way toward opening local markets to competition. Through the efforts of the DPUC and SNET, the state of Connecticut has implemented an innovative and promising approach to opening local markets to competition, namely the restructuring of the incumbent LEC into separate wholesale and retail operations, with the wholesale company (the Telco) ceasing to compete for the business of providing service to end-user customers.⁷⁹ The DPUC clearly expects that SBC will continue with this arrangement, as evidenced by its reliance on the Telco's withdrawal from the retail market when it declined to impose certain

⁷⁵ Omnipoint Petition at 10-11 (citing *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162, Report and Order, 12 FCC Rcd 15668 (1997)).

⁷⁶ For example, SBC claims, and Omnipoint does not dispute, that SBC's affiliate has provided collocation space on its cellular towers to four other wireless telecommunications service providers, none of whom is opposing the proposed merger. SBC Reply at 33.

⁷⁷ Inner City Press Petition, at 1-2.

⁷⁸ *Id.* at 4-6.

⁷⁹ *Investigation of the Southern New England Telephone Company for Affiliate Matters Associated with the Implementation of Public Act 94-83*, Docket No. 94-10-05 (June 25, 1997).

enable more effective price squeezes because: (1) the merged entity would be the incumbent LEC at both ends of more long distance calls than is the case today; and (2) SBC has greater financial resources than SNET, which will permit SNET to incur more easily the costs of a price squeeze. Applicants respond that the Commission has rejected the very same argument in several orders, and for several reasons each time. In particular, Applicants argue that: (a) the merger would not change their incentives to engage in a price squeeze; (b) there are a number of statutory and regulatory barriers to price squeezes; and (c) MCI does not even attempt to argue that a price squeeze could harm competition by driving a long distance company from the market.⁶⁰

24. MCI made the identical argument in opposing the merger of Bell Atlantic and NYNEX.⁶¹ In the *Bell Atlantic-NYNEX Order*, the Commission concluded that this concern did not justify blocking the merger,⁶² and MCI does not challenge the Commission's analysis in this proceeding. More importantly, MCI's argument is significantly less persuasive in this proceeding than it was in the proceeding that led to the *Bell Atlantic-NYNEX Order* because the merger of SBC and SNET will result in a significantly smaller increase in the percentage of calls that both originate and terminate in SBC's region than did the merger of Bell Atlantic and NYNEX. Therefore, we conclude that the price squeeze issue provides even less of a reason to be concerned about the merger of SBC and SNET than it did with respect to Bell Atlantic and NYNEX. Accordingly, we conclude that MCI and Conn. Tel. have not presented evidence from which one could conclude that the merger may harm the public interest via a price squeeze in long distance markets and, as a result, that SBC has met its burden of proof on this issue.

25. *Wireless Markets Served by SNET*. Although SBC and SNET do not currently hold any spectrum in the same markets, Omnipoint contends that, but for the proposed merger, SBC is a "likely potential entrant into SNET's Connecticut . . . wireless markets."⁶³ Omnipoint does not explain how SBC would enter SNET's markets other than by acquiring a firm with existing spectrum in SNET's wireless service areas, however. Should more spectrum be made available, the proposed merger will not result in fewer market participants since other firms will be able to acquire the new spectrum. Moreover, we are not aware of any reason that the proposed merger could reduce the number or competitive significance of wireless firms in any market. In fact, as discussed below, it appears that the transaction could actually improve market performance in the relevant market for wireless telecommunications

⁶⁰ Applicants Reply at 17-19.

⁶¹ *Id.* at 20044-45 ¶¶ 115-18.

⁶² *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20045 ¶¶ 117-18.

⁶³ Omnipoint Petition to Deny at 14.

pending before it [concerning the issue]."⁸⁵ Furthermore, Applicants have voluntarily committed to maintain SNET's current treatment of traffic destined to paging companies, which is not the subject of a pending complaint, during the pendency of the complaint against SBC.⁸⁶ Given this commitment, we find that the proposed merger will not result in an adverse change of circumstances for paging companies and, accordingly, we find that SBC's treatment of paging traffic does not provide a basis for concluding that the proposed merger does not serve the public interest.

3. *Acquisition of Long Distance Customers in SBC's Region*

35. As mentioned above, through its SNET America subsidiary, SNET has been providing domestic interLATA (long distance) services for several years. In addition to serving approximately forty percent of the access lines in Connecticut, SNET has some customers in other states, "typically branch offices of companies with primary office locations in Connecticut."⁸⁷ SNET also issues calling cards to its local customers and to SNET America long distance customers, and sells prepaid phone cards. These cards can be used to originate long distance calls in current SBC service territories and, at the time of the Applications, SAI was often the provider in such cases.

36. Section 271 of the Communications Act requires BOCs to obtain approval from the Commission before providing long distance services originating within their "in-region" territories.⁸⁸ By its terms, Section 271 does not apply to SNET's service area since that area was not served by a BOC at the time the 1996 Act was enacted.⁸⁹ Therefore, we find that, to the extent SBC provides long-distance services to customers in Connecticut after consummation of the merger, it will not be providing in-region long-distance services in violation of Section 271 as Inner City Press alleges.⁹⁰ SBC has not yet obtained permission, however, to provide long distance services within any of the seven "in-region" states it

⁸⁵ Applicants Reply at 35.

⁸⁶ Letter dated September 8, 1998 from Todd Silbergeld, Director - Federal Regulatory, SBC, to Magalie Roman Salas, Secretary, FCC, at 1-2 (SBC Sept. 8 Ex Parte).

⁸⁷ Letter dated August 24, 1998 from Anne U. MacClintock, Vice President, Southern New England Telephone Corporation, to Magalie Roman Salas, Secretary, Federal Communications Commission., at 1 (SNET Aug. 24 Ex Parte).

⁸⁸ 47 U.S.C. §§ 271(a-b).

⁸⁹ See 47 U.S.C. § 271(i): "The term 'in-region State' means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T consent Decree, as in effect on the day before the date of enactment of the Telecommunications Act of 1996."

⁹⁰ Inner City Press Petition at 2-3.

SBC has operated and is currently operating PacTel and the rest of its communications businesses in a sufficiently responsible manner.⁷⁰ In other words, we are not aware of any reason to conclude that SBC may not have the necessary "citizenship, character, financial, technical and other qualifications" to hold either the licenses and authorizations formerly held by PacTel or those that it holds with respect to the rest of its current operations. Given SBC's evident fitness to hold its current licenses, we are convinced that SBC has the requisite qualifications to hold the licenses and authorizations currently held by SNET.

2. *Current Competitive Disputes*

28. *Omnipoint's Allegations.* Omnipoint argues that SBC is currently engaged in anticompetitive practices that are "undermining Omnipoint's ability to compete with SBC's cellular affiliates in various wireless markets"⁷¹ More specifically, Omnipoint alleges: (1) that SBC refuses to provide Omnipoint with "the billing and collection services necessary to support a national [calling party pays] service"; and (2) that SBC, unlike SNET, has made unreasonable demands concerning collocation arrangements for its cellular towers located in New England.⁷²

29. Omnipoint's first allegation -- that SBC is not providing the support necessary for a calling party pays service -- concerns a subject that is currently pending before the Commission. The Commission has regularly declined to consider in merger proceedings matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability.⁷³ We find no reason to depart from Commission precedent in this case.

30. Omnipoint's second allegation -- that SBC, unlike SNET, is acting unreasonably with respect to collocation on cellular towers -- also fails to create a material question of fact as to SBC's fitness to hold wireless licenses. First, Connecticut has a statute that requires "tower sharing," which may explain any differences in treatment experienced by Omnipoint.⁷⁴ In any event, we see no reason to conclude that SBC will not comply with the statute to the same extent shown by SNET. Omnipoint also argues that SBC's conduct

⁷⁰ Application, Exh. 1, at 23-25; Applicants Reply at 37-39.

⁷¹ Omnipoint Petition at 6-7.

⁷² *Id.* at 6-11.

⁷³ See, e.g., *AT&T-McCaw Order*, 9 FCC Rcd at 5877 ¶ 70, 5887 ¶ 86; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 19902 ¶ 210.

⁷⁴ Conn. Gen. Stat. Ann. § 6-50aa (West Supp. 1998).

4. Acquisition of SNET's International Authorizations

38. Two SNET subsidiaries hold Section 214 authorizations to provide U.S. international services. SAI and SNET Diversified Group, Inc. are authorized to provide international switched and private line services by reselling the switched and private line services of other authorized U.S. international common carriers.⁹⁶ SNET Diversified also is authorized to provide its international switched services by reselling international private lines, interconnected to the public switched network at one or both ends of the private line, between the United States and Commission-approved foreign points.⁹⁷ This practice of routing switched traffic over international private lines has been referred to as "International Simple Resale (ISR)." The potential use of ISR by SNET Diversified as a means to terminate U.S.-inbound switched traffic in SBC in-region states is the subject of a voluntary commitment by SBC and SNET.

39. SBC and SNET have agreed that any arrangements which SNET Diversified may negotiate with foreign carriers to use ISR to route U.S.-inbound switched traffic to SBC's in-region states via SNET Diversified private lines will be subject to prior Commission approval under the procedures of Section 43.51(e), pending the outcome of the Commission's biennial review of its International Settlements Policy ("ISP") and associated filing requirements.⁹⁸ In the *ISP Reform* proceeding, we noted that commenting parties in other proceedings have expressed concern regarding whether U.S. international carriers may negotiate arrangements with foreign carriers to accept "groomed" traffic, *i.e.*, traffic that

⁹⁶ International switched services consist primarily of International Message Telephone Service ("IMTS"), which accounts for approximately 95 percent of all U.S. international service revenues. See Federal Communications Commission, *Trends in the U.S. International Telecommunications Industry* at 3 (Industry Analysis Div., CCB Aug. 1998).

⁹⁷ Commission rules permit duly authorized U.S. carriers to use international private lines, interconnected to the public switched network at one or both ends of the private line, to route their international switched traffic between the United States and particular foreign points subject to the conditions specified in Section 63.21(a) of the rules, 47 C.F.R. § 63.21(a).

⁹⁸ See SBC Sept. 8 Ex Parte (citing *1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements and Regulation of International Accounting Rates*, IB Docket No. 98-148 and CC Docket No. 90-337, Notice of Proposed Rulemaking, FCC 98-190 (rel. Aug. 6, 1998) (*ISP Reform* proceeding or *ISP Reform Notice*)). Section 43.51(e) generally requires that, if a carrier enters into an operating agreement with a foreign carrier to exchange traffic that is subject to the ISP under terms and conditions that differ from those contained in the operating agreement of another carrier providing the same or similar service between the United States and the same foreign point, the carrier must file a notification or modification request with the International Bureau, as specified in Section 64.1001. Alternatively, the carrier may seek approval for the agreement as specified in Section 64.1002. In any case, the International Bureau may reject a particular agreement if it finds that its terms and conditions do not serve the public interest. See §§ 64.1001(1)(2), 64.1002(e)(2). Section 43.51(e) does not apply to U.S. carrier agreements to exchange traffic with foreign carriers on an ISR basis.

reporting requirements on SBC as a result of the merger.⁸⁰ Moreover, SBC has clearly stated in the record in this proceeding that it "will continue to implement the division of SNET into separate wholesale and retail units following the merger"⁸¹ This restructuring is intended, among other things, to make it easier to detect any discrimination against unaffiliated retail providers seeking to compete with SNET's retail affiliate. Based on SBC's representation that it will continue with the market-opening experiment in Connecticut, we conclude that Applicants have demonstrated that the proposed merger is unlikely to adversely affect the development of competition in markets currently served by SNET.

33. *Conn. Tel.'s Allegations Regarding SNET's Conduct.* Conn. Tel. alleges that SNET -- the company being purchased in this merger -- has engaged in several types of anticompetitive conduct, including: (1) refusing to permit resale of its voice mail services or to permit Conn. Tel.'s customers to purchase voice mail services from SNET; (2) refusing to permit resale of its centrex services to end user customers and requiring Conn. Tel.'s customers to pay early termination fees for dropping SNET service; and (3) failing to provide competitors with access to technologically-advanced interfaces with SNET's operational support systems.⁸² Based on these allegations, Conn. Tel. argues that the Commission "should take advantage of the opportunity presented by this proceeding to open the local market in Connecticut to competition."⁸³ Conn. Tel. does not allege, however, that SBC would continue these practices, much less make the problems worse if it were to acquire SNET. Accordingly, we conclude that these allegations concerning SNET's past conduct do not materially weigh against Applicants' proof that the proposed merger serves the public interest.

34. *Allegations Raised by Metrocall and the Personal Communications Industry Association (PCIA).* Metrocall and PCIA allege that SBC has charged "paging providers for the facilities used to transport SBC-originated traffic to paging networks, and has failed to pay paging providers for terminating SBC's traffic."⁸⁴ They argue that the Commission should not approve the merger until SBC ceases such anticompetitive practices. In addition, Metrocall has filed a complaint with the Commission against SBC, but not SNET, concerning this practice. Applicants respond that SBC's treatment of its interconnection arrangements with paging companies "is the product of a legitimate difference of opinion . . . [,] has nothing to do with the proposed merger, and the Commission has numerous other proceedings already

⁸⁰ *Final DPUC Decision*, at 48.

⁸¹ Letter dated September 10, 1998 from Todd F. Silbergeld, Director - Federal Regulatory, SBC Communications, Inc. to Magalie Roman Salas, Secretary, FCC (SBC Sept. 10 Ex Parte).

⁸² Conn. Tel. Ex Parte at 2-3

⁸³ *Id.* at 3.

⁸⁴ PCIA Petition at 5 (emphasis omitted); Metrocall Petition.

41. Applicants have submitted information to demonstrate that SAI and SNET Diversified warrant continued regulation as non-dominant international carriers on their affiliated routes. According to the Applicants, VTRI, through its subsidiaries, provides local, long distance, and cable television services in Chile. Diax is a new full-service Swiss telecommunications carrier. Applicants represent that VTRI and Diax each lack 50 percent market share in the international transport and local access markets in Chile and Switzerland, respectively.¹⁰⁵ There is no evidence in the record and we are aware of no information that suggests these statements are not credible. We therefore conclude that it is not necessary to impose our international dominant carrier safeguards on SAI's and SNET Diversified's provision of service on these routes. With respect to South Africa, SBC states that it does not seek in this transfer of control proceeding to obtain the authority, currently held by SAI and SNET Diversified, to resell private line service between the United States and South Africa.¹⁰⁶ We therefore cancel the Section 214 authority granted SAI and SNET Diversified to resell private line service between the United States and South Africa. We also find that, because these carriers now will be authorized to serve the U.S.-South Africa route solely by reselling the switched services of unaffiliated U.S. facilities-based carriers, they warrant continued regulation as non-dominant international carriers in their provision of service on this route.¹⁰⁷ We do remind the Applicants, however, that SAI and SNET Diversified are required by our rules and decisions to file quarterly traffic reports of their switched resale service on the U.S.-South Africa route.¹⁰⁸

5. *Service Quality Issues*

42. Inner City Press argues that the proposed merger will not preserve and enhance universal service and indicates that this is because the merger may adversely affect service quality.¹⁰⁹ To support this allegation, Inner City Press points to press reports that claims have been made by other companies to the effect that consumers in California were made worse off

¹⁰⁵ See International Section 214 Application, at 10-11, 14.

¹⁰⁶ *Id.* at 9-10.

¹⁰⁷ See 47 C.F.R. § 63.10(a)(4) (establishing a presumption of non-dominance for the provision of service on any route where a carrier provides the service solely by reselling an unaffiliated U.S. facilities-based carrier's international switched services (either directly or indirectly through the resale of another U.S. resale carrier's international switched services)).

¹⁰⁸ SBC has committed to file the quarterly traffic reports required by Section 43.61(c) of the rules, 47 C.F.R. § 43.61(c). See International Section 214 Application, at 14. Section 43.61(c) provides that "[e]ach common carrier engaged in the resale of international switched services that has an affiliation with a foreign carrier that has sufficient market power on the foreign end of an international route to affect competition adversely in the U.S. market and that collects settlement payments from U.S. carriers" shall file a quarterly traffic report of its switched resale services.

¹⁰⁹ Inner City Press Petition, at 9.

currently serves. Therefore, in order to comply with Section 271, SNET and its subsidiaries must cease originating long distance traffic in SBC's current seven-state region if the merger is approved.

37. SNET has taken several steps to ensure that it will not originate long distance traffic in SBC's seven-state region. SNET states that

all 1+ customers [in those states] have now moved to an alternative interexchange carrier of their choice. Therefore, SNET no longer has any relationship with former 1+ customers located in the SBC states or those customers' chosen carrier(s). SNET has not received any compensation, nor will there be any future compensation from the carrier(s) who now serve SNET's former customers in the SBC states.⁹¹

SNET also states that all of the relevant commissions in SBC's in-region states, at SNET's request, have cancelled SNET America's certificates to provide service and the related tariffs.⁹² SNET further states that it will no longer carry the calls originating in SBC's region through customers' use of calling cards it provides to customers and the prepaid calling cards it sells to customers.⁹³ As a result of the measures taken by SNET, other long distance companies will be carrying traffic originating in SBC's current region. These measures appear to be the same procedures followed by SBC with respect to calling cards provided to its own out-of-region long distance customers.⁹⁴ We do emphasize, however, that it is the responsibility of SBC after the merger to ensure that SNET is in compliance with any relevant statutory provisions and Commission orders,⁹⁵ including any interpretations of those provisions that the Commission promulgates in the future.

⁹¹ Letter dated September 4, 1998, from Wendy Bluemling, Director - Regulatory Affairs, SNET, to Magalie Roman Salas, Secretary, FCC. (SNET Sept. 4 Ex Parte).

⁹² *Id.*

⁹³ SNET Aug. 24 Ex Parte at 2-3.

⁹⁴ *See, e.g.*, Section 214 Application, Exh. 1, at 39 n.45.

⁹⁵ *See, e.g.*, *AT&T Corp., et al. v. Ameritech Corp. and Qwest Communications Corp.*; *AT&T Corp. et al. v. U S West Communications, Inc. and Qwest Communications Corp.*; *McLeod USA Telecommunications Services, Inc. et al. v. U S West Communications, Inc.*, File No. E-98-41, Memorandum Opinion and Order, FCC 98-242 (Oct. 7, 1998).

competitors such as AT&T, Sprint, Omnipoint, and Nextel.¹¹⁴ Second, Applicants argue that the merger will enhance SNET's purchasing, marketing, research, and technical design capabilities for its local exchange and wireless network and retail operations.¹¹⁵ Applicants also argue that many of the measures needed to comply with the market-opening provisions in the Telecommunications Act of 1996 involve substantial economies of scale and, as a result, that the merger will help SNET to open its markets.¹¹⁶ For example, the development of OSS that are required to provide unbundled elements and wholesale services to competitors clearly involve large sunk cost investments. Finally, Applicants claim that SBC's current and future long distance operations will benefit from SNET's experience and expertise in successfully providing long distance services in Connecticut.¹¹⁷ MCI responds that the Applicants have only articulated one benefit -- that the merger will give SNET access to greater resources -- which MCI argues will be used in a manner that is not consistent with the public interest.¹¹⁸

45. We disagree with MCI and find that Applicants have demonstrated that the proposed merger is likely to produce at least some tangible public interest benefits. We find that the merger will provide Applicants with an increased wireless calling area that may result in improved wireless competition in the relevant markets. We also note that the DPUC concluded that SNET's access to improved research capabilities "would be a major benefit of the merger,"¹¹⁹ and that "Connecticut consumers are likely to see the benefits of ADSL technology more quickly as a result of SNET's merger with SBC."¹²⁰ We need not ascertain the exact magnitude of the benefits of the proposed merger because "where, as here, potential harms are unlikely, Applicants' demonstration of potential benefits need not be as certain."¹²¹

¹¹⁴ *Id.* at 26-28.

¹¹⁵ *Id.* at 28, 35-36, 40.

¹¹⁶ *Id.* at 34.

¹¹⁷ *Id.* at 39-40.

¹¹⁸ MCI Comments at 2.

¹¹⁹ *DPUC Decision*, at 41.

¹²⁰ *Id.* at 46.

¹²¹ *WorldCom-MCI Order*, FCC 98-225, at ¶ 194.

terminates in particular geographic regions.⁹⁹ We requested comment in the *ISP Reform Notice* whether agreements by U.S. carriers to accept "groomed" U.S.-inbound traffic present a potential for anticompetitive effects, particularly with respect to arrangements between foreign carriers with market power and domestic incumbent local exchange carriers.¹⁰⁰ We therefore accept the SBC/SNET voluntary commitment to afford the Commission prior approval of any arrangements that SNET Diversified may negotiate with foreign carriers to route U.S.-inbound switched traffic into SBC's in-region states via SNET Diversified private lines pending the adoption of final rules in the *ISP Reform* proceeding.¹⁰¹

40. We also note that, as a result of the merger, SAI and SNET Diversified would become affiliated, as that term is defined in Section 63.18(h)(1)(i) of the rules, with three foreign carriers: VTR Inversiones (Chile); Telkom South Africa Ltd. (South Africa); and Diax Holding AG (Switzerland).¹⁰² These affiliations raise the issue of whether it is necessary to impose our international "dominant carrier" safeguards on SAI and SNET Diversified in their provision of service on any of these affiliated routes. In general, the Commission imposes its international dominant carrier safeguards on a U.S. carrier's provision of service on a particular route where an affiliated foreign carrier has sufficient market power to affect competition adversely in the U.S. market.¹⁰³ A U.S. carrier will presumptively be classified as non-dominant on an affiliated route if the carrier demonstrates that the foreign affiliate lacks 50 percent market share in the international transport and the local access markets on the foreign end of the route.¹⁰⁴

⁹⁹ *Id.* at ¶ 43.

¹⁰⁰ *Id.*

¹⁰¹ SBC states in the SBC Sept. 8 Ex Parte that it does not waive its objections to applying the Section 43.51(e) prior approval requirement to any of SBC's pending or future Section 214 authorizations (other than requests submitted by SNET Diversified) pending the outcome of the *ISP Reform* proceeding. SBC, through its subsidiaries, has previously received, and has pending applications for, Section 214 authority to provide international switched and private line services. Most recently, SBC subsidiary Southwestern Bell Communications Services, Inc. (SBCS) received a grant of special temporary authority (STA) to provide out-of-region facilities-based and resold switched and private line services between the United States and particular foreign points. See TAO-2623 (Feb. 26, 1998). This STA is conditioned to require that SBCS seek prior approval, under the procedures of Section 43.51(e), of any agreements SBCS negotiates with foreign carriers to use ISR to route U.S. switched traffic to SBC in-region states over SBCS private lines. The underlying SBCS application for permanent Section 214 authority remains pending. See Application File No. ITC-97-770.

¹⁰² 47 C.F.R. § 63.18(h)(1)(i). See Joint Application to Transfer Control of the International Section 214 Authorizations held by SNET America, Inc. and SNET Diversified Group, Inc. at 10-11 (International Section 214 Application).

¹⁰³ See 47 C.F.R. § 63.10(a)(3); see also *id.* § 63.10(c) (listing the international dominant carrier safeguards).

¹⁰⁴ See 47 C.F.R. § 63.10(a)(3).

require a live hearing."¹²⁹ The record before us has provided sufficient evidence for us to determine, without conducting an evidentiary hearing, that the Applicants' request serves the public interest, convenience, and necessity.¹³⁰

48. *Other Determinations Requested by the Applicants.* Applicants request that, pursuant to Section 212 of the Communications Act and Part 62 of the Commission's rules, the Commission find and declare that, upon consummation of the amended Agreement, all of SBC's post-merger carrier subsidiaries will be "commonly owned carriers" as that term is defined in the Commission's Rules. Because this request is reasonable and unopposed, we grant the request and make the requested finding.¹³¹

49. The Applicants make additional procedural requests that are reasonable and unopposed. Accordingly, we grant them. First, pursuant to Section 21.39 of our Rules,¹³² we state that the transfer of control sought in the Application includes authority for SBC to acquire control of: (1) any authorization issued to SNET's subsidiaries and affiliates during the Commission's consideration of the transfer of control applications and the period required for consummation of the transaction following approval; (2) construction permits held by such licensees that mature into licenses after the closing and that may not have been included in the transfer of control applications; and (3) applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer of control. Second, pursuant to Sections 22.123(a), 25.116(b)(3), 90.164(b), and 101.29(c)(4) of our Rules,¹³³ we grant applicants a blanket exemption from any applicable cut-off rules that would otherwise apply to subsidiaries or affiliates filing amendments to pending Part 22, Part 25, Part 90, or Part 101 applications or other applications to reflect the consummation of the proposed transfer of control. Finally, pursuant to Sections 1.2111, 24.839, and 101.55(d) of our Rules,¹³⁴ we find that no trafficking or unjust enrichment is involved in the transfer of control of licenses for facilities in the Personal Communications Services which were obtained through competitive bidding in the last three years.

¹²⁹ *WorldCom-MCI Order*, FCC 98-225, at 117 ¶ 205 (citing *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1496-97 (1995) (quoting *U.S. v. FCC*, 652 F.2d at 89-90)).

¹³⁰ 47 U.S.C. § 309(d)(2). *WorldCom-MCI Order*, FCC 98-225, at 117 ¶ 205. See also *U.S. v. FCC*, 652 F.2d at 90; *SBC Communications v. FCC*, 56 F.3d at 1496-97 (quoting *U.S. v. FCC*, 652 F.2d at 96).

¹³¹ See, e.g., *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20091 ¶ 233.

¹³² 47 C.F.R. § 21.39.

¹³³ 47 C.F.R. §§ 22.123(a), 25.116(b)(3), 90.164(b), and 101.29(c)(4).

¹³⁴ 47 C.F.R. §§ 1.2111, 24.839, 101.55(d).

by SBC's merger with PacTel. In response, SBC has submitted evidence in this proceeding that service quality has actually improved in California since the merger with PacTel, including documentation of increased investment in advanced technologies, deployment of new services, improved response times, and compliance with the performance standards of the California Public Utilities Commission.¹¹⁰ Moreover, the DPUC considered, and rejected, allegations that service quality is likely to decline in Connecticut as a result of the merger.¹¹¹ One significant reason the DPUC gave for its belief that service quality would not decline is that the Telco will be withdrawing from the retail market and that there will be a balloting process whereby all of the current SNET retail customers will be asked to choose from a number of local service providers. We note that SBC has stated on the record that it will continue to implement the division of SNET into separate wholesale and retail units following the merger.¹¹²

43. Based on the absence of credible evidence in the record indicating that service quality is likely to decline in Connecticut, and particularly on the DPUC's comfort with its own ability to ensure that service quality is not adversely affected, we conclude that the proposed merger is unlikely to affect adversely the public interest in high quality telephone service. We agree with the DPUC that consumers are more likely to be able to enjoy high quality telephone service when they can choose to purchase services from another carrier if they are unhappy with the service they receive. We are also encouraged by the efforts of the parties in Connecticut to explore different ways to promote competition in local markets, and we share the DPUC's optimism that competition may develop more quickly in an environment where all retail providers access the incumbent LEC's network through the same transparent processes. Should service quality become a problem with respect to any interstate services, however, we will not hesitate to act in an appropriate manner to ensure that the problem is resolved quickly and effectively.

V. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

44. Applicants assert that "this merger is likely to produce a number of merger-specific, procompetitive, and other public interest, benefits which support approval of the proposed transfers of control."¹¹³ First, Applicants argue that the wireless operations of the combined firm will be able to offer "a considerably larger calling scope, through the combination of areas served separately by SBC and SNET," and that this will enable the combined firm to offer the kinds of toll-free and "home rate" calling plans offered by

¹¹⁰ SBC Sept. 8 Ex Parte, at 2-4.

¹¹¹ *DPUC Decision*, at 43, 45-48.

¹¹² SBC Sept. 10 Ex Parte.

¹¹³ Application, Exh. 1, at 26.

Telecommunications Corporation (SNET) in the above-captioned proceeding ARE GRANTED.

53. IT IS FURTHER ORDERED pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the above grant shall include authority for SBC Communications to acquire control of:

- a) any authorization issued to SNET's subsidiaries and affiliates during the Commission's consideration of the transfer of control applications and the period required for consummation of the transaction following approval;
- b) construction permits held by licensees involved in this transfer that mature into licenses after closing and that may have been omitted from the transfer of control applications; and
- c) applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.

54. IT IS FURTHER ORDERED that all references to SBC Communications and SNET in this Order shall also refer to their respective officers, directors and employees, as well as to any affiliated companies, and their officers, directors and employees.

55. IT IS FURTHER ORDERED that as a condition of this grant, SBC and SNET shall comply with the conditions set forth in Section VII of this order.

56. IT IS FURTHER ORDERED pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the "Petition to Deny of Omnipoint Communications, Inc." IS DENIED.

57. IT IS FURTHER ORDERED pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the "Petition to Deny" filed by Inner City Press/Community on the Move & Inner City Public Interest Law Project IS DENIED.

58. IT IS FURTHER ORDERED pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the "Petition to Deny" filed by Metrocall, Inc. IS DENIED.

59. IT IS FURTHER ORDERED pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i),

VI. ADDITIONAL PROCEDURAL MATTERS

46. *Request for a Hearing.* In its petition, Inner City Press appears to request that the Commission schedule a hearing as an alternative to dismissing the Application.¹²² As we recently explained, however, if there are no substantial and material questions of fact presented by the record and a grant of the application would be in the public interest, we must grant the transfer of control application and deny any petitions to deny and requests for evidentiary hearing.¹²³ A party seeking to compel the Commission to hold an evidentiary hearing must satisfy the two-part test established by the United States Court of Appeals for the District of Columbia Circuit in *Gencom Inc. v. FCC*.¹²⁴ Under this test, a party seeking an evidentiary hearing must: (1) submit a petition to deny containing "specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with [the public interest];"¹²⁵ and (2) present to the Commission a "substantial and material question of fact."¹²⁶ In addition, the allegations set forth by the petitioning party must be supported by an affidavit and "be specific evidentiary facts, not 'ultimate conclusory facts or more general allegations'"¹²⁷

47. Initially, we note that Inner City Press's allegations are not supported by "an affidavit of a person or persons with personal knowledge thereof." as required by Section 309.¹²⁸ Moreover, the evidentiary support provided by Inner City Press consists nearly entirely of second-hand recitations of publicly-reported allegations of anticompetitive conduct by SBC in recent years. We find that such weakly-supported allegations do not provide any meaningful basis to conclude that there is a material question of fact. In any event, the allegations made by Inner City Press do not reflect disputes over material facts, but rather, focus on the relevance of particular facts in our public interest determination. As we concluded in the *WorldCom-MCI Order*, however, these types of issues "'manifestly do not'

¹²² Inner City Press Petition at 10. *See also* Inner City Press Petition at 4 n.3.

¹²³ *WorldCom-MCI Order*, FCC 98-225, at 110 ¶ 201 (citing 47 U.S.C. § 309(d)(2)).

¹²⁴ *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (*Gencom Inc.*). *See Astroline Communications Company Ltd. v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988) (*Astroline*).

¹²⁵ 47 U.S.C. § 309(d)(1).

¹²⁶ 47 U.S.C. § 309(d)(2).

¹²⁷ *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980) (*U.S. v. FCC*) (quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-324 (D.C. Cir. 1974)).

¹²⁸ 47 U.S.C. § 309(d)(1).



VII. CONCLUSION OF ANALYSIS AND CONDITIONS OF APPROVAL

50. After considering all of the issues raised by commenters and parties opposing Applicants' requests, we conclude that the proposed merger between SBC and SNET is unlikely to produce any meaningful public interest harms. We also find that it is likely to produce at least some tangible public interest benefits. Accordingly, subject to the conditions in the following paragraph, we grant Applicant's requests that licenses and authorizations currently held by SNET be transferred to SBC in connection with their merger.

51. As discussed in the preceding sections of this order, our approval of the requested transfers of licenses and authorizations has been based, in part, on certain commitments and representations made by Applicants and our understanding that certain actions have been taken, or will be taken in the future. As a result, our approval of the applications before us is conditioned upon these commitments and representations. The conditions of our approval include:

- (1) Applicants' complete and continued fulfillment of the measures described above that are designed to ensure that this merger does not result in SBC providing interLATA services in its current region in violation of Section 271 of the Communications Act;
- (2) Applicants' maintenance of SNET's current treatment of Metrocall and other pagers pending resolution of Metrocall's complaint against SBC;
- (3) Applicants' commitment not to implement any arrangements that SNET Diversified may negotiate with foreign carriers to route U.S.-inbound switched traffic into SBC's in-region states via SNET Diversified private lines unless and until the Commission approves these arrangements during the period of time pending the adoption of final rules in the *ISP Reform* proceeding; and
- (4) Applicants' continued good faith implementation of the restructuring of local exchange operations in Connecticut in accordance with the requirements of the DPUC.

VIII. ORDERING CLAUSES

52. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the applications filed by SBC Communications, Inc. and Southern New England

substantial talent and resources in the review of this merger, as is evident by the accompanying Order. But our staff is hard working and has many demands placed on their time. Another agency of the federal government, one with specific statutory authority to review mergers and with substantially more staff that specialize in nothing other than merger analysis, has already examined this merger in all market contexts and has found it acceptable. For this reason, I would prefer a more thorough consideration of ways to eliminate the duplicative nature of this dual analysis of proposed mergers. Surely there is a more efficient and less time-consuming process that could be followed.

For example, it is the obligation of this agency to find the transfer of licenses is in the "public interest."³ A finding by this agency that the transfer of licenses involves merging parties that have in the past and are currently complying with existing Commission rules, and that no extraordinary reason to oppose the transfer of licenses is articulated by the public, would seem the proper basis for this agency to exercise its responsibility.

Several regulatory authorities, both at the state and federal level, have already approved the merger with various qualifications. The FCC seems always to be the last among countless agencies to offer an opinion. I concur in the decision to approve this transaction, but I do so with deep reservations about the process that these companies have had to endure.

³ I emphasize that it is the obligation of this agency to find only the *transfer of licenses* is in the public interest, not the merger or acquisition of the underlying firms. I note that the Commission has some limited shared Clayton Act jurisdiction to review the merger more broadly, but that jurisdiction does not involve a "public interest" standard. The standard there is quite specific: "substantially to lessen competition, or tend to create a monopoly," 15 U.S.C. Section 18, which does not require that a proposed merger be demonstrably "pro-competitive," and under which the Department of Justice has promulgated guidelines for the type of evidence required to meet that standard. The Commission makes no specific findings with respect to this standard. Moreover, another federal agency, with substantially more expertise, has already applied that standard.

154(j), 214(a), 214(c), 309, 310(d), that the "Petition of the Personal Communications Industry Association to Deny or Defer Action" IS DENIED.

60. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release in accordance with 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

**SEPARATE STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re: Application For Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation to SBC Communications, Inc.; CC Docket No. 98-25.

I support today's decision approving the proposed purchase of Southern New England Telecommunications Corporation by SBC Communications Inc. I concur in that result, but write separately to express my concern with the underlying reasoning. I continue to be uncomfortable with the Commission's proposed framework for analyzing mergers as I believe that it is (i) essentially duplicative of the merger analysis already conducted by the Department of Justice, (ii) excessively time-consuming since this agency waits until after DOJ clearance has been granted before proceeding, and (iii) too speculative in its analysis of who may be potential competitors.

Cumbersome and Time-Consuming Review Process

I continue to be frustrated by this agency's unwieldy review of mergers and the length of time that we take to do so. As I have noted in several recent orders,¹ I am troubled that this agency takes as long as it does to review mergers. The transfer currently before us was filed on February 20, 1998 and cleared the Department of Justice without condition on February 21, 1998. Moreover, this is a relatively small transaction and one that appears to raise fewer legal issues than past mergers. Indeed, only five parties filed comments or petitions to deny. It should not take this agency an additional 8 months beyond the Department of Justice's review to agree that there are no negative competitive effects.²

As I have indicated before, I am troubled that the Commission engages in such extensive market analysis and the development of conclusions about market structure and market power that duplicate work done by other federal agencies. Our staff has invested

¹ Statement of Commissioner Furchtgott-Roth regarding the Application of Worldcom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc. (Sept. 14, 1998); Statement of Commissioner Furchtgott-Roth regarding the Application to Transfer Control of Teleport Communications Group Inc. to AT&T Corp. (July 22, 1998).

² Again I note that the Commission's internal procedures that typically limit the Commissioners' input until after an item has been fully drafted and presented is not only precluding full consideration of important issues by the entire Commission in a timely manner, but ultimately delaying the decision-making process. I look forward to working with my colleagues to attempt to rectify this situation.

substantial talent and resources in the review of this merger, as is evident by the accompanying Order. But our staff is hard working and has many demands placed on their time. Another agency of the federal government, one with specific statutory authority to review mergers and with substantially more staff that specialize in nothing other than merger analysis, has already examined this merger in all market contexts and has found it acceptable. For this reason, I would prefer a more thorough consideration of ways to eliminate the duplicative nature of this dual analysis of proposed mergers. Surely there is a more efficient and less time-consuming process that could be followed.

For example, it is the obligation of this agency to find the transfer of licenses is in the "public interest."³ A finding by this agency that the transfer of licenses involves merging parties that have in the past and are currently complying with existing Commission rules, and that no extraordinary reason to oppose the transfer of licenses is articulated by the public, would seem the proper basis for this agency to exercise its responsibility.

Several regulatory authorities, both at the state and federal level, have already approved the merger with various qualifications. The FCC seems always to be the last among countless agencies to offer an opinion. I concur in the decision to approve this transaction, but I do so with deep reservations about the process that these companies have had to endure.

³ I emphasize that it is the obligation of this agency to find only the *transfer of licenses* is in the public interest, not the merger or acquisition of the underlying firms. I note that the Commission has some limited shared Clayton Act jurisdiction to review the merger more broadly, but that jurisdiction does not involve a "public interest" standard. The standard there is quite specific: "substantially to lessen competition, or tend to create a monopoly," 15 U.S.C. Section 18, which does not require that a proposed merger be demonstrably "pro-competitive," and under which the Department of Justice has promulgated guidelines for the type of evidence required to meet that standard. The Commission makes no specific findings with respect to this standard. Moreover, another federal agency, with substantially more expertise, has already applied that standard.