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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 1, 2000

Redacted – For Public Inspection

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: GTE Corp. and Bell Atlantic Corp. CC Docket 98-184

Dear Ms. Salas:

Pursuant to the Commission's Public Notice issued on January 31, 2000, in the above-captioned docket, please find enclosed an original plus 4 copies of the Opposition of AT&T Corp. to Applicants' Supplemental Filing and Renewal of Petition to Deny.

AT&T's filing contains a confidential appendix, which discusses confidential material provided by Bell Atlantic and GTE. Pursuant to the terms of the Protective Order, AT&T is filing the appendix under seal.

Thank you for your attention to this matter. Please contact me if you have any questions.

Sincerely,

Michael J. Hunseder

Michael J. Hunseder

Enclosures

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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter	)	
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GTE CORP.	)	
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Transferor,	)	
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and	)	**CC Docket No. 98-184**
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BELL ATLANTIC CORP.	)	
	)	
Transferee,	)	
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For Consent to Transfer of Control	)	

ORIGINAL

**OPPOSITION OF AT&T CORP. TO
APPLICANTS' SUPPLEMENTAL FILING
AND RENEWAL OF AT&T'S PETITION TO DENY**

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March 1, 2000

Before the
Federal Communications Commission
Washington, DC 20554

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GTE CORP.	)	
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For Consent to Transfer of Control	)	

OPPOSITION OF AT&T CORP. TO
APPLICANTS' SUPPLEMENTAL FILING
AND RENEWAL OF AT&T'S PETITION TO DENY

Pursuant to the Public Notice issued by the Commission on January 31, 2000, AT&T Corp. ("AT&T") respectfully submits this Opposition to the Supplemental Filing of Bell Atlantic Corp. ("Bell Atlantic") and GTE Corp. ("GTE") (collectively "Applicants") concerning their license transfer applications. *See* Supplemental Filing of Bell Atlantic and GTE, CC Docket 98-184, Jan. 27, 2000 ("Supp. Filing").[1] AT&T also hereby renews its Petition to Deny. *See* Petition of AT&T Corp. to Deny Application, CC Docket 98-184, (Nov. 23, 1998) ("AT&T Pet.").

[1] The Commission bifurcated responses to the Applicants' Supplemental Filing and directed that comments on the Applicants' proposal regarding GTE's interLATA operations be filed by February 15, 2000, and comments on the remaining issues be filed by March 1, 2000. AT&T's February 15 comments addressed the unlawfulness of Applicants' interLATA proposal. *See* Opposition of AT&T Corp. to Applicants' Proposal Regarding GTE's InterLATA Operations (Feb. 15, 2000) ("AT&T InterLATA Opposition"). The instant Opposition responds to the Supplemental Filing on the remaining issues.

INTRODUCTION AND SUMMARY

AT&T has previously demonstrated that this merger, in the form it is presently proposed, would violate Section 271. *See generally* AT&T Pet. at 36-43 & AT&T InterLATA Opposition. As the Commission recognized in seeking separate comment on that question, the Section 271 issue is a threshold matter. Unless and until Applicants demonstrate that their merger would not be unlawful under Section 271, the question of whether Applicants otherwise meet their burden of showing that their merger would serve the public interest and enhance competition is irrelevant.

These comments, therefore, are addressed to showing that this burden would not be met even if Applicants were to reverse course and eliminate the Section 271 bar to this transaction by either obtaining the necessary Section 271 approvals prior to closing their merger or engaging in a straightforward divestiture of GTE's interLATA operations. AT&T and other parties demonstrated in their comments on the Applicants' original application that approving these license transfers would harm competition and disserve the public interest in numerous respects. The intervening time has only strengthened those arguments: the Commission subsequently endorsed the central elements of that analysis in the *SBC-Ameritech Order*,[2] and the consummation of that transaction, by eliminating yet another large incumbent LEC benchmark, has made the competitive problems identified by the parties and the Commission even more acute.

The Supplemental Filing makes patently self-contradictory statements and ignores or challenges express findings made by the Commission less than five months ago in the *SBC-Ameritech Order*. For example, the Commission found in the *SBC-Ameritech Order* (¶ 85) that

[2] *In re Applications of Ameritech Corp. and SBC Communications Inc.*, CC Docket 98-141 (Oct. 8, 1999) ("*SBC/Ameritech Order*").

contiguous LECs have special advantages in entering one another's territories. Applicants nonetheless assert (p. 13) that there is no prospect, absent this merger, that GTE would have entered Bell Atlantic's contiguous territories with the CLEC it (with great fanfare) had formed because GTE's territories could not possibly serve as "a jumping-off point to major urban markets" in Bell Atlantic's region. In the same breath, however, they also claim (p. 10) that the merger would unleash significant out-of-region local entry elsewhere because GTE's local service facilities would "provide a springboard for the merged company's expansion on a national basis into markets outside its traditional telephone service areas." Applicants never explain how GTE's facilities can be a "springboard" but not a "jumping-off point."

Similarly, Applicants' principal defense to the showing that their merger would both eliminate an important incumbent LEC benchmark and enhance their ability and incentive to discriminate against their rivals is also self-contradictory and, ultimately, baseless. Thus, while Applicants elsewhere describe this as a "merger of equals," they claim that GTE is in reality merely a collection of small and disparate mom-and-pop rural operations that provide no benchmark for large incumbent LECs like the BOCs and no attractive markets for entry by others. GTE made similar claims shortly after the 1996 Act was enacted, when it asked numerous State commissions to find that it was exempt as a "rural LEC" from the market-opening requirements of Section 251(c). State commissions not only rejected those claims but found that they indicated bad faith, and this Commission likewise expressly rejected them when it found in the *SBC-Ameritech Order* (¶¶ 162-173) that GTE and the BOCs occupy the same category for benchmarking purposes and are not comparable to the smaller rural LECs.

Part I of this submission thus shows that Applicants' proposed merger presents profound public interest harms and will hinder the development of competition in local markets within

Applicants' territory and, indeed, throughout the country. First, it will remove each Applicant as a significant potential competitor from the other Applicant's territories. Second, the merger will further reduce the number of large incumbent LEC benchmarks to just four, making it even more difficult for competitors and regulators across the country to implement the market-opening requirements of the Act. Third, the merger will enhance the combined company's incentives and ability to engage in acts of discrimination against their rivals. Finally, with regard to Applicants' claims that this merger will produce "enormous" countervailing public benefits, (1) the benefit that Applicants assert is most "critically important" – the vertical combination of Bell Atlantic's monopoly local service assets with GTE's interLATA data facilities – is based on their unlawful interLATA proposal, and (2) the other supposed benefit – the merged company's out-of-region entry plans – was never any more substantial than what each Applicant could accomplish on their own without this merger, and, in all events, is backed by no true commitment to expand to compete against other LECs (as the Applicants' hollow out-of-region entry condition amply confirms).

Part II of these Comments then demonstrates that these deficiencies could not be remedied by any set of conditions. Indeed, the conditions submitted by the Applicants fulfill the prophecy made months ago by Bell Atlantic's counsel that the Applicants could propose conditions that "look good, but [that have] really no impact on the business." Bell Atlantic-GTE Press Conf. (July 30, 1998). Thus, the Applicants' proposed conditions, which take the SBC-Ameritech conditions as a starting point and then dilute them further, share with those conditions the same numerous flaws and add others of their own. They would harm rather than advance competition, and should not be adopted under any circumstances.

I. IT IS EVEN CLEARER TODAY THAN WHEN THE APPLICATION WAS FIRST FILED THAT THE PROPOSED MERGER WOULD HAVE PROFOUND ANTICOMPETITIVE EFFECTS AND NO PUBLIC INTEREST BENEFITS

Applicants are required by the Act to demonstrate that their proposed license transfers serve the "public interest," 47 U.S.C. § 310(d), which in this context requires Applicants to prove that their proposed merger will "enhance competition."[3] But as AT&T demonstrated in its original Petition to Deny, Applicants' merger would, to the contrary, "eliminate or retard" competition, *BA/NYNEX Order,* ¶ 48, particularly within local telephone markets. Specifically, AT&T's Petition demonstrated that the merger would, *inter alia,* 1) remove a potential market entrant from each Applicant's territory – the other Applicant – with unique abilities to introduce and enhance local competition; 2) severely handicap the ability of regulators and competitors to monitor anticompetitive behavior in all local markets by further reducing the few relevant remaining benchmarks; and 3) enhance Applicants' incentives and abilities to raise their rivals' costs by offering Applicants' greater rewards and opportunities for such discriminatory conduct. AT&T Pet. to Deny at 12-36; *see also SBC/Ameritech Order* ¶¶ 55-254. AT&T's Petition (at 44-52) also demonstrated that the merger would produce no public interest benefits to counteract these harms, and that, particularly in light of Bell Atlantic's brazen disregard of conditions imposed on its merger with NYNEX, no set of conditions could effectively ensure that the merger, on balance, would be pro-competitive. AT&T Pet. at 52-55.

As demonstrated in these Comments, nothing in Applicants' Supplemental Filing provides any basis to undermine these central points. Because AT&T's arguments remain equally valid today, AT&T hereby renews its Petition to Deny these license transfers, and in support specifically references for the Commission's consideration its prior filings, including its

[3] *SBC/Ameritech Order* ¶ 49; *In the Applications of NYNEX Corp. and Bell Atlantic Corp.,* 12 FCC Rcd. 19985, ¶¶ 2-3 (1997) ("*BA/NYNEX Order*").

Petition to Deny and the supporting exhibits and affidavits and with the subsequent *ex parte* filings.[4]

A. The Merger Would Remove Each Applicant As A Significant Potential Entrant In The Other's Local Service Territory[5]

Applicants' merger would cause substantial harm to local competition within their in-region markets by eliminating the other Applicant as a potential competitor. As was the case with Bell Atlantic-NYNEX and SBC-Ameritech, each Applicant was "reasonably likely to enter" and to compete effectively in the other's territories. *BA/NYNEX Order* ¶ 75; *see SBC/Ameritech Order* ¶¶ 63-99. That is because, like these other incumbent LECs, each Applicant not only had actual plans to enter, but also "is one of only a few potential entrants" with the "special expertise," the "necessary systems," and the other "operational capabilities" needed to provide competing local services. *Id.* ¶¶ 56, 84.

Even though the Commission's conclusions with regard to potential competition in past LEC merger orders plainly apply with equal force here, Applicants nonetheless make an effort – ultimately futile – to evade these precedents. But they can only do so by continuing, as they have in prior filings, to rely on patently self-contradictory arguments. Thus, in an attempt to

[4] *See* Public Notice (Jan. 31, 2000) ("interested parties that have previously submitted comments or petitions in this proceeding should make specific reference to any comments or petitions, or portions thereof, on which they intend to rely"). AT&T's Petition to Deny included the Affidavit of John W. Mayo and David Kaserman, which described the economic harms of the merger; the Affidavit of Joyce Beasley, which explained GTE's anticompetitive conduct; the Affidavits of Patricia Boyle and Paul Kouropas, which described Bell Atlantic's anticompetitive conduct; and the Affidavit of Stephen B. Levinson, which explained why Applicants do not need to merge to enter out-of-territory local markets. AT&T also submitted a letter and memorandum by Judge Robert H. Bork that analyzed the competitive effects of this merger. *See* AT&T *Ex Parte* Letter, CC Dockets. 98-141 and 98-184 (Apr. 7, 1999).

[5] In a Confidential Appendix submitted with this filing, AT&T discusses the Applicants' documents, which were made available for review by the parties to this proceeding, in connection with the issues discussed herein.

convince the Commission that, despite all the objective evidence of its capabilities and incentives, GTE is not a potential entrant in Bell Atlantic's local markets, Applicants assert that GTE's territories cannot possibly serve as "a jumping-off point to major urban markets" in Bell Atlantic's region. Supp. Filing at 13. But Applicants themselves, when selling the supposed benefits of this merger, also tell the Commission that GTE's local service facilities would "provide a springboard for the merged company's expansion on a national basis into markets outside its traditional telephone service areas." *Id.* at 10. These two positions are, of course, irreconcilable: If GTE's in-region facilities are in fact a "springboard," then they must also be a "jumping-off point" for it to invade Bell Atlantic's potentially lucrative territories. *See* AT&T Pet. at 29-30 (describing Applicants' similar instances of self-contradiction).

In fact, by undertaking the same "independent analysis" of Applicants' "operational capabilities" and "own plans" as the Commission did with SBC-Ameritech and BA-NYNEX, it is plainly apparent that each Applicant is "among a very few that are poised on the edge of an entrenched monopolist, with genuine abilities to challenge that monopolist," *SBC/Ameritech Order* ¶¶ 71, 84, 99, and that – but for their proposed merger – each applicant would be able to provide competing local services within the other's region. *See BA/NYNEX Order* ¶¶ 72-79, 106-108; AT&T Pet. at 22-30.

First, and as with SBC-Ameritech, both Bell Atlantic and GTE have "the requisite access to the necessary facilities, 'know how,' and operational infrastructure such as customer care, billing, and related systems that are essential to the provision of local exchange service to broad base of residential and business customers." *SBC/Ameritech Order* ¶ 73, 84; *see BA/NYNEX Order* ¶ 107, 126-27. Indeed, Applicants freely admit that, well before the proposed merger, GTE had "already" installed these capabilities in "an established and operational CLEC," and had also "invested hundreds of millions of dollars in the operations support systems and other assets . . . needed to compete outside its traditional local service areas." Supp. Filing at 10. Moreover, like SBC-Ameritech, Applicants "also possess special expertise as incumbent LECs that each could bring to the interconnection negotiation and arbitration process when entering out-of-region markets because of their intimate knowledge of local telephone operations." *SBC/Ameritech Order* ¶ 84; *BA/NYNEX Order* ¶¶ 107, 126-27. These are the same "unique advantages" that are "not possessed by other market participants" that the Commission has previously relied upon to find that other incumbent LECs are significant potential competitors in the local markets of their merger partners. *See SBC/Ameritech Order* ¶¶ 63-99; *BA/NYNEX Order* ¶¶ 73-78, 101-08, 126-27.

Likewise, LEC-on-LEC entry in this case is likely because, as with SBC and Ameritech, Bell Atlantic and GTE have the unusual and "additional advantage of adjacency" in many of their local service territories. *SBC/Ameritech Order* ¶ 85. Thus, GTE has existing local facilities in close proximity to many of Bell Atlantic's most significant local markets, such as suburban Virginia and Washington, D.C., the Norfolk-Newport News area, and Pittsburgh, Pennsylvania. For its part, Bell Atlantic's incumbent local exchange facilities surround GTE's territories in Virginia and Pennsylvania. Thus, the statement that this merger is "vastly different" because it is "not a merger of adjacent BOCs" (Supp. Filing at 1, 3) is accurate only in the most technical and irrelevant sense – because GTE is not a BOC. Under the objective standard employed by the Commission, *see BA/NYNEX Order* ¶¶ 74-78 & n.166; *SBC/Ameritech Order* ¶¶ 64, 75, each Applicant could readily use its existing local facilities as a "springboard" to invade the other's lucrative territories.

Applicants' claim (at 13) that GTE "is concentrated in rural and sparsely populated areas that are removed from the urban centers" is baseless on its face: for example, GTE is the incumbent local service provider in the area surrounding Dulles Airport, which is itself an "urban center" that is neither rural nor sparsely populated and that is unquestionably an "attractive entry target" for Bell Atlantic. Indeed, Applicants have already conceded that Bell Atlantic pursued market opportunities to enter GTE's Dulles Airport territory: through the use of a Bell Atlantic "facility located nearby," Bell Atlantic sought to provide high-end business services like "pay-telephone contract, limited SONET-based services, and a private Airport Communications System." Public Interest Statement (Oct. 2, 1998) at 32 n.30. This is a vivid confirmation of Bell Atlantic's unique capability to take advantage of its proximate facilities and compete against GTE.

As for GTE, well before the merger announcement, it had created and funded a CLEC that actually competes today out-of-region against other RBOCs. Supp. Filing at 10; Gould/Young Decl. ¶¶ 3-4; GTE, 1998 Annual Report, at 4, 14; GTE, 1997 Annual Report, at 5. GTE's public proclamations reveal that its CLEC had ambitious plans to enter numerous markets throughout the country and that prior to the merger announcement, those plans included several local markets within Bell Atlantic's territory. *See, e.g.*, AT&T Pet. at 27-28 & n.21. GTE's CLEC has demonstrated its abilities to leverage its existing local service expertise into out-of-region local markets, *see* GTE, 1998 Annual Report, at 4, 14; Gould/Young Decl. ¶¶ 3, 4, and there is no reason why, except for this proposed merger, GTE should not today be competing with Bell Atlantic in its local markets. In fact, GTE opened negotiations with Bell Atlantic for interconnection agreements throughout Bell Atlantic's region, and reached agreements in several states, including Virginia, where GTE's incumbent territory adjoins Bell Atlantic's. *See, e.g.*, Approval of BA/GTECC Interconnection Agreement, Case No. 980120 (Va. SCC Nov. 5, 1998). And again like Ameritech's out-of-region entry plans, GTE's efforts to enter out-of-region markets in Bell Atlantic's territory abruptly halted right around the time the BA/GTE merger was announced. *See* AT&T Pet. at 28 n.21 & App. F.

Applicants' Supplemental Filing also emphasizes GTE's "enormous investments in Internet POPs and related assets outside its local service areas," which can eventually be used to offer, among other things, voice telecommunications services over Internet facilities – i.e., VoIP. Supp. Filing at 10-11. But, if true, that fact means only that GTE could have used its data facilities – which are anchored throughout Bell Atlantic's territory (*see* www.bbn.com) – to compete directly against Bell Atlantic's traditional voice services. Thus, GTE's investments in data facilities – far from justifying Applicants' merger – further demonstrate that Applicants will be competing in local markets against one another if they do not merge.

Accordingly, Applicants' assertion (at 12) that they "lack[ed] any actual entry plans in one another's local service areas" is at best highly misleading. *Cf.* AT&T Pet. at 27-30, 46 n.39; *BA/NYNEX Order* ¶¶ 74-75 (highlighting Bell Atlantic's stilted understanding of the term "plans"). Moreover, and in all events, the Commission has held that actual entry plans are not a necessary basis for a finding that a firm is a potential competitor. *SBC/Ameritech Order* ¶ 75 ("the lack of entry plans does not eliminate a firm from being considered a significant participant"). The Commission's ultimate test is "whether the firm has the capabilities, and is likely to have the incentive" to enter its merger partner's markets. *Id.* Under that standard, Applicants are plainly potential competitors of one another.

B. The Merger Would Eliminate Yet Another Major Incumbent LEC As A Benchmark, And Thereby Would Severely Handicap Efforts of Regulators and Competing Carriers To Detect Anticompetitive Conduct

In approving the SBC-Ameritech merger, the Commission once again made clear that regulators and competing carriers have an "acute present need for benchmarking" to "defin[e] incumbent LEC obligations and [to] discover[] new approaches and solutions to open markets to competition." *SBC/Ameritech Order* ¶¶ 57, 161. The Commission found that "the major incumbent LECs" – including both the "RBOCs *and* GTE" – remain "uniquely valuable benchmarks for assessing each other's performance." *Id.* ¶ 103 (emphasis added). It also found that a lack of an adequate number of "independent" benchmarks would result in "grave harms" to the regulatory process and the Act's market-opening requirements. *Id.* ¶¶ 104, 185. Further, those harms would "increase disproportionately with each additional decline in the number of major incumbent LECs." *Id.* ¶ 183. Accordingly, because past mergers have whittled the number of major incumbent LEC benchmarks from eight down to just five, the Commission re-affirmed that "future applicants bear an additional burden" in establishing that a merger that removes yet another major incumbent LEC benchmark serves the public interest. *Id.* ¶ 102 & n.214; *see also BA/NYNEX Order* ¶ 16.

In seeking to reduce the number of benchmarks to just four, Applicants here have no hope of meeting even the traditional burden of proof that their merger serves the public interest, let alone the heightened standard necessitated by the steady disappearance of large incumbent LECs. Instead of meeting this additional burden, Applicants claim that, somehow, the Commission's plain statements regarding benchmarking do not mean what they say and do not even apply to this merger. These claims lack merit, and should be summarily rejected

1. As the Commission Has Found, GTE Is A Comparable Benchmark To Bell Atlantic And The Other RBOCs

First, Applicants claim that GTE – which has 23 million access lines and more than $25 billion in annual revenue and which elsewhere proclaims that it "already has the best national profile of *any* local carrier"[6] – is not, after all, similarly situated with the RBOCs to make it a valuable benchmark, but is rather "predominantly rural" and therefore "far more comparable to the smaller independent LECs." Supp. Filing at 13-14. Such claims are unbelievable on their face. Indeed, it is apparent that even Applicants themselves do not believe this, for later in their filing they announce that this is a "true merger of equals." *Id.* at 25.

Applicants' occasional efforts to portray GTE as a small rural company resurrects a patently anticompetitive claim that was rejected by virtually every state commission to have heard it. As described in AT&T's Petition to Deny and the accompanying affidavit of Joyce Beasley, GTE, in the midst of the initial negotiations for interconnection agreements in 1996, applied to seventeen states for relief from the unbundling and other market-opening requirements of section 251 of the Act, on the grounds that it was a "rural telephone company." AT&T Pet. at 15-16 & Beasley Aff. ¶¶ 8-9; *see* 47 U.S.C. §§ 251(f); 153(37) (defining "rural telephone company" to include, for example, firms that serve "fewer than 50,000 access lines"). GTE's claims were roundly rejected, and indeed its decision even to raise them led several state commissions – and should lead this Commission – to question "whether the company is positioning itself to act in an anti-competitive fashion." Beasley Aff. ¶ 9 (quoting order of the Public Utilities Commission of Ohio); *see id.* ¶ 9 & Exh. 1 (quoting other orders and listing other state decisions that rejected GTE's rural telephone company claims).

[6] GTE, 1998 Annual Report, at 2, 5, 6 (emphasis added) (available at www.gte.com).

Most fundamentally, Applicants' casual remarks that GTE's territories are "more dispersed" (Supp. Filing at 14) than those of the BOCs are plainly insufficient to disprove the Commission's prior decision in the *Ameritech/SBC Order*. There, the Commission expressly included GTE, together with the RBOCs, within the group of "large incumbent LECs" that are "similarly situated" to each other and that "remain the principal sources of benchmarks for their own behavior." *SBC/Ameritech Order* ¶¶ 103, 160, 173. In that *Order*, the Commission already considered and rejected the claim that smaller independent LECs are comparable to companies like GTE. *Id.* ¶¶ 162-69. Rather, the Commission reasoned that GTE and the RBOCs serve as "uniquely valuable" benchmarks for one another because "they are of similar size and face similar statutory obligations and market conditions." *Id.* ¶ 103; *see id.* ¶ 160 (firms are comparable because of similar "customer base, access to capital, network configuration, and the volume and type of demands from competitors"). Accordingly, there is no doubt that this merger will result in the loss of yet another large incumbent LEC benchmark and will "pose a significant harm to the public interest by severely handicapping the ability of regulators and competitors to use comparative practices analysis as a critical, and minimally-intrusive, tool for achieving the Communications Act's objectives." *Id.* ¶ 101; *see id.* ¶¶ 57-59, 184.

2. Despite Applicants' Consistently Anticompetitive Postures, The Merger's Further Reduction In Benchmarks Would Be Significant

Applicants' second effort to minimize the public interest harms from the merger's removal of another benchmark fares no better than the first. Applicants assert that this merger does not present the same risk to competition as in the SBC-Ameritech merger, arguing that in that case, Ameritech was "an especially important benchmark" because it "frequently had taken positions different from the other RBOCs." Supp. Filing. at 14. But this argument reduces to nothing more than a claim that the loss of GTE as a benchmark could not harm the public interest because GTE has never adopted divergent, pro-competitive positions that regulators and competing carriers could use as a benchmark. Although AT&T does not dispute that GTE has adopted a campaign of massive resistance to the Act's requirements, *see* Beasley Aff., it would be truly perverse and contrary to the public interest to reward Applicants with merger approval for their past intransigence to the Act's requirements.

More fundamentally, Applicants' argument fails because benchmarking prevents competitive harm even where incumbent LECs persistently defy the public interest mandates of the Act and other regulatory rules. As the Commission explained, incumbent LECs have "strong economic incentive[s] to preserve their traditional monopolies." *SBC/Ameritech Order* ¶ 107. When acting on these incentives, large "independent incumbent LECs, *absent collusion*, are likely to adopt different defensive strategies to forestall competitive entry, and each particular strategy will reveal information to regulators and competitors." *Id.* ¶¶ 107-08 (emphasis added). Thus, benchmarking works not merely because there exists an incumbent LEC that acts as a maverick firm and that consistently breaks rank with the others to open its markets (there is no such LEC), but because the policies of numerous large incumbent LECs will necessarily diverge. Accordingly, removal of a large incumbent LEC via a merger – even a recalcitrant one like GTE – threatens competition in a variety of ways, including "removing a source of potential diversity," "creating an incentive for the combined firm to coordinate behavior," and "increasing the incentive and opportunity for collusion and concealment of information among the few remaining major incumbent LECs." *Id.* ¶ 184; *see id.* ¶ 104.[7]

[7] It is thus irrelevant whether the lost benchmark is viewed as GTE or as Bell Atlantic, for in either case there would be one fewer benchmark. Indeed, Applicants' statement that "Bell Atlantic itself has become the benchmark for section 271 purposes" (Supp. Filing at 14) concedes there would be public interest harm if Bell Atlantic's practices were changed as a result of the merger.

In fact, Applicants have elsewhere effectively conceded that their merger will reduce diversity among large incumbent LECs. In announcing the merger, Bell Atlantic CEO Ivan Seidenberg stated, "You know the expression 'I want to be like Mike?' Well, in terms of regulations, 'we want to be like Chuck [Lee, GTE's CEO].'" *See* Bell Atlantic-GTE Press Conf. (July 28, 1998). Thus, "by admitting that each company, pre-merger, has different practices, the Applicants essentially acknowledge that there is diversity in the manner in which these companies market and provision services, deploy new technologies and respond to competitors." *SBC/Ameritech Order* ¶ 146; *see id.* ¶ 154 (noting that SBC's policy of adopting "best practices" – which Applicants also pledge to do – "effectively admits that it will impose greater uniformity in policies toward competitive LECs following consummation of its merger with Ameritech").

C. The Merger Would Significantly Enhance Applicants' Incentives and Ability to Discriminate Against Competitors

The Commission's *SBC/Ameritech Order* re-affirmed the "fundamental postulate" that incumbent LECs, by virtue of their "monopoly control over key inputs that rivals need in order to offer retail services," possess "both the incentive and ability to discriminate against competitors" in "all retail markets in which they participate." *SBC/Ameritech Order* ¶ 190. Because of these incentives and abilities, the Commission also found that mergers among large incumbent LECs can "increase predation" against rivals. *Id.* ¶¶ 186, 190-94. The combined companies, by "controlling a larger area," will "realize more of the gains" from discriminatory conduct. *Id.* ¶¶ 193, 196. Such mergers, therefore, are anti-competitive and harm the public interest because they are "likely to increase the level of discrimination that rivals must overcome" to compete against the combined incumbents. *Id.* ¶ 196.

Specifically, as the Commission stated, "discriminatory conduct by an incumbent LEC in its region affects a competitor in areas both inside and outside the incumbent's region." *Id.*

¶ 192. The effects outside the region – "spillover effects" – are not captured by the incumbent LEC. After a LEC merges with another large incumbent LEC, however, the combined company's greater size allows it to capture more of these spillover effects. Thus, because the merger provides a greater reward for discrimination than when the two LECs were independent, the combined company has a greater incentive to discriminate. *Id.* ¶¶ 192-93. Moreover, because the combined company can coordinate its activities and make it harder for regulators and competitors to "monitor[] and detect[] this misconduct because of the reduction in the number of benchmarks," the combined company also has a "heightened ability" to discriminate and raise rivals' costs. *Id.* ¶¶ 194, 209, 245.

As AT&T and other parties showed in their Petitions to Deny, this large "footprint" theory is every bit as applicable to this merger. AT&T Pet. at 12-14 & Mayo/Kaserman Aff.; Petition to Deny of Sprint (filed Nov. 23, 1998). Applicants offer no plausible explanation why their merger does not pose an identical public interest harm. In this filing, Applicants can only make the observation that "the percentage of long distance calls that both originate and terminate in areas served by the merged company will actually be *lower* than that of Bell Atlantic alone." Supp. Filing at 15 (emphasis in original). Even assuming this is true, the merger nonetheless poses the precise harm identified by the Commission: that a combined BA/GTE, which indisputably will "control[] a larger area," will have increased incentives to discriminate against rivals in order to capture spillover effects that neither company separately could secure. *SBC/Ameritech Order* ¶ 196.

In that regard, the *SBC/Ameritech Order* found that the merged entity would have increased incentives and ability to discriminate against rivals in three markets: advanced services (¶¶ 197-211), long distance services (¶¶ 212-230), and circuit-switched local exchange services

(¶¶ 236-245). The Commission's discussion of the percentage of calls that will both originate and terminate in the merged company's region related solely to *one aspect* of the merged entity's increased ability to discriminate in *one* of those markets (long-distance). *See SBC/Ameritech Order*, ¶ 226.[8] The Commission relied exclusively on other grounds for its conclusion that the ability to discriminate would be greater post-merger in the other two markets, and relied on those same other grounds – in *addition* to its concern about the heightened percentage of calls both originating and terminating in-region – in finding that the merged entity would have an enhanced ability to discriminate in the long-distance market as well. In particular, it found that there would be a heightened ability to discriminate in all three markets as a result of "(1) the reduction in the number of benchmarks, making it more difficult for regulators to monitor and detect misconduct; (2) the ability of the combined entity to coordinate and rationalize the discriminatory conduct of the two companies (sharing 'worst practices'), making detection and proof of discrimination more difficult; and (3) the efficiencies (economies of scope) that result from being able to share strategies and arguments while fighting similar regulatory battles in multiple state forums." *See id.* ¶¶ 209, 227, 245. Each of those grounds is equally applicable here.[9]

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[8] Even with respect to that particular aspect of the Commission's analysis, Applicants' response is incomplete. Applicants focus only on the *percentage* of calls that will both originate and terminate in-region after the merger, and note that this percentage will decrease. But it is also the case that the absolute number of such calls will increase as a result of the merger. As the Commission pointed out, in those instances in which the merged entity can identify customers that originate and terminate calls within its region and that have chosen rival carriers, the incentive to discriminate on the terminating end will increase as a result of the merger because "more customers would originate and terminate calls in the combined region" in absolute terms, regardless of percentages. *See SBC/Ameritech Order* ¶ 215 n.394.

[9] Applicants also claim that their merger is different because SBC and Ameritech have yet to obtain interLATA authority pursuant to section 271, while GTE was exempted from section 271 and Bell Atlantic has obtained relief in one of its twelve States. Supp. Filing. at 15-16. This point again relates solely to interexchange markets, not the other markets the Commission

Indeed, Applicants have no serious argument to refute the findings that they would be better able to discriminate successfully against competitors providing advanced services and circuit-switched services as a result of the merger. Their sole response is to assert that those findings do not apply to their proposed merger because the underlying theory allegedly depends on two premises that, according to Applicants, are absent here: first, that the same CLECs will enter both Applicants' local service territories and, second, that those CLECs will have common costs in those areas. Supp. Filing at 16-17. But Applicants' provide no basis for their claim that those predicates are not present here, and the claim is simply wrong: AT&T, MCI WorldCom, and Sprint, among others, all have plans to enter local markets nationwide, including both Bell Atlantic's and GTE's territories. All of these competing carriers have devoted significant resources to entry in Bell Atlantic's and GTE's territory, including, for example, negotiating interconnection agreements. *See, e.g.*, AT&T Pet., Beasley Aff.[10] And the types of common costs that the Commission addressed in the *SBC/Ameritech Order* – "such as research, product development, and marketing" – would be common to Bell Atlantic's and GTE's regions as well. *See SBC/Ameritech Order* ¶ 192.

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analyzed in the *SBC-Ameritech Order*, and is meritless in any event. According to Applicants, this fact makes "the Commission's vertical concerns vanish." *Id.* at 16. Nothing could be farther from the truth: the Commission made it unmistakably clear that it is the "control over key inputs that rivals need" that provides all "[i]ncumbent LECs" – including GTE – with the incentive and ability to discriminate against rivals. *SBC/Ameritech Order* ¶ 190. It cannot be disputed that Applicants maintain a tight grip on these key inputs in all of their local markets. In this regard, the Commission noted that not just section 271, but also section 251 – which has always applied to GTE and Bell Atlantic (and continues to apply in New York) – embraces this concern for discrimination by vertically integrated entities. *Id.*

[10] Applicants again rely on the ludicrous claim that GTE's territories are rural. Supp. Filing at 17. For its part, if GTE truly believed that carriers were not interested in entering its local territories (both across the country and specifically in Virginia), then it presumably would not have incurred such substantial litigation costs to attempt to block local competition. *See, e.g.*, *AT&T Corp.* v. *Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *GTE South, Inc.* v. *Morrison*, 1999 WL 1186252 (4th Cir. Dec. 15, 1999).

D. The Merger Would Produce No Significant Public Interest Benefit

AT&T's Petition to Deny demonstrated that the merger benefits originally touted by Applicants were remote, speculative, and trivial. AT&T Pet. at 44-52. Now that Applicants' Supplemental Filing (at 4-6) is promoting the combined company's supposed ability to enhance competition in markets for the "Internet backbone" and "advanced data services," the merger's claimed benefits are also unlawful. *See generally AT&T InterLATA Opposition.*

The other alleged benefit of the merger – that it "will finally enable one of the Bell companies to attack the local markets of the other Bells" (Public Interest Statement at 1) – was never backed by any true commitment. *See* AT&T Pet. at 45-48. And now, even though it did not seem possible, Applicants have actually downgraded their assertions of out-of-region entry plans. Supp. Filing at 9-11; Young/Gould Decl.; *see infra* pp. 28-29 (Applicants' refusal to agree to SBC/Ameritech Merger Condition on out-of-region entry). Accordingly, this merger presents no possible meaningful pro-competitive benefits, and certainly no benefits that could offset the significant anticompetitive harms it will produce.

1. The Principal Merger Benefit Touted By Applicants Is Unlawful

In this filing, Applicants claim that this merger results in "strongly pro-competitive vertical components," especially the "ultimate combination" of GTE's interLATA "Internet backbone business and national long distance network" with Bell Atlantic's monopoly-"established [in-region] customer[s]." Supp. Filing at 3-4. Though Applicants note that this benefit was "wholly lacking in other recent mergers" (*id.* at 4), that is for good reason: the Act bars a BOC like Bell Atlantic from acquiring "vertical components" like those held by GTE. Thus, Congress has already determined that, whatever pro-competitive benefits might be asserted to arise from combining Bell Atlantic's in-region customers with GTE's long distance voice and data networks, those claimed benefits (even if they were to exist) would be, absent full compliance with section 271, categorically outweighed by the significant harms that accompany such vertical integration. *See, e.g.*, *SBC/Ameritech Order* ¶¶ 14-16, 190. That determination is the "fundamental postulate" of both "modern U.S. telecommunications law" and "[t]wo key sections of the 1996 Act – sections 251 and 271." *Id.* ¶ 190.

Indeed, there is only one significant lesson to be drawn from Applicants' insistence (at 2-3) that the merger's "critically important" benefit will be the "ultimate combination" of Bell Atlantic's bottleneck facilities with GTE's interLATA assets: that one of the fundamental claims that Bell Atlantic and GTE have offered in support of their unlawful plan to retain ownership and control of GTE's interLATA assets is patently erroneous. Specifically, in arguing that Bell Atlantic's "option" to costlessly acquire 80% of the interLATA assets does not constitute ownership and control, Applicants claim that there is a "genuine" and even a "substantial" possibility that they will not exercise this option and "will have to forfeit [their] interest" in these assets. *See* Response of Bell Atlantic and GTE in Support of Proposal to Transfer GTE Internetworking to a Separate Corporation Owned and Controlled by Public Shareholders at 7 (Feb. 22, 2000). If that were the case, then the Commission could not find that what Applicants assert is a primary benefit of this merger is anything but speculative. However, as Applicants' description of the transaction makes clear – *i.e.*, that it is designed to "preserve" this "benefit[]" and to avoid "compromis[ing] the value of [their] option" (*id.* at 18 n.14; Supp. Filing at 5) – Bell Atlantic will unquestionably exercise its option to re-acquire these assets. *See AT&T InterLATA Opposition* at 7-9.

2. Applicants' Significantly Downgraded Out-Of-Region Entry Plans Are Not Merger-Specific

Far from demonstrating "enormous public interest benefits," (Supp. Filing at 3), the Supplemental Filing only further confirms that Applicants' merger would produce no substantial out-of-region entry against fellow incumbent LECs. This filing, like Applicants' prior one, touts GTE's local service facilities as "islands in the other RBOCs' seas that provide a springboard for the merged company's expansion on a national basis into markets outside its traditional telephone service areas." Supp. Filing at 10. Applicants' initial filing contained only the barest description of these post-merger entry plans, merely noting that "the combined company plans to enter at least 21 [out-of-region] markets." Public Interest Statement at 6; see also Kissell Decl. ¶¶ 7, 14; AT&T Pet. at 45-48. Incredibly, though nearly a year and a half has passed, Applicants' current filing contains even less detail, with virtually no mention whatsoever of merger-specific entry plans. *See* Supp. Filing at 10-11 & Gould/Young Decl. ¶¶ 3-4.

In fact, Applicants' own statements, including those in their Supplemental Filing, readily confirm that the very limited out-of-region plans that Applicants contemplate post-merger could easily have been obtained by the companies acting individually. Thus, just months before the merger was announced, GTE's Chairman proclaimed in its annual report that its CLEC "will market the full spectrum of GTE services in key markets, without regard to franchise boundaries" and that GTE could "could go it alone and win" and "succeed in the competitive marketplace." GTE, 1997 Annual Report at 2-3 (statement of Charles R. Lee).[11] And that is in fact precisely what has happened: Applicants now admit that "GTE *already* has an established and operational CLEC with approximately 60,000 local customers outside its local service

[11] Its most recent annual report (1998) noted that GTE's CLEC arm "will expand in 1999 beyond our current markets" and that it "built software systems, distribution centers, and other processes for expansion nationwide." GTE Annual Report, at 4.

territory." Supp. Filing at 10 (emphasis added); *see* Gould/Young Decl. ¶¶ 3-4; see also GTE 1998 Annual Report at 4, 14. It is apparent that, absent the merger, either GTE or Bell Atlantic can readily compete on its own in out-of-region local markets – including within the other's territories.

II. BECAUSE NEITHER APPLICANTS' PROPOSED CONDITIONS NOR ANY OTHER SET OF CONDITIONS COULD REMEDY THE SUBSTANTIAL PUBLIC INTEREST HARMS OF THIS MERGER, THE APPLICATION SHOULD BE DENIED

At a press conference held at the time this merger was announced, the General Counsel of Bell Atlantic explained that he was unconcerned about the prospect that conditions might be imposed on this merger. He said that, because GTE "has done so well on [its] unbundled element prices," it has "regulatory head room." Bell Atlantic-GTE Press Conf. (July 30, 1998). In particular, Bell Atlantic's General Counsel stated, "I think you can make some concessions that look good, but [that have] really no impact on the business." *Id.*

The merger conditions that Applicants are now proposing are precisely those that he described. Though the proposed conditions take up nearly 50 pages of single-spaced text, they require Applicants to do virtually nothing of true public interest benefit that they are not already obligated by law to perform – and in some cases they require much less. Further, despite (or perhaps because of) their length, these conditions still contain numerous qualifications, ambiguities, and other loopholes that would be used by Applicants to avoid whatever seemingly pro-competitive requirements they might contain. And in all events, the history of such conditions has shown them to be unenforceable and to have had the principal effect of merely increasing the amount of litigation. That is the lesson taught by the conditions on Bell Atlantic's prior merger – and the lesson that is apparently beginning to be repeated with respect to the conditions applied to SBC/Ameritech.

A. Conditions Cannot Cure This Merger's Anticompetitive Effects

Although the set of merger conditions proposed by Applicants is patently inadequate, this is not a drafting issue. No set of merger conditions could compensate for the myriad competitive harms posed by this merger. For example, no condition could possibly replace the lost benchmark that would be absorbed by Applicants' merger. The Commission has recognized that each large incumbent LEC is a "uniquely valuable" benchmark, *SBC/Ameritech Order* ¶ 103, and the benefits that are lost when another such LEC disappears through a merger are irreplaceable. Nor could there be a merger condition that would replicate the unique advantages of LEC-on-LEC competition that will be lost by this merger. Once GTE's incumbent territories in Pennsylvania and Virginia, for example, are swallowed by the combined company, they can no longer be used by any other carrier to attack Bell Atlantic's local markets. Nor can conditions change the fact that the Applicants will have enhanced incentives and abilities to discriminate against their rivals. Because conditions cannot fully address these harms, the Commission should not even attempt to craft new conditions or to substantially revise those proposed by Applicants. Rather, the application should simply be denied.

B. Bell Atlantic Has Consistently Ignored And Violated Past Merger Conditions.

Even if adequate pro-competitive merger conditions could be devised in this case on paper, Bell Atlantic's continued and persistent defiance of the conditions placed on its merger with NYNEX amply demonstrates that imposing additional conditions on Bell Atlantic here could not, as a practical matter, cure or even mitigate the anticompetitive harms that this merger would produce, but would merely further bog down the process of CLEC entry with additional protracted litigation. Bell Atlantic's prior conduct has plainly shown that it believes the Commission lacks either the authority or the will to enforce any merger conditions against it and that, rather than implement any conditions that might enhance local competition, Bell Atlantic will choose simply to ignore them.

Bell Atlantic never made any serious effort to comply with the substance of the NYNEX merger conditions. Most notably, even though the Commission required Bell Atlantic to determine prices for access to network elements using "forward-looking, economic costs," *BA-NYNEX Order* ¶ 185, Bell Atlantic did not even pretend to comply with the condition, and continued to advocate precisely the same inflated, backward-looking rates as it had prior to the merger.[12]

As a result, AT&T and MCI filed complaints with the Commission to enforce this merger condition and the others that the Commission had found were vital to ensure that the NYNEX merger served the public interest. *See* AT&T Complaint. Bell Atlantic's audacious response to these pricing complaints declared the conditions a "dead letter" and contested the Commission's very authority to adjudicate its compliance with the conditions. Opening Brief of Bell Atlantic Corp., File No. E-98-05, at 4, 7-10 (March 13, 1998); Motion to Dismiss of Bell Atlantic Corp., File No. E-98-05, at 9-12 (Dec. 15, 1997). And for whatever reason, the Commission has never acted on those complaints: although they were filed well over two years ago, and briefed promptly thereafter, the Commission has yet to issue a decision. That is especially troubling, for AT&T and other CLECs are now engaged in renegotiations with Bell Atlantic to replace the original interconnection agreements to which the Bell Atlantic proposals that are the subject of the merger condition are relevant. Thus, unless the Commission acts promptly, there is virtually

[12] *See, e.g.,* Complaint of AT&T Corp., File No. E-98-05 (FCC Nov. 16, 1997) ("AT&T Complaint") (demonstrating instances of Bell Atlantic's failure to adhere to the forward looking economic cost standard); Opening Brief of AT&T In Support of Complaint, *id.* (filed March 13, 1998); Reply Brief of AT&T Corp. In Support of Complaint, *id.* (Apr. 1, 1998); Supplemental Brief of AT&T Corp. in Support of Complaint, *id.* (Feb. 26, 1999).

no chance that the conditions will be complied with before the next round of interconnection agreements are executed. And because the merger condition will expire before negotiation of the third generation of agreements, any opportunity that the conditions could have achieved a benefit will be lost.

As a result, none of the pro-competitive benefits these conditions were intended to create have been realized.[13] Conditions that are disregarded by the Applicants, and not enforced by the Commission, can have no pro-competitive effect regardless of their content. Bell Atlantic's unabashed disregard of past merger conditions underscores that conditions will not remedy the public interest harms of this merger. And because of Bell Atlantic's disgraceful record of non-compliance with the NYNEX merger conditions, there is no basis here to "assum[e] Applicants' ongoing compliance with [merger] conditions." *SBC/Ameritech Order* ¶ 4. *See Filloramo* v. *Johnston, Lemon & Co., Inc.*, 700 F. Supp. 572, 580 n.5 (D.D.C. 1988) ("Fool me once, shame on you. Fool me twice, shame on me"). And, perhaps most fundamentally, Bell Atlantic's disobedience ensures that the already protracted and contentious process of opening local markets to competing carriers will only be further delayed and more dependent upon litigation, precisely the opposite of the goals of the Act and the Commission.

[13] In fact, within the last few weeks, in a state proceeding to develop new prices for unbundled network elements in New York, Bell Atlantic has recently provided competing carriers with its cost studies. Astoundingly, those cost studies would result in substantially *increased* prices on an across-the-board basis, including such key inputs as unbundled loops and local switching. As just one example, Bell Atlantic now claims the non-recurring charge for a "hot cut" loop should be $204.81 – *46 times* the current rate of $4.39. None of these rates comply with the Bell Atlantic-NYNEX merger condition or with the Act.

C. Applicants' Proposed Conditions Are Not Only Inadequate To Remedy The Harms Of The Merger But Affirmatively Harmful To Local Competition

Although AT&T does not believe that any set of conditions could address this merger's profound competitive harms, it is a certainty that the particular conditions proposed here will lead to no substantial pro-competitive benefits. Instead, like the conditions adopted in the SBC/Ameritech merger, these conditions are likely affirmatively to harm local competition.

1. The Proposed Conditions Contain Nearly All Of The Numerous Flaws Characteristic Of The SBC-Ameritech Merger Conditions.

For many of the same reasons AT&T identified in its comments on the SBC/Ameritech conditions,[14] the conditions proposed here could not possibly compensate for the anticompetitive effects of this merger or otherwise promote the development of local competition. Like the SBC/Ameritech conditions, some of these conditions merely restate that Applicants must abide by existing law, which is already their duty, and which is not a concession to be traded for approval of an anticompetitive merger;[15] others are vague and open-ended, making it impossible even to determine what they mean or how they will be applied;[16] many conditions will last for such a short duration that any possible pro-competitive benefits will not likely be obtained before

[14] *See* Comments of AT&T Corp. on Proposed Conditions, CC Docket 98-141 (filed July 19, 1999) ("AT&T SBC/Ameritech Comments"); *Ex Parte* Letter from Joan Marsh, AT&T, to Magalie Roman Salas, FCC, CC Docket 98-141 (filed Sept. 15, 1999) ("AT&T Conditions *Ex Parte*") (responding to revised merger conditions proposed by SBC and Ameritech).

[15] *See, e.g.* Proposed Condition VII, Collocation Compliance; AT&T SBC/Ameritech Comments, at 8, App. A at 27-34.

[16] *E.g.*, Proposed Condition XIV (InterLATA Service Pricing). Apparently, the merged company would charge its similarly-situated customers two different rates for interLATA calls, depending on whether this Condition applies. Thus, Applicants pledge that, in Bell Atlantic's territory, they will not assess minimum charges on interLATA calls (which Bell Atlantic had already announced when it received interLATA approval in New York). Within GTE's territory, however, such charges may be retained.

they expire;[17] and all contain the same ineffectual enforcement provisions, so there is no likelihood that any of the few public interest benefits contained in them will actually be realized.[18] Thus, for virtually all of the same reasons AT&T set forth in the SBC/Ameritech merger proceeding, which AT&T incorporates here by reference, these conditions would provide no meaningful benefits.

2. The Proposed Conditions Are Far Weaker Than The SBC-Ameritech Merger Conditions

Ironically, however, these conditions are even weaker than those approved for SBC/Ameritech. Applicants claim (at 2) that their proposed merger conditions were "patterned closely" on those adopted in the SBC/Ameritech proceeding. But even the most cursory comparison reveals that Applicants in fact have made numerous and substantial changes to those conditions, and that those changes in nearly every instance serve Applicants' interests, not the public interest.[19] That cannot be defended. The Commission has found that the harms from lost benchmarks "increase disproportionately with each additional decline in the number of major incumbent LECs." *SBC/Ameritech Order* ¶ 183. If conditions were appropriate at all, therefore,

[17] *See, e.g.*, Proposed Condition V (Performance Plan) (expires at least as early as when Applicants meet just half of their paltry out-of-region draft condition); Proposed Condition VI (Uniform and Enhanced OSS) (requires collaboratives and possible arbitration before benefits may be realized, and then expires after three years). In this regard, SBC-Ameritech have already caused a delay in the completion of the collaboratives, demonstrating incumbents' incentive and ability to prolong implementation of pro-competitive merger conditions. *See* Letter of Lawrence Strickling to Charles Foster, SBC, Feb. 24, 2000.

[18] *See, e.g.*, Proposed Condition XI (ADR through Mediation), Proposed Conditions VIII & XIX (describing audits), and Proposed Condition XVIII (Compliance Program); *see* AT&T SBC/Ameritech Comments, at 13-14.

[19] *See generally* Letter of Suzanne Yelen, to Magalie Roman Salas, (Feb. 1, 2000) (including comparison of conditions proposed here with those adopted in SBC's case).

they would have to be more stringent, and provide more benefits, than those that were imposed on SBC/Ameritech – not, as is the case here, move in the opposite direction.

The most striking example is the draft condition regarding Applicants' commitment to enter out-of-region markets. Even though Applicants originally claimed, similarly to SBC-Ameritech, that the combined company would enter "at least 21 [out-of-region] markets," Pub. Int. Statement at 6, Applicants concede that their proposed merger conditions do not contain "the same [out-of-territory] commitment as SBC/Ameritech." Supp. Filing at 28.[20] Rather, the sum total of Applicants' proposal is that, over a three-year period, they will spend just "$500 million to provide services outside their franchise areas." Supp. Filing at 28. That is just $175 million per year, an amount that is a mere 3/10ths of one percent of Applicants' combined annual revenues and is less than what even many small CLECs spend each year to attempt to enter local markets controlled by Applicants and other incumbent LECs.[21] This commitment is so insignificant that GTE alone could already easily satisfy this proposed merger condition merely by continuing its existing CLEC operations.[22]

[20] And as AT&T demonstrated, the SBC/Ameritech merger condition itself required SBC to accomplish less than the companies originally proposed with their so-called "National-Local" strategy, and even less than what either SBC or Ameritech could do without merging. *See* AT&T SBC/Ameritech Comments, App. A at 99-105. Applicants' own declarants recognize the toothless nature of the SBC merger condition, Gould/Young Decl. ¶ 4 ("SBC committed to provide local service to only 3 customers in each of 30 markets"), but Applicants nonetheless have drafted for themselves an even more modest commitment.

[21] Notably, Bell Atlantic recently contended that in New York State alone, CLECs have "by conservative estimates" invested more than "$1 billion dollars into competing facilities." Application by Bell Atlantic – New York, CC Docket 99-295, at 4 (filed Sept. 29, 1999).

[22] GTE's Annual Report does not disclose the amounts it spent on the local services offered by its CLEC, but the Report reveals that the CLEC's total annual gross revenues (which include local and long distance services) are over $1 billion, which strongly indicates that GTE's local services expenditures could alone exceed more than $500 million over three years.

Moreover, because Applicants have designed this commitment to be "technology-neutral" (Supp. Filing at 28), they could also easily meet this goal by implementing their existing pre-merger plans to offer out-of-region wireless services. Indeed, they expressly note that this commitment may be met wholly by Bell Atlantic "continuing to build out its data/internet and/or wireless businesses out of region." *Id.* at 28 n.20.

In short, Applicants' commitments to make additional out-of-region entry plans as a result of this merger are a sham. They proclaim these plans as a significant merger benefit, but in fact all of the plans could be accomplished without this merger. *See supra* Part I.D.2. And the merger condition designed to ensure that this asserted "benefit" is realized perfectly encapsulates Applicants' objective of obtaining merger conditions that have "really no impact on business." It requires nothing more than that just one of the Applicants continue its pre-existing out-of-region entry plans.

Likewise, the Applicants' proposed condition relating to performance measurements revises the counterpart condition in the *SBC/Ameritech Order* so as to render it even weaker. The Commission emphasized in the *SBC/Ameritech Order* that "the list of measurements reported by SBC/Ameritech under this condition is not static. This list is subject to addition or deletion, and the measurements themselves are subject to modification, by the Chief of the Common Carrier Bureau, through a joint semi-annual review." *SBC/Ameritech Order* ¶ 377. The conditions proposed here, by contrast, would be fixed and inalterable. *See* Condition V & Att. A (listing measures, but no provision to revise them).

A static performance plan is less helpful to opening markets, because measurements need to be refined to address unintended omissions or unforeseen errors in methodology, and to reflect changes in the marketplace as they occur. The performance measures in New York, for example, which form the putative basis for Condition V, are regularly updated to address necessary amendments.[23] In particular, performance measurements relating to DSL services are just now being defined. In its current form, many critical measures relating to advanced data services would be omitted forever from the proposed condition. Indeed, the only possible reason for Applicants to make this particular revision is to ensure that this condition will become obsolete more quickly.

3. Several Of The Proposed Conditions Would Affirmatively Impede The Development Of Competition

The conditions that Applicants propose will not only fail to remedy the profound public interest harms to local competition occasioned by this merger, but also will cause further material harm to efforts to break open Applicants' monopoly markets. That is true not merely for the reasons previously advanced by AT&T in the SBC/Ameritech proceeding,[24] but also for reasons that have become more clear since that proceeding. In particular, SBC's post-merger conduct demonstrates some of the ways in which the merger conditions proposed here can (and likely would) be implemented in ways that are anticompetitive rather than pro-competitive.

For example, proposed Condition XI, regarding most-favored-nation (MFN) provisions for out-of-region and in-region interconnection agreements, is modeled upon a condition that was adopted in the Ameritech/SBC proceeding and that purports to allow competing carriers to import into interconnection agreements provisions from any other agreement in the SBC or former Ameritech region. Although the SBC/Ameritech Condition was "designed to facilitate

[23] *See, e.g,* Order Directing Improvements to Wholesale Service Performance, *Complaint of AT&T Communications of New York, Inc.*, Case No. 99-C-1529 (N.Y. P.S.C. Feb. 11, 2000) (issuing emergency amendments to address errors in performance measures that, "if unabated for [even] another month, could undermine the ability of competitors to provide local service in New York State").

[24] *See* AT&T SBC/Ameritech Comments at 15-20 & App. A; AT&T Conditions *Ex Parte*.

market entry throughout SBC/Ameritech's region," *SBC/Ameritech Order* ¶ 388, it has been affirmatively harming competing carriers' efforts to negotiate market-opening interconnection agreements.

To begin with, SBC has stymied most requests by AT&T and other CLECs to import provisions under the terms of MFN provisions. The SBC/Ameritech MFN condition is limited to provisions that were "negotiated," SBC/Ameritech Condition XII, *see SBC/Ameritech Order* ¶ 491, and since the merger SBC has consistently objected to use of the MFN condition on the grounds that a requested provision was, it asserts, not "voluntarily negotiated." For example, in Illinois, the parties were ordered to have a "MFN collaborative" that would collectively address MFN requests under a similar MFN provision adopted by the Illinois Commerce Commission. As part of that collaborative, there were 36 distinct MFN requests. Of these 36, SBC agreed to consider a mere six, objecting to the remaining 30 under a variety of extremely narrow interpretations of the MFN clause.[25]

A narrowly-drawn MFN condition like the one proposed by BA/GTE will not, therefore, facilitate market entry throughout its new, expanded region. In fact, as AT&T and other CLECs have discovered in negotiations with SBC for new interconnection agreements, the SBC MFN condition is affirmatively hampering market entry because it has created an incentive for SBC to "agree" to very little – apparently to avoid the possibility that the negotiated provision will then be sought by CLECs in all SBC states pursuant to the MFN merger conditions. Indeed, the SBC negotiators at times take positions that mark a substantial retreat from issues previously resolved in a particular state to avoid MFN implications.

[25] For example, while SBC admitted that definitions relating to reciprocal compensation (i.e., "local traffic") were voluntarily negotiated, it simply refused to MFN these provisions, claiming those definitions were pricing provisions and thus not subject to the MFN clause.

For example, in California, AT&T was in the midst of re-negotiations with Pacific Bell on a new interconnection agreement when the SBC/Ameritech merger conditions became effective in early October. The effect was to make already difficult negotiations even tougher. On multiple occasions, PacBell's negotiating team expressly cited the MFN merger condition as the basis for rejecting an AT&T proposal, with the negotiators asserting that they could not afford to reach an agreement with AT&T on a provision that could become available widely elsewhere. As a result, PacBell's negotiators have rarely reached agreement with AT&T on significant points, and a tremendous number of "open issues" are headed to arbitration – many more than in 1996.

Moreover, in addition to hardening its resolve to refuse to negotiate significant items, the MFN provision has led PacBell to seek to include within the negotiated agreement certain "poison pills" that would make the agreement unattractive to other CLECs who might take advantage of the MFN provision. And PacBell has also insisted on including the following "Non-voluntary negotiations" clause in its Interconnection Agreements, presumably to preclude CLECs from invoking the MFN merger condition: "This Agreement incorporates a number of interconnection arrangements, Network Elements arrangements and other provisions that were not voluntarily negotiated by PACBELL or AT&T, but instead resulted from determinations made in arbitrations under Section 252 of the Act or from other requirements of regulatory agencies or state law. The arrangements and provisions of this Agreement shall not be available to other parties or beyond the scope of this contract, except as may be required by law." The intent behind this language is clear: SBC is vigilantly seeking to limit the reach of the MFN clause to only those provisions that it deems "voluntarily negotiated" – which, under its narrow view of that phrase, would be very few of true public interest benefit.[26]

The MFN merger condition proposed by Applicants in this proceeding would likely lead to the same phenomenon. Indeed, it would probably be even worse, because the Bell Atlantic/GTE condition already expressly limits the MFN requirement to terms that are "voluntarily negotiated." The addition of the term "voluntarily" will likely lead only to lengthy debates about its meaning and serve as the basis for the merged entity to exclude various negotiated terms from the reach of the provision on the ground that the negotiated outcomes were not "voluntary."

The Applicants' proposed condition on performance measures could also substantially harm competition, for at least two reasons. *First,* the proposed Performance Plan is patently incomplete, and could be ultimately misleading, appearing to demonstrate adequate or even superior performance while hiding significant and harmful discrimination. As it would apply in Bell Atlantic's region, for example, the proposed Plan is based largely on measurements from the New York State performance measurements. Of the 170 separate "sub-metrics" adopted in New York, less than a quarter – only 41 – are included in the proposed Plan. Beyond the obvious

[26] Pacific has recently described this language as "beneficial" to CLECs, claiming that it "tells the CLEC" trying to take advantage of the MFN merger condition either that, if the CLEC wishes to incorporate the entire agreement, it must "keep looking elsewhere" or that, for any individual provisions, the CLEC "will have to do some serious investigation of the[ir] status" to determine whether SBC believes they were "voluntary" and thus eligible to be imported. Response of Pacific Bell Tel, to Application of AT&T et al. for Arbitration, A.00-01-022 (Cal. PUC Feb. 18, 2000). As Pacific's own description shows, this provision, far from providing a benefit to CLECs, confirms that the merger condition is not in fact helping to "facilitate market entry" (*SBC/Ameritech Order* ¶ 388), given Pacific's view that so few provisions are subject to it.

harm caused by omitting so many critical measures,[27] the proposed Plan threatens the value of even the 25 percent of measures that have been included. That is because the New York State performance measures were designed to function as an integrated whole, with many metrics dependent on other metrics to achieve full and accurate reporting of Bell Atlantic's performance. The use of one metric without its intended companion metrics can actively disguise poor and discriminatory wholesale performance.[28] If the Commission intends to try to craft truly pro-competitive conditions, then it might, for example, require Bell Atlantic to adopt the entirety of the New York performance plan (and GTE to adopt California) on a region-wide basis. That could provide much needed uniformity in the reporting of performance data.

Second, the proposed condition would as a practical matter serve as a *de facto* ceiling on performance measures in interconnection negotiations and in state proceedings. That is how SBC is seeking to treat the comparable condition from its own merger proceeding. SBC's new position in negotiations on performance measures closely mirrors the limited 20-measurement Plan that was included as a condition on its merger with Ameritech. *See SBC/Ameritech Order* ¶ 380 (describing limitations of Plan). In many states, this position marks a substantial retreat, both from previously negotiated agreements on performance measurements and prior state commission orders on this issue. Thus, the measures being proposed by SBC after this merger

[27] For example, in the metrics relating to provisioning, the Proposed Plan omits nine of the ten metrics designed to measure hot cut performance and also ignores metrics that measure the average interval offered and the average interval completed.

[28] For example, with metrics relating to ordering, the Proposed Plan omits metrics measuring the length of time to confirm an order, but includes the metrics measuring the percentage of orders confirmed on time. This can mask discriminatory performance where 95% of orders are confirmed on time, but the remaining 5% of orders remain unconfirmed for weeks (as has in fact occurred in New York). Likewise, the Proposed Plan include a measurement on order flow-through percentage, but eliminates the metric for percent of orders rejected. As the Commission has found, a high flow through rate is less meaningful if an incumbent improperly rejects a significant amount of orders.

condition was approved entirely omit numerous pro-competitive measures agreed to in such states as Texas, California, Nevada, Indiana, Michigan and Illinois.[29] Accordingly, despite the Commission's "encourage[ment]" for "each state to adopt rigorous and extensive performance monitoring programs," *SBC/Ameritech Order* ¶ 380, the performance measurements in the SBC-Ameritech merger condition are apparently becoming a new and lower ceiling of performance reporting.[30]

Thus, it remains inevitable that, as with the SBC-Ameritech conditions, these proposed conditions will also serve as the basis for ongoing disputes about whether they are a *de facto* ceiling on the requirements incumbent LECs will be expected to meet. That is plainly evident from SBC's post-merger conduct, and apparently will occur despite the presence of any stated disclaimers and other admonitions that the conditions should serve as floor, and not a ceiling. Indeed, despite its own pronouncements that merger conditions have no impact on section 271 proceedings, the Commission itself nonetheless expressly relied upon the meager SBC-Ameritech conditions in finding that Bell Atlantic had complied with the competitive checklist. *See Application of Bell Atlantic New York To Provide In-Region, InterLATA Service in the State*

[29] The merger condition is having other adverse effects. Thus, some states like Illinois required that all performance measures rely on a parity standard, which compares performance with an incumbent's operations and which is generally simpler and more rigorous than attempting to devise a performance benchmark. But the language in the SBC-Ameritech merger condition (and the one proposed here) relies heavily on the use of benchmarks. That has led SBC, in turn, to propose a mixture of measurement standards, rather than a requirement of parity. Thus, the Illinois Commission's order is apparently being ignored as a result of the merger conditions.

[30] Both merger conditions allow the incumbent considerable discretion in how to report performance measures, which can also lead to anticompetitive results. AT&T's preliminary analysis of SBC's performance data suggests that SBC selectively excludes certain information that demonstrates poor performance. Specifically, the "Z score" (the statistical test used to establish compliance) is not always provided, especially for measures with small data sets. It appears that if a measure has a small data set and the result is favorable to SBC, then the Z result is posted. Otherwise the Z result is excluded.

See Application of Bell Atlantic New York To Provide In-Region, InterLATA Service in the State of New York, CC Docket 99-295, ¶ 331 & n.1036 (Dec. 21, 1999). The prospect that an inadequate set of performance measures can be cited by Applicants and other incumbent LECs as sufficient for other purposes plainly impedes the development of competitive markets rather than fostering it.

CONCLUSION

For the reasons stated above, and in AT&T's Petition to Deny, the Commission should deny the Applicants' proposed merger as contrary to the public interest.

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