

98. As explained in the *WorldCom/MCI Order*, our framework for analyzing transitional markets reflects the values of, but does not attempt to replicate, the “actual potential competition” doctrine established in antitrust case law.<sup>245</sup> Under the actual potential competition doctrine, a merger between an existing market participant and a firm that is not currently a market participant, but that would have entered the market but for the merger, violates antitrust laws if the market is concentrated and entry by the nonparticipant would have resulted in deconcentration of the market or other pro-competitive effects.<sup>246</sup> The transitional markets framework set forth in the *Bell Atlantic/NYNEX Order* identifies as “most significant market participants” not only firms that already dominate transitional markets, but also those that are most likely to enter in the near future, in an effective manner, and on a large scale once a more competitive environment has been established.<sup>247</sup> The Commission seeks to determine whether either or both of the merging parties are among a small number of these most significant market participants,<sup>248</sup> in which case its absorption by the merger could harm the public interest in violation of the Communications Act unless offset by countervailing positive effects.

99. In this portion of the Order, we conduct an analysis of the probable competitive effects of the merger of Bell Atlantic and GTE on the provision of local exchange and exchange access services.<sup>249</sup> We utilize the “transitional markets” analytical framework set forth in the *Bell Atlantic/NYNEX Order* to determine whether the proposed merger would result in a potential harm to the public interest by diminishing the potential for competition in local exchange and exchange access markets in Bell Atlantic’s or GTE’s regions.

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<sup>245</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14744, para. 64; *WorldCom/MCI Order*, 13 FCC Rcd at 18038, para. 20.

<sup>246</sup> See *id.* (citing *United States v. Marine Bancorporation*, 418 U.S. 602 (1974); ABA Section of Antitrust Law, *Antitrust Law Developments* (4th ed. 1997) at 346-50 (Antitrust Law Developments)).

<sup>247</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14744, para. 64. In addition, the transitional markets framework is well-tailored to the Commission’s unique role as an expert agency and statutory obligation to promote competition and to open local markets.

<sup>248</sup> As we stated in the *AT&T/TCG Order*, when analyzing a merger in a market that is rapidly changing, the best way to assess the likely effect of the merger is to isolate the merger’s effects from all other factors affecting the development of the relevant market over time. This is achieved by framing the analysis in a way that holds constant the effects of all changes in the market conditions other than those directly caused by the merger. To do this, we also identify as market participants those firms that have been effectively precluded from the market—that is, those firms that are most likely to enter (or are just beginning to enter) the market but have until recently been prevented or deterred from participating in the market by the barriers that the 1996 Act seeks to eradicate. We then identify the most significant participants based on an assessment of capabilities and incentives to compete effectively in the relevant market. *AT&T/TCG Order*, 13 FCC Rcd at 15245-46, para. 17.

<sup>249</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14745, para. 65; *WorldCom/MCI Order*, 13 FCC Rcd at 18036-37, para. 18; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20008-10, paras. 37-38.

## 2. Discussion

### a. Overview

100. We conclude that the proposed merger is likely to result in a public interest harm by eliminating GTE as among the most significant potential participants in the mass market for local exchange and exchange access services in Bell Atlantic's operating areas. Specifically, with respect to the mass market for local services, we find that GTE is a most significant market participant in Bell Atlantic service areas adjacent to and surrounding its GTE's service areas and in which it has a cellular presence. We base this finding in part on our analysis of the plans of GTE to expand out-of-region and, in particular, into Bell Atlantic's territories within Pennsylvania and Virginia. We find that this elimination of GTE as a competitor in the mass market for these services will result in a significant public interest harm. We also conclude that Bell Atlantic, despite having the capabilities to be a most significant market participant in GTE's service area, lacks the incentives to enter the mass market in GTE's territory. In the larger business market for local exchange and exchange access services, we conclude that both Bell Atlantic and GTE are only two of a larger number of most significant actual and potential competitors in each other's service areas. The merger would thus be less likely to have adverse competitive effects leading to public interest harms in these markets.<sup>250</sup>

## 3. Relevant Markets

101. We begin our analysis of the proposed merger by defining the relevant product and geographic markets.<sup>251</sup> We then consider whether the merger frustrates the Communications Act's goal of encouraging greater competition in those markets.

102. *Product Markets.* We analyze the competitive effects of the proposed merger on the provision of local exchange and exchange access services.<sup>252</sup> Defining relevant product markets involves identifying and aggregating consumers with similar demand patterns. For purposes of analyzing the competitive effects of this merger on local exchange and exchange access services we identify two distinct relevant product markets: (1) residential consumers and

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<sup>250</sup> Additionally, we note that our analysis of these competitive issues is necessarily truncated in this portion of the order. Because information concerning the Applicants' business plans is subject to a Protective Order, much of the evidence on which we rely is explained in Appendix C, to which access must be restricted.

<sup>251</sup> See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53; see also *SBC/Ameritech Order*, 14 FCC Rcd at 14746, para 67; *WorldCom/MCI Order*, 13 FCC Rcd at 18119, para. 164.

<sup>252</sup> In Sections IX and X, we address the proposed merger's impact upon the wireless and international markets. Additionally, although Bell Atlantic recently entered the long distance market in New York, it does not provide interexchange services in other states. Furthermore, as a result of a recent divestiture, GTE no longer serves long distance customers in either the larger business or mass markets within Bell Atlantic's region, with the exception of New York. Accordingly, we conclude that the proposed merger will not result in a loss of competition in the domestic market for long distance services. See *supra* Section V. As discussed below, however, we do find that a merged Bell Atlantic/GTE will have an increase ability and incentive to discriminate in the provision of exchange access service. See *infra* Section VI.D.

small business (mass market) and (2) medium-sized and large business customers (larger business market).<sup>253</sup>

103. *Geographic Markets.* We conclude that the relevant geographic market in which to measure the effects of this merger on local exchange and exchange access services consists of the geographic markets for those services in which one or both of the merging parties provide service.<sup>254</sup> It is in these markets that the merging parties actually operate and where the potential is greatest for both parties to operate in the future. In focusing our analysis upon these markets, we recognize that the proposed merger can produce anticompetitive effects only in markets in which both firms actually or potentially operate.<sup>255</sup> Furthermore, as was the case in the *WorldCom/MCI Order*, we conclude that, for purposes of this transaction, we need not conduct a separate assessment of each local area in which Bell Atlantic and/or GTE have facilities to determine whether there are potential anticompetitive effects.<sup>256</sup>

**a. Market Participants**

104. When analyzing the probable effects of this merger on the relevant product and geographic markets, we begin by identifying significant market participants. We first note that Bell Atlantic and GTE remain dominant within their traditional service areas and therefore are included in the list of most significant market participants within their respective traditional markets. Next we consider whether, but for the merger, either of the merging parties would be a significant potential competing provider of local exchange and exchange access services in the other's markets. In doing so, we examine each of Bell Atlantic's and GTE's capabilities and incentives to provide local exchange and exchange access services outside the region in which it is an incumbent LEC, with particular emphasis on analyzing existing plans and any past attempts to do so. We then examine other firms that may be considered most significant market participants in the relevant markets to determine the competitive impact of the loss of one of the

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<sup>253</sup> We distinguish mass market consumers from larger business customers because the services offered to one group may not be adequate or feasible substitutes for services offered to the other group, and because firms need different assets and capabilities to target these two markets successfully. *See generally SBC/Ameritech Order*, 14 FCC Rcd 14746, para. 68 & n.146; *WorldCom/MCI*, 13 FCC Rcd at 18119, para. 164; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53. As recognized in previous merger orders, mass market customers have a different decision-making process than do larger business customers. For example, residential and small businesses are served primarily through mass marketing techniques including regional advertising and telemarketing, while larger businesses tend to be served under individual contracts and marketed through direct sales contacts. *See SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 68.

<sup>254</sup> *See SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 69; *WorldCom/MCI Order*, 13 FCC Rcd at 18120, para. 167. *See also AT&T/TCG Order*, 13 FCC Rcd at 15248, para. 21; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20017, para. 54.

<sup>255</sup> *WorldCom/MCI Order*, 13 FCC Rcd at 18120, para. 167.

<sup>256</sup> *See id.* at 18120, para. 168.

Applicants as an independent entity.<sup>257</sup>

105. We consider all available evidence indicating that precluded competitors possess the capability to and would likely have entered the relevant markets.<sup>258</sup> For instance, parties' plans or attempts to enter the relevant markets represent probative evidence of each firm's own perception that it possesses the capabilities and incentives necessary to be a significant market participant. We similarly examine unsuccessful plans to enter a relevant market in the past. While recognizing that a failed attempt could suggest that a firm is not a significant market participant, we would also consider all relevant circumstances, including changed market conditions, that might facilitate successful subsequent entry and the strategic business consequences to a firm of failing to enter into a relevant market.<sup>259</sup>

(i) **Mass Market**

106. With respect to the mass market for local exchange and exchange access services, we conclude that Bell Atlantic and GTE each has the capabilities to be considered a significant market participant in the other's operating areas. In addition, as major incumbent LECs, both Bell Atlantic and GTE are equipped with advantages when expanding out-of-region that other potential local service market entrants lack. GTE has had the incentive and intention to enter portions of Bell Atlantic's region, and we therefore find that it is a most significant participant in the mass market for local exchange and exchange access services in Bell Atlantic's region. Because we find that Bell Atlantic lacks the incentives to enter GTE's region, however, we conclude that it is not among the most significant potential participants in the mass market within GTE's service area.

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<sup>257</sup> The Commission previously has set forth the various capabilities it considers in identifying the most significant potential competitors in local exchange and exchange access markets. Those capabilities include whether the firm possesses the following: (1) the operational ability to provide local telephone service (*i.e.*, know how and operational infrastructure, including sales, marketing, customer service, billing, and network management); (2) the ability to quickly acquire a critical mass of customers; (3) brand name recognition, a reputation for providing high quality and reliable service, an existing customer base, or the financial resources to get these assets; and (4) some significant unique advantages, such as a cellular presence in the relevant market. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20019, paras. 58-64; *see also SBC/Ameritech Order*, 14 FCC Rcd at 14748, para. 73; *WorldCom/MCI Order*, 13 FCC Rcd at 18047-48, 18051-56, 18122, paras. 36, 42-51, 171.

<sup>258</sup> *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20021-22, para. 64. We also noted in the *Bell Atlantic/NYNEX Order* that if a firm's internal documents demonstrate serious consideration of entry, they may create an inference of a capability to effect the market without a detailed examination of the competitor's capabilities and incentives.

<sup>259</sup> Firms providing one service may choose to expand their offering to provide a whole range of products or expand to other geographic regions. For instance, as noted *supra*, in recent merger applications before the Commission, some merging parties have asserted that consumers are expressing demand for "one-stop shopping." *See WorldCom/MCI Order*, 13 FCC Rcd at 18037, para. 19; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20015, para. 52. According to the Applicants, this demand stimulated in part their merger plans. We also examine the activities of competitors providing similar services; if a competitor branches into new relevant markets, we may determine that a firm could or would respond to such a competitive challenge by serving these other relevant markets as well.

107. *Capabilities and Incentives.* We conclude that both Bell Atlantic and GTE have the operational capabilities necessary to enter out-of-region markets. In general, as major incumbent LECs, both 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 services to a broad base of residential and business customers.<sup>260</sup> These systems are required whether entry occurs through resale, use of UNEs, or some other form of facilities-based entry. Similarly, Bell Atlantic and GTE also possess special expertise that they could bring to the interconnection negotiation and arbitration process when entering out-of-region markets because of their intimate knowledge of local telephone operations and experience negotiating interconnection agreements with new entrants.<sup>261</sup>

108. Moreover, as was the case in the merger of SBC and Ameritech, Bell Atlantic and GTE have the additional advantage in Pennsylvania and Virginia of adjacent territories, a cellular presence, or both.<sup>262</sup> In Virginia, for instance, each of the areas served by GTE’s incumbent LEC is abutted by Bell Atlantic’s territory.<sup>263</sup> Additionally, GTE’s substantial wireless presence in Virginia is largely within Bell Atlantic’s wireline territory.<sup>264</sup> Each company has an array of switches and switching locations that have capacity or can be readily upgraded to provide switching to contiguous territories, and, in fact, GTE’s own local entry strategy indicates its intent to leverage upgraded wireless switches to provide wireline service to “near-franchise” areas.<sup>265</sup> Thus, in their contiguous service areas in Pennsylvania and Virginia, Bell Atlantic or GTE could lease or build transport from their existing switches to a newly entered market more readily than other potential local service providers because of their proximity to the newly entered market, as well as their understanding of the requirements of providing local exchange services.<sup>266</sup> In addition, both Bell Atlantic and GTE have brand recognition in contiguous regions because of extensive advertising in media markets that cross these regions, as well as nationally

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<sup>260</sup> See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd 20020, 20040-41, paras. 62, 106-08; see also AT&T Mar. 1, 2000 Opposition at 7-8.

<sup>261</sup> *Bell Atlantic/NYNEX Order*, 12 FCC Rcd 20040, para. 107; see also AT&T Mar. 1, 2000 Opposition at 7-8; National ALEC Assoc. Mar. 1, 2000 Comments at 5.

<sup>262</sup> See *Bluestar, et al.* Mar. 1, 2000 Comments at 2; National ALEC Assoc. Mar. 1, 2000 Comments at 6; *CompTel* Mar. 1, 2000 Comments at 4-5; *MCI WorldCom* Nov. 23, 1998 Comments at 22. See also *SBC/Ameritech Order*, 14 FCC Rcd at 14753-54, paras. 85-86 (adjacency and cellular presence or both evidence that merging parties are significant market participants in each other’s operating areas).

<sup>263</sup> See Appendix C (Summary of Confidential Information).

<sup>264</sup> See *id.*

<sup>265</sup> See *id.* In this regard, we find GTE’s argument that it intended to utilize only one upgraded wireless switch for the provision of wireline services to be contradicted by its own internal documents. See *id.*

<sup>266</sup> As contiguous incumbent LECs in Pennsylvania and Virginia, Bell Atlantic and GTE also have the ability to use remote digital loop carriers to serve out-of-region end users. Such technology has a range of about 125 miles, which would permit it to be used in conjunction with the contiguous provider’s switch in its nearby in-region territory. See AT&T Nov. 23, 1998 Opposition at 24.

recognized brand names resulting from extensive advertising campaigns.<sup>267</sup> Finally, the wireless assets that Bell Atlantic and GTE possess in Pennsylvania and Virginia also provide unique advantages for out-of-region entry, for a wireless presence can provide a ready customer base for expanding into wireline local telephony.<sup>268</sup> As discussed below, this is indicated by GTE's own entry plans.<sup>269</sup>

109. *GTE's Out-of-Region Plans.* In addition to having the capability to do so, we conclude that GTE also possesses the incentives to be a most significant participant in the mass market for local exchange and exchange access services in Bell Atlantic's region, particularly in Pennsylvania and Virginia. By 1998, when it announced the proposed merger with Bell Atlantic, GTE had entered and was providing service as a competitive LEC in the small business market for local exchange and exchange access services in several states spread across the territories of each Bell Operating Company (BOC) with the exception of Bell Atlantic.<sup>270</sup> In those markets, GTE offered local services through resale, as well as through utilization of proximate wireless switches in certain places.<sup>271</sup> As with many other competitive LECs that initially enter a market through resale of the incumbent LEC's services, GTE's business plans indicate that it intended to convert its resale activities into facilities-based services as its customer base expanded.<sup>272</sup>

110. We find that, absent the merger, it is highly likely that GTE would have continued entering local markets, including Bell Atlantic-controlled markets, and would have continued converting its resale operations into facilities-based service. The fact that prior to the merger announcement GTE had not begun offering local wireline services in Bell Atlantic's region does not establish that it lacked the capabilities and incentives to do so.<sup>273</sup> Rather, GTE's internal documents indicate that it planned to continue expanding its local presence by offering services through resale and by leveraging its existing facilities and wireless and long distance customer bases to offer bundled service packages.<sup>274</sup>

111. Both Bell Atlantic and GTE are incumbent LECs in substantial geographic areas within Virginia and Pennsylvania. Internal GTE documents indicate that GTE had long-standing

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<sup>267</sup> As discussed below, GTE launched a national advertising campaign, and the company's traditional advertising strategy has emphasized "national, strategic branding." See Sprint Nov. 23, 1998 Petition at 19-20.

<sup>268</sup> See Appendix C (Summary of Confidential Information). See also *SBC/Ameritech Order*, 14 FCC Rcd at 14754, para. 85.

<sup>269</sup> See Appendix C (Summary of Confidential Information).

<sup>270</sup> *Id.*

<sup>271</sup> See *id.*

<sup>272</sup> See *id.*

<sup>273</sup> See *SBC/Ameritech Order*, 14 FCC Rcd 14750, para. 78.

<sup>274</sup> See Appendix C (Summary of Confidential Information).

plans to enter Bell Atlantic's local markets in each of these states.<sup>275</sup> For instance, GTE's competitive LEC had completed interconnection negotiations with Bell Atlantic and submitted interconnection agreements to the Pennsylvania and Virginia state utility commissions for approval.<sup>276</sup> Significantly, GTE withdrew its request for approval of its interconnection agreement with Bell Atlantic in Virginia the day before it filed its application for approval of the merger with this Commission,<sup>277</sup> further indicating that GTE would have expanded into Bell Atlantic's Virginia market but for its merger with Bell Atlantic.

112. In addition to its significant presence in Virginia as an incumbent LEC, GTE has a substantial wireless presence in Virginia, with several wireless switches from which it could offer facilities-based local exchange and exchange access services in Bell Atlantic's region. Despite its wireless presence in Pennsylvania being more limited, GTE's wireline presence throughout the state would permit it to implement its competitive LEC's plans to enter adjacent "near-franchise" areas. Although it appears that GTE's plans to enter Bell Atlantic's region suffered several delays during 1998, documents created after the proposed merger was announced indicate that GTE had not abandoned its plans to enter the local markets in either of these states. To the contrary, GTE continued to have definite plans and articulated strategies for entering Bell Atlantic's local markets in 1999.<sup>278</sup> Accordingly, we conclude that GTE is a significant market participant in the mass market for local exchange and exchange access service in Bell Atlantic's local markets in Pennsylvania and Virginia.

113. In addition, GTE had long-term plans to expand into many additional states within Bell Atlantic's region. Indeed, at the time of the announcement of the merger, in addition to Pennsylvania and Virginia, GTE's competitive LEC had filed applications for certification as a competitive LEC in Connecticut, Maryland, New Hampshire, New York, Rhode Island, and the District of Columbia.<sup>279</sup> Indeed, the Applicants' Supplemental Filing in this proceeding refers to the investment by GTE's competitive LEC of "hundreds of millions [of dollars] in [operational] support systems and other assets needed to compete outside its traditional local telephone service areas."<sup>280</sup>

114. We are unpersuaded by GTE's contentions that its competitive LEC was pursuing an extremely limited out-of-region presence prior to the merger. Although GTE argues that its

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<sup>275</sup> See *id.*

<sup>276</sup> See Appendix C (Summary of Confidential Information). We reject Applicants' argument that because GTE opted into an existing Bell Atlantic interconnection agreement in Virginia pursuant to section 252(i) of the Act, its plans were not concrete. See Bell Atlantic/GTE Dec. 23, 1998 Joint Reply. Adoption of a previously approved interconnection agreement in no way renders the subsequent agreement less meaningful. See Sprint Nov. 23, 1998 Petition at 19.

<sup>277</sup> See *id.*

<sup>278</sup> Appendix C (Summary of Confidential Information).

<sup>279</sup> See Appendix C (Summary of Confidential Information); See also Sprint Nov. 23, 1998 Petition at 13-16.

<sup>280</sup> Bell Atlantic/GTE Jan. 27, 2000 Supplemental Filing, Attach. B, Tab 2, para. 3.

competitive LEC's initial launch in California demonstrated stark differences between its business plan and its actual commercial results, causing it to prepare to enter only one out-of-region city in 1999,<sup>281</sup> GTE's internal documents indicate that it in fact planned to enter several additional markets as a competitive LEC in 1999, including Bell Atlantic's incumbent LEC markets of Pennsylvania and Virginia.<sup>282</sup> Similarly, GTE's argument that its competitive LEC's entry plans focused nearly exclusively on reselling its incumbent LEC's services to customers within its own region<sup>283</sup> is belied by the evidence indicating that GTE, in fact, intended to offer local services to small businesses in several states in which its incumbent LEC has no presence.<sup>284</sup>

115. Despite GTE's claims that its competitive LEC was considering canceling many of its out-of-region entry plans because of problems experienced with its competitive LEC's entry into the local market in California, it has presented no evidence to that effect. Rather, documents dated after the announcement of GTE's merger with Bell Atlantic indicate that GTE had extensive competitive local market entry activities planned for 1999.<sup>285</sup> Moreover, whatever the merits of GTE's reasons for allegedly scaling back its competitive LEC's activities, none of them is described in contemporaneous documents as a reason for halting its plans for more extended entry. Indeed, there is no indication that GTE would not have continued developing its resale strategy, as well as its plans to begin offering facilities-based service, absent the announcement of the merger with Bell Atlantic. We therefore conclude that GTE's extensive entry plans were ultimately cancelled because it preferred to merge with Bell Atlantic rather than compete on its own in the mass market for local exchange and exchange access services.<sup>286</sup>

116. We similarly disagree with GTE that its entry into the mass market for local services would have a limited impact on that market because its entry was resale-based.<sup>287</sup> Relying on resale operations is a typical initial entry strategy employed by competitive LECs. As we recognized in the *SBC/Ameritech Order*, a competitor's entry by resale can be a necessary first step to facilities-based competition, not a *per se* disavowal of it.<sup>288</sup> Nor do we find credible GTE's assertion that it lacks brand name recognition outside of its region. GTE operates in twenty-eight states, offers long distance, wireless, local, and Internet services, and has a decidedly national corporate focus.<sup>289</sup> Moreover, we disagree with Applicants' contention that

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<sup>281</sup> See Bell Atlantic/GTE Dec. 23, 1998 Joint Reply, Attach. B at 6.

<sup>282</sup> Appendix C (Summary of Confidential Information).

<sup>283</sup> Bell Atlantic/GTE Dec. 23, 1998 Joint Reply, Attach. B. at 5 ("Consumers were not targeted out-of-franchise because acquisition costs were too high.")

<sup>284</sup> See Appendix C (Summary of Confidential Information).

<sup>285</sup> *Id.*

<sup>286</sup> See *id.*

<sup>287</sup> Bell Atlantic/GTE Dec. 23, 1998 Joint Reply, Attach. B at 5.

<sup>288</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14751, para. 81.

<sup>289</sup> See Appendix C (Summary of Confidential Information).

GTE has limited name recognition in Pennsylvania and Virginia.<sup>290</sup> Although GTE's brand recognition in Pennsylvania and Virginia on a statewide basis may not approach that of the three largest interexchange carriers that also provide local services, it is likely to be extremely high in the Bell Atlantic areas adjacent to GTE's incumbent LEC operating areas simply because of advertising spillover. In any case, GTE's brand recognition nonetheless is greater than that of other competitive entrants due to its substantial presence in those states as an incumbent LEC and wireless provider. Additionally, GTE retained the services of a national advertising agency to begin implementing a national campaign to assist it with becoming a nationwide integrated provider of local, long distance, wireless, and data products.<sup>291</sup>

117. We also find that, despite having the capability to enter the out-of-region mass market within GTE's service areas, Bell Atlantic lacked the incentive to enter that market. The record does not indicate that Bell Atlantic had any specific or concrete plans to enter the mass market for local exchange and exchange access services in GTE's service areas.<sup>292</sup> Moreover, we note that because it contains largely rural and less populated areas and contains few concentrated geographic areas, GTE's local markets are not as attractive for entry as are those of Bell Atlantic. Accordingly, we do not find that Bell Atlantic is a most significant market participant in GTE's territory.

118. With respect to other significant market participants, we reaffirm our finding in prior decisions that the three largest interexchange carriers, AT&T, MCI WorldCom, and Sprint are among the most significant participants in the mass market for local exchange and exchange access services.<sup>293</sup> We find that each of these firms each has the capabilities, incentives, and stated intentions to serve the mass market for local exchange services. Because each of these three firms has a substantial base of residential customers of their long distance services and established brand names resulting from their marketing of these services, they are among the best positioned to provide local services to residential customers. Furthermore, their stated intentions to begin serving the mass market for local services underscores their position as being among the most significant competitors.<sup>294</sup> Nevertheless, in certain regions, such as adjacent territories or cellular markets, where incumbent LECs have brand name and/or customer base advantages similar to those enjoyed by the interexchange carriers with their customers, incumbent LECs have the additional advantage of their experience in providing local services to mass market customers as incumbent LECs.

119. Finally, as in previous merger orders, we conclude that other firms currently serving or planning to serve the mass market for local exchange and exchange access services

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<sup>290</sup> Bell Atlantic/GTE Dec. 23, 1998 Joint Reply at 34.

<sup>291</sup> See Sprint Nov. 23, 1998 Petition at 19-20.

<sup>292</sup> See Appendix C (Summary of Confidential Information).

<sup>293</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14754, para. 87; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20029, para. 82.

<sup>294</sup> *SBC/Ameritech Order*, 14 FCC Rcd at 14754, para. 87.

out-of-region are not yet included in the list of most significant market participants.<sup>295</sup> Competitive LECs have begun serving residential markets but do not yet have the existing customer base and brand name that enable AT&T, MCI WorldCom, and Sprint, as well as certain incumbent LECs, to become most significant competitors.

**(ii) Larger Business Market**

120. We find that the larger business local exchange market has a number of market participants with similar incentives and capabilities as an incumbent LEC expanding out-of-region. As the Commission found in earlier orders, incumbent LECs still dominate the market for local exchange and exchange access services sold to larger business customers in their regions and are therefore most significant market participants.<sup>296</sup> We recognize, however, that in contrast to the relative lack of competition incumbent LECs face in the market for local services sold to mass market customers, incumbent LECs face increasing competition from numerous new facilities-based carriers in serving the larger business market.<sup>297</sup>

121. Because the record demonstrates that Bell Atlantic undertook significant efforts to win large business customers in GTE's region in Virginia, we conclude that Bell Atlantic is one of the more significant market participant in the larger business market for local exchange and exchange access services in GTE's service area.<sup>298</sup> Similarly, GTE is likely to have pursued a number of its large business customers in out-of-region states in Bell Atlantic's territory, as documented by GTE's plans to offer local exchange services.<sup>299</sup> Unlike in the mass market for local exchange and exchange access services, however, a large number of other firms may have similar capabilities and incentives expanding out-of-region to serve larger business customers.<sup>300</sup> As we have noted previously, the larger business market for local exchange and exchange access services differs from the mass market.<sup>301</sup> Larger business customers in general tend to be more

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<sup>295</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14755, para. 88.

<sup>296</sup> See *WorldCom/MCI Order*, 13 FCC Rcd at 18123, para. 172; *AT&T/TCG Order*, 13 FCC Rcd at 15250, para. 26.

<sup>297</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14755, para. 89; *WorldCom/MCI Order*, 13 FCC Rcd at 18123, para. 172.

<sup>298</sup> See Appendix C (Summary of Confidential Information).

<sup>299</sup> See *id.*

<sup>300</sup> The list of market participants with the capabilities and incentives to provide local exchange services to larger business customers includes the largest interexchange carriers.

<sup>301</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14755-56, paras. 89-91; See also *WorldCom/MCI Order*, 13 FCC Rcd 18119, para. 164; *AT&T/TCG Order*, 13 FCC Rcd 15257, para. 38. AT&T/TCG, with its combination of AT&T's capital resources and existing base of business long distance customers along with TCG's local exchange facilities and existing base of business local exchange customers, is a significant competitor in the local market for larger business customers. Similarly, with its combination of MCI's business customer base and local facilities along with WorldCom's competitive LEC assets (including Brooks Fiber and MFS), MCI WorldCom is also a significant competitor in the larger business local exchange market.

sophisticated and knowledgeable purchasers of telecommunications services than mass market customers.<sup>302</sup> Finally, broad-based brand name recognition and mass advertising are less important in attracting larger business customers,<sup>303</sup> and, as a result, many more firms are entering the larger business market successfully than are entering the mass market for local exchange services.

**b. Public Interest Analysis**

122. Applying our analysis to the proposed transaction, we conclude that eliminating GTE as an actual or potential participant in the mass market for local exchange and exchange access services in Bell Atlantic's region, particularly in Pennsylvania and Virginia, results in a significant public interest harm by frustrating the Communications Act's objective of fostering greater competition in the markets for those services. More specifically, we find that the merger of Bell Atlantic and GTE is likely to cause a significant public interest harm by reducing the level of competition in the mass market for local exchange and exchange access services. One of the major purposes of the Act is to lower the entry barriers that gave incumbent LECs monopoly control over the local services offered to customers in their regions. The Act's goal is to introduce competition in these markets to the ultimate benefit of customers, both as entrants attempt to win consumers' business with lower prices and improved services and as incumbents are forced in turn to respond to the entrants or lose customers. The potential for achieving these goals is jeopardized if the incumbent and one of the most significant competitors in its region choose to merge instead of compete. This is true even where the competitor has not entered the market during the transitional period when entry barriers are being eliminated, for the merger will eliminate future entry and any corresponding competitive restraint it would place on the incumbent.

123. As discussed above, we base our conclusion on the following. First, until the merger was negotiated, GTE was implementing plans to enter the mass market for local services in both Pennsylvania and Virginia. Second, we conclude that GTE was among the most significant potential competitors to Bell Atlantic in Pennsylvania and Virginia. We base this finding on our determination that, as an incumbent LEC, GTE has the operational experience to be able to offer local exchange services on a large scale in out-of-region markets. In addition, GTE has a number of advantages for entering Bell Atlantic's territory in Pennsylvania and Virginia, including its substantial wireless customer base, brand reputation, and adjacency to those regions. Additional most significant potential market participants in the mass market for local services in Pennsylvania and Virginia are limited to the major interexchange carriers that are able to capitalize on their brand name and existing customer base.<sup>304</sup> We thus conclude that

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<sup>302</sup> A significant difference between the mass market for local services and the larger business market for local services is that larger business customer purchases are not limited to a single local metropolitan geographic area; rather, they purchase simultaneously in numerous local markets.

<sup>303</sup> See *AT&T/TCG Order*, 13 FCC Rcd at 15257, para. 39; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53.

<sup>304</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14758, para. 95; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20024, para. 70.

the merger will eliminate GTE as one of a very limited number of most significant market participants in the mass market for local services in Pennsylvania and Virginia and, therefore, will result in a public interest harm.<sup>305</sup>

124. Additionally, we further conclude that the proposed merger will likely result in the elimination of GTE as a significant market participant in other states within Bell Atlantic's region. As discussed above, the record indicates that GTE's competitive LEC had long-term plans to expand its operations into many states in which Bell Atlantic is the incumbent LEC. In view of the advantage of GTE's operational experience as both an incumbent LEC and a competitive LEC, we find that GTE had the capabilities and incentives to further expand into the mass market for local services in Bell Atlantic's region.

125. Accordingly, we conclude that the merger of Bell Atlantic and GTE results in the loss of a most significant potential competitor in the provision of mass market local exchange services in portions of Bell Atlantic's region, resulting in a potential public interest harm. The harm is significant because GTE is among a very few firms that are able to enter a market dominated by an entrenched monopolist that are equipped with genuine abilities to challenge that monopolist. Without accompanying conditions, we therefore would be forced to conclude that the proposed merger does not serve the public interest.

126. With respect to the provision of local exchange access services to larger business customers, we conclude that, absent the merger, GTE is likely to have followed a number of its large business customers in a number of out-of-region states in Bell Atlantic's territory, as documented by GTE's plans to offer local exchange services. Additionally, Bell Atlantic had demonstrated plans to win large business customers in GTE's service areas and would likely have continued its plans absent the merger.<sup>306</sup> At the same time, however, we also conclude that there are a number of significant competitors equally competitive with Bell Atlantic and GTE in these larger business markets.<sup>307</sup> Therefore, although Bell Atlantic and GTE are significant market participants, they are not among a limited number of most significant market participants. Accordingly, we do not find that the merger will substantially frustrate the goals of the Act and by reducing competition in the provision of local exchange and exchange access services to larger business customers.<sup>308</sup>

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<sup>305</sup> In doing so, we recognize that the Department of Justice did not find any basis for a case of actual potential competition with regard to the proposed merger of Bell Atlantic and GTE. We note, however, that as discussed above, the public interest standard that governs the Commission's review is broader than the antitrust analysis undertaken by the Department. In particular, as described herein, we find that the merger may contravene the intent of the 1996 Act by delaying the future development of competition or lessening its eventual impact.

<sup>306</sup> See Appendix C (Summary of Confidential Information).

<sup>307</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14760, para. 100; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20022, para. 65.

<sup>308</sup> See *WorldCom/MCI Order*, 13 FCC Rcd at 18074, para. 86; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20022, para. 65. We note, further, that this conclusion undermines the Applicants' argument that a potential public interest benefit would result post-merger from Applicants following their larger business customers out-of-region. Cite. A (continued....)

### C. Comparative Practices Analysis

127. In this section, we analyze the effect of the proposed merger on the ability of regulators and competitors to use comparative analyses of the practices of similarly situated independent incumbent LECs to implement the Communications Act in an effective, yet minimally intrusive manner. As the Commission explained in the *SBC/Ameritech Order*, comparative practices analyses, also referred to as “benchmarking,” provide valuable information regarding the incumbents’ networks, operating practices and capabilities to regulators and competitors seeking, in particular, to promote and enforce the market-opening measures required by the 1996 Act and the rapid deployment of advanced services.<sup>309</sup> Without the use of this tool, regulators would be forced, contrary to the goals of the 1996 Act and similar state laws, to engage in less efficient, more intrusive regulatory intervention in order to promote competition and secure quality service at reasonable rates for customers.<sup>310</sup> We find that the proposed merger of Bell Atlantic and GTE would 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 objectives of the 1996 Act.

128. The Commission’s public interest test considers, among other things, “whether the merger . . . would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy.”<sup>311</sup> In previous incumbent LEC mergers, the Commission has recognized that the declining number of independently-owned major incumbent LEC’s limits the effectiveness of benchmarking for regulators in carrying out the competitive goals of the Communications Act in a less regulatory fashion.<sup>312</sup> In the *SBC/Ameritech Order*, the Commission concluded that by further reducing the number of major incumbent LEC’s, the merger increased the risk that the remaining firms will collude, either explicitly or tacitly, to conceal information and hinder the benchmarking efforts of regulators and competitors.<sup>313</sup> Consequently, the Commission expressly noted that the *SBC/Ameritech* merger posed “a significant harm to the public interest.”<sup>314</sup> The Commission stated that the *SBC/Ameritech* “merger would result in dangerously few RBOC and major incumbent LEC

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number of firms, including Bell Atlantic and GTE, are already providing or could provide local exchange and exchange access services to these customers.

<sup>309</sup> *SBC/Ameritech Order*, 14 FCC Rcd at 14760-61, para. 101.

<sup>310</sup> *Id.* at 14761, para. 101.

<sup>311</sup> *Id.* at 14761, para. 102; *AT&T/TCI Order*, 14 FCC Rcd at 3169, para. 14.

<sup>312</sup> *SBC/Ameritech Order*, 14 FCC Rcd at 14761, para. 102; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, para. 16; *SBC/SNET Order*, 13 FCC Rcd at 21292, para. 21.

<sup>313</sup> *SBC/Ameritech Order*, 14 FCC Rcd at 14762, para. 104. In the *Bell Atlantic/NYNEX Order*, the Commission stated that further reduction of the number of RBOCs is problematic because “the potential for coordinated behavior increases and the impact of individual company actions on our aggregate measures of the industry’s performance grows.” *Bell Atlantic/NYNEX Order* 12 FCC Rcd at 20062-63, para. 156.

<sup>314</sup> *SBC/Ameritech Order*, 14 FCC Rcd at 14761, para. 101.

benchmarks,<sup>315</sup> and posed “grave harms” to the regulatory processes and the operation of the 1996 Act’s interconnection requirements.<sup>316</sup>

129. Following the concerns expressed in prior merger orders, we must consider the effect that a further reduction in the number of large incumbent LEC’s would have on the ability of regulators and competitors to use comparative practices analyses as a deregulatory means to advance the pro-competitive goals of the Communications Act.<sup>317</sup> We find, as the Commission concluded in the *SBC/Ameritech Order*, that the major incumbent LECs (RBOCs and GTE), because they face similar statutory obligations and market conditions, remain uniquely valuable benchmarks for assessing each other’s performance.<sup>318</sup> Thus, a reduction in the few remaining major incumbent LECs would restrict the flow of information to regulators and competitors that otherwise could be used to promote innovative and deregulatory market-opening solutions or to identify and curtail unreasonable and discriminatory behavior that frustrates Congress’ goal of encouraging vibrant competition.<sup>319</sup>

130. As discussed in greater detail below, we find that the proposed merger’s elimination of GTE and Bell Atlantic as separate independent major incumbent LECs,<sup>320</sup> will adversely impact the ability of this Commission, state regulators and competitors to use comparative practices analyses to develop beneficial, pro-competitive deregulatory approaches to open telecommunications markets to competition and to promote rapid deployment of advanced services. More specifically, the loss of GTE and Bell Atlantic as separate independent sources of comparative practices analysis, and the increased incentive for the merged entity to reduce autonomy at the local operating company level, would severely restrict the diversity of practices that regulators and competitors could observe and, where pro-competitive and less regulatory, endorse. By further reducing the number of major incumbent LECs, the merger also increases the risk that the remaining firms will collude, either explicitly or implicitly, to conceal information and thereby hinder regulators’ and competitors’ ability to benchmark.<sup>321</sup> We therefore conclude that the proposed merger of Bell Atlantic and GTE would impede the ability of regulators and competitors to effectively benchmark, precipitating more intrusive, more costly and less effective regulatory schemes, contrary to the deregulatory aims of the 1996 Act and the interests of regulated firms, consumers and taxpayers.

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<sup>315</sup> *Id.* at 14792, para. 179.

<sup>316</sup> *Id.* at 14795, para. 185.

<sup>317</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14761, para. 103; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 1994, para. 16; *SBC/SNET Order*, 13 FCC Rcd at 21292, para. 21; *SBC/PacTel Order*, 12 FCC Rcd at 2624, para. 32.

<sup>318</sup> *SBC/Ameritech Order*, 14 FCC Rcd at 14761-62, para. 103.

<sup>319</sup> *Id.* at 14762, para. 103.

<sup>320</sup> Bell Atlantic and GTE state that their merger “is a true merger of equals and not an outright acquisition.” Bell Atlantic/GTE Jan. 2000 Supplemental Filing at 25.

<sup>321</sup> See also *SBC/Ameritech Order*, 14 FCC Rcd at 14762, para. 104.

131. Our analysis of the effect on comparative practices analysis of the Bell Atlantic/GTE merger is comprised of: (1) the need for comparative practices analyses to offset the informational disadvantage of regulators and competitors; (2) the impact of a reduction in the number of comparable firms on benchmarking's effectiveness; (3) the adverse impact of the proposed Bell Atlantic/GTE merger on the effectiveness of benchmarking; and (4) the current inadequacy of other alternatives to large incumbent LEC benchmarks.

### 1. Need for Comparative Practices Analyses

132. Comparative practices analyses of the practices and performances of similarly situated incumbent LECs, yield a plethora of valuable information for regulators and competitors. The 1996 Act requires regulators to oversee the opening of local telecommunications markets to competition and to promote rapid deployment of advanced services under circumstances in which regulators possess far less accurate and less complete information than incumbent LECs about the capabilities and constraints of existing networks.<sup>322</sup> Without such information, regulators and competitors may not be able to make well informed decisions regarding the feasibility and costs of certain interconnection or access arrangements, particularly when disputes arise over the introduction of new technologies or services.<sup>323</sup> The incumbent LEC's superior knowledge also give it a tangible advantage over competitors in negotiating prices, terms, and conditions for interconnection or network access.<sup>324</sup>

133. In the *SBC/Ameritech Order*, we established the need for and importance of comparative practices analyses.<sup>325</sup> Absent the ability to benchmark among major independent incumbent LECs, this Commission and state regulators would very likely have to engage in highly intrusive and time consuming regulatory practices, such as investigating the challenged conduct directly and at substantial cost to make an assessment regarding its feasibility or reasonableness.<sup>326</sup> The increased need for such direct regulation would not only be more costly, but would clash with the deregulatory goals of the 1996 Act.<sup>327</sup> Furthermore, these more intrusive, time consuming, and costly regulatory alternatives are unlikely to be as effective as comparative practices analysis in implementing the pro-competitive mandates of the 1996 Act, given the rapid evolution of technology, the incumbent LECs' informational advantage and their incentive to conceal such information.

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<sup>322</sup> *Id.* at 14762-63, para. 106.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 14762-67, paras. 106-17

<sup>326</sup> As Sprint points out, without benchmarking, the Commission would have to employ far more intrusive measures, including document and *in personae* subpoenas, more after-the-fact complaint adjudication, or on-the-record hearings. Sprint Nov. 23, 1998 Petition at 52-53.

<sup>327</sup> *See id.* at 53-54.

## 2. Effect of Reduction in Number of Benchmarks

134. In order to devise a variety of policies and practices for regulators and competitors to observe and analyze, comparative practices analysis requires a large number of comparable independent sources of observation. For this reason, mergers between benchmark firms significantly weaken the effectiveness of this pro-competitive, deregulatory tool. Removing a benchmark firm through a merger reduces the independence of the sources of observation at three levels: (a) the holding company level, as policies of each of the merging firms conflicts with the other's; (b) the local operating company level, as the merged company's incentive to impose uniform practices throughout its expanded region increases; and (c) the industry level, as the incentives and capabilities of the few remaining major incumbent LECs to coordinate their behavior increase. In addition, the loss of an independent incumbent LEC will have a greater impact on reducing benchmarking's effectiveness the larger the region of the combined entity and the smaller the number of similarly-situated firms remaining following the merger.

### a. Effect at Holding Company Level

135. A merger of two large incumbent LECs obviously eliminates an independent source of observation at the holding company level. The combined entity is unlikely to continue with two sets of policies and practices where the dual policies conflict with one another. Instead, it is likely to eliminate any divergent approaches in favor of a standard policy (which may represent a choice between the two firms' positions, or a compromise). Consequently, as the Commission explained in the *Bell Atlantic/NYNEX Order*, the result of the merger may be a reduction in the level of experimentation and variety of approaches observable to regulators and competitors.<sup>328</sup>

136. When only a few similarly-situated benchmark firms remain, the harms to benchmarking increase more than proportionately with each successive loss of a firm as an independent source of observation.<sup>329</sup> As the number of independent sources of observation declines, there is less likelihood that one of these firms will emerge to undertake a strategic or management decision that departs from the other incumbents, and that may establish a best practice in the industry. Moreover, the observed best practice is likely to become worse simply because there are fewer observations.<sup>330</sup> Finally, as the number of independent sources of

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<sup>328</sup> *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20060-62, paras. 152-54.

<sup>329</sup> *See id.* at 20062-63, para. 156.

<sup>330</sup> The Applicants contend that in many instances, a merger will have no effect on a best-practices benchmark. *Bell Atlantic/GTE Dec. 23, 1998 Joint Reply App. F, Declaration of Kenneth J. Arrow at para. 37 (Bell Atlantic/GTE Arrow Decl.)*. While the Applicants' contention has merit in theory, the argument breaks down when applying it to the present merger. The *Bell Atlantic/GTE* merger will reduce the number of major incumbent benchmarks from five to four, thus significantly reducing the sample size of observations available for benchmarking. The reduction in benchmarks also increases the ability for firms to either tacitly or explicitly engage in suboptimal behavior that would reduce the effectiveness of best practices benchmarking, and result in a less beneficial "best practice." *See, e.g., Nov. 23, 1998 Petition at 47-49; Letter from Michael Jones, Willkie Farr & Gallagher, Counsel to Sprint, to Magalie Roman Salas, Secretary, FCC (filed Apr. 12, 1999) (Sprint Apr. 12, 1999 Ex Parte Letter), Farrell & Mitchell Attachment at 20.*

observation decreases, deviations from average practices can be identified less confidently as unreasonable and punishable.

137. Having a significant number of independent points of observation is especially crucial for regulators and competitors in decisions regarding new services and innovative technologies. Such decisions are likely to entail forecasting the expected benefits, costs, timing, and problems associated with the provision, maintenance, and interconnection of such new services and new technologies. Although it is impossible to make such predictions with certainty, the existence of numerous major incumbent LECs increases the information available to regulators in evaluating whether or when to require the offering and interconnection of the new service or technology, and in setting interconnection standards, terms, conditions, and rates. Conversely, having few major incumbent LECs to serve as independent points of observation can undermine the credibility of such determinations.

**b. Effect at Operating Company Level**

138. A merger of two holding companies is likely to reduce the relative autonomy of their local operating companies and hence the overall level of experimentation and diversity for decisions that were made at the operating company level. This is because a holding company's size increases, the cost it incurs when one of its operating companies' practices is used as a benchmark against the rest of the company also increases. For example, if each of the merging firms previously had five local operating companies, then each of these holding companies would have been concerned only with the cost of adopting a benchmark practice for its four other operating companies. Following the merger, however, the holding company would have to consider the cost of adopting this benchmark practice for a total of nine other operating companies. Accordingly, as a holding company acquires more operating companies and its service region expands, it has an increased incentive to ensure that all of its operating companies' policies are uniform and consistent with each other and with those of the holding company.

139. Where a merger creates an incumbent LEC of sufficient size to dominate the setting of industry averages and standard practices, which are based on data from operating companies, the merged firm acquires an incentive to impose uniform practices in order to influence or set the *de facto* average benchmark. An incumbent LEC with few operating companies, for example, may allow its local operating companies to set the non-recurring charge (NRC) associated with cutting over a loop, because the data from its operating companies will have negligible impact on the industry average. If, however, as a result of a merger, the holding company controlled a large percentage of the nation's local loops, then it would have a strong incentive to establish a uniform NRC in order to influence the industry average.<sup>331</sup> The result would be a loss of independent sources of observation for regulators and competitors seeking to use comparative practices analyses, rather than intrusive and expensive regulation, to promote competition and rapid deployment of advanced services.

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<sup>331</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14768, para. 120 & n.236.

c. **Effect at Industry Level**

140. A reduction in the number of independently owned major incumbent LECs as a result of a merger increases the likelihood of coordination, either tacit or explicit, among the remaining firms in the industry for the purposes of reducing the effectiveness of comparative practices analyses. As general antitrust principles indicate, collusion is more likely to occur where only a few participants comprise a market and entry is relatively difficult.<sup>332</sup> This is due in part to the fact that, with fewer firms, less potentially divergent interests must be accommodated by the coordinated behavior. On the other hand, with a large number of competitors and low barriers to entry, coordinated behavior is less likely.<sup>333</sup>

141. In the context of comparative practices analysis, we expect that having fewer benchmark firms would result in the remaining firms being better able to coordinate their behavior. In this situation, the coordination of behavior could be designed not to raise price, but, rather, to conceal information concerning operating practices (particularly concerning interconnection), and strategic behavior (particularly dealing with nascent competitors) from regulators, and thereby impede the development of a competitive, less regulatory market. Unlike coordinated pricing activity, where each participant has a unilateral incentive to cheat on the agreement in order to raise its profits, no such incentive to cheat exists with respect to an agreement, tacit or explicit, to behave in a uniform way to conceal market-opening information from a regulator.

142. By reducing the number of benchmark firms, and thereby simplifying coordination of operational and strategic behavior, a merger between major incumbent LECs facilitates the ability of the remaining firms to conceal information to thwart the effectiveness of benchmarking.<sup>334</sup> The remaining firms will find it easier to coordinate the withholding of certain

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<sup>332</sup> See F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* 277-315 (3<sup>rd</sup> Ed., 1990); A. Jacquemin and M. Slade, "Cartels, Collusion, and Horizontal Merger," published in R. Schmalensee and R.D. Willig, *Handbook of Industrial Organization*, Vol. 1 (1989).

<sup>333</sup> Applying these principles, the Commission has recognized that the markets for local exchange and exchange access services, traditional monopolies collectively dominated by major regional holding companies, are conducive to coordinated interaction. See *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20047, para. 122 (concluding "that the risk of coordinated interaction is particularly high in the markets in which Bell Atlantic and NYNEX compete.").

<sup>334</sup> Because each successive reduction in the number of benchmarks will reduce the utility of comparative practices analyses, there will be some point at which further reduction in benchmark firms renders such comparisons ineffective. In the *Horizontal Merger Guidelines*, the Department of Justice and the Federal Trade Commission set a threshold of market concentration according to an 1800 HHI, approximately the equivalent of six equally-sized firms. "Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise." In such a market, a merger that reduces the number of competing firms from six to five is therefore likely to be challenged as raising serious concern regarding unilateral and coordinated effects. A merger that reduces the number of competing firms from five to four raises even greater concerns. Analogously, using a market which consists not of competing firms but of benchmark firms, reducing the number of benchmark firms from five to four, is likely to raise grave concern with respect to coordinated efforts to defeat benchmarking, which are more likely to succeed here than in competitive markets where each firm faces potential gain from unilateral deviation. *Horizontal Merger* (continued....)

types of information and the elimination of divergent operational practices that regulators and competitors could use in comparative practices analyses. For example, tacit coordination among fewer major incumbent LECs may make it easier for the remaining firms to agree not to provide a certain type of interconnection or access arrangement in order to prevent regulators and competitors from concluding that such arrangement is technically and practically feasible because another major incumbent is providing it. In this way, further consolidation among the major incumbent LECs could severely curtail regulators' abilities to constrain any tacit or explicit coordination by these incumbents to impede comparative practices analyses, especially as regulators seek to open the incumbents' markets to competition.

### 3. Adverse Effects of Bell Atlantic/GTE Merger

143. We conclude that the merger of Bell Atlantic and GTE will have an adverse impact on the ability of regulators and competitors to employ comparative practices analyses, which ultimately would force regulators to substitute more intrusive, more costly, and less effective methods of regulation to the detriment of the public interest. We now examine the merger's likely impact upon the diversity of approaches among major incumbent LECs to comply with the Communications Act and adopt market-opening measures (a) at the holding company level, (b) at the local operating company level, and (c) at the industry level.

#### a. Loss of GTE as Independent Holding Company

144. We find that, with only five major incumbent LECs remaining today (the RBOCs and GTE), the elimination of an independent source of observation impairs the ability of regulators and competitors to use comparative practices analyses to facilitate implementation of the Communications Act. Moreover, by reducing the number of major incumbent LECs, the merger makes it less likely that deviations from the average benchmark will be identified confidently as unreasonable and punishable.

145. We reject the Applicants' arguments that GTE's service areas are highly dispersed and largely rural, thus differentiating GTE from Bell Atlantic for benchmarking purposes.<sup>335</sup> As an initial matter, we note that GTE has been selling many of its rural exchanges to other independent local telephone companies.<sup>336</sup> Thus, on a going forward basis, it appears that GTE's service area is becoming increasingly less rural in nature. Similarly, we reject the Applicants'

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\_\_\_\_\_ *Guidelines*, Department of Justice and Federal Trade Commission (1997); *SBC/Ameritech Order*, 14 FCC Rcd at 14769-70, n.240.

<sup>335</sup> Bell Atlantic/GTE Mar. 16, 2000 Joint Reply at 8. *But see* AT&T Mar. 1, 2000 Comments at 12 (refuting Applicants' claim that GTE is not similarly situated with the RBOCs, and that GTE's service area is predominantly rural by stating "[s]uch 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.'").

<sup>336</sup> *See, e.g., Comments Invited on GTE Southwest Incorporated's Application to Discontinue Local Exchange and Exchange Access Service for Certain Exchanges in New Mexico*, Public Notice, NSD File No. W-P-D-457 (rel. Mar. 24, 2000).

contentions that “GTE’s value as a benchmark for RBOCs is limited,”<sup>337</sup> and that the 1996 Act has created a far greater number of benchmarks than the seven RBOCs created by the MFJ.<sup>338</sup> As we stated above and in license transfer proceedings associated with other RBOC mergers, the major incumbent LECs (RBOCs and GTE), because they face similar statutory obligations and market conditions, remain uniquely valuable benchmarks for assessing each other’s performance.<sup>339</sup> Instead, we find that the dispersed nature of GTE’s service area makes it much more valuable as a benchmark, because it operates under a wide range of geographic, regulatory, and economic conditions. Moreover, GTE owns about 11% of customer loops in the United States, far more than any smaller independent LEC or competitive LEC, and comparable to the other major incumbent LECs.<sup>340</sup>

146. We also reject the Applicants’ argument that the merger represents “but a small loss in the effectiveness of one regulatory tool.”<sup>341</sup> This proposed merger cannot be evaluated in a vacuum. Rather, it must be examined in the context of recent developments in the telecommunications marketplace. Specifically, less than a year ago, the Commission concluded that the SBC/Ameritech merger would remove “another independent source of experimentation and diversity,”<sup>342</sup> and that regulators and competitors would lose the problem-solving opportunities that flow from this diversity of approaches.<sup>343</sup> The Bell Atlantic/GTE merger exacerbates this problem by further diminishing our regulatory capabilities.

#### **b. Loss of Independence of Operating Companies**

147. We find that, although the actual number of operating companies may not diminish following the merger of Bell Atlantic and GTE, the combined entity will have greater incentive to unify the practices of these companies, resulting in an overall loss of independence at the operating-company level, and in fewer independent points of observation for regulators and competitors.

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<sup>337</sup> Bell Atlantic/GTE Mar. 16, 2000 Joint Reply at 9; Bell Atlantic/GTE Dec. 23, 1998 Joint Reply at 40. *But see* CoreComm Mar. 1, 2000 Comments at 13 (citing Commission orders stating that the Commission has consistently relied upon GTE in establishing benchmark rates, terms and conditions).

<sup>338</sup> Bell Atlantic/GTE Dec. 23, 1998 Joint Reply at 39. *See also* Bell Atlantic/GTE Arrow Decl. at para. 6 (stating that the 1996 Act and the widespread deployment of facilities and services by competitive LECs, have reduced the importance of the traditional types of benchmarks relied on by the Commission and other regulatory bodies).

<sup>339</sup> *See SBC/Ameritech Order*, 14 FCC Rcd at 14761-62, para. 103; *Bell Atlantic/NYNEX Order* at 19994, para. 16.

<sup>340</sup> *Trends in Telephone Service, March 2000*, Tables 20.2 & 20.3, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission. *See also* Sprint Apr. 12, 1999 *Ex Parte* Letter, Farrell & Mitchell Attachment, Table.

<sup>341</sup> Bell Atlantic/GTE Dec. 23, 1998 Joint Reply at 38.

<sup>342</sup> *SBC/Ameritech Order*, 14 FCC Rcd at 14781, para. 146.

<sup>343</sup> *See also id.* at 14781, para. 147 (stating that “[t]he record from prior RBOC mergers shows that, after both mergers, the acquiring firm quickly eliminated certain policies of the acquired company that were in conflict with those of the acquiring company.”); AT&T Mar. 1, 2000 Comments at 15.

148. The merged firm also will have a greater incentive to coordinate decisions made at the local operating company level in order to affect the outcome of average-practices benchmarking. The merger of Bell Atlantic and GTE would create the largest incumbent LEC controlling more than one-third of access lines nationwide.<sup>344</sup> Because the merged firm would be disproportionately large compared to other incumbent LECs, the aggregate data reported by it will have a direct impact on the industry's average benchmarks. Thus, the merged firm will have both the capability and incentive to skew its decisions in order to affect the average benchmark strategically. Moreover, the merged firm's size could cause it to dominate the standards-setting process and establish *de facto* standards that advantage itself and disadvantage potential competitors or consumers. The proposed merger could thus seriously undermine the value of average-practices benchmarking among incumbent LECs.

**c. Increased Risk of Coordination Among Remaining Major Incumbent LECs**

149. The proposed merger, by reducing to four the number of major incumbent LECs, increases the incentive and ability of the remaining incumbents to coordinate their behavior, either explicitly or implicitly, to impede benchmarking, and to resist market-opening measures.<sup>345</sup> As an initial matter, the merger of Bell Atlantic and GTE reduces by one the number of independent holding companies whose behavior must be coordinated, which simplifies the process of coordination.<sup>346</sup> Coordination requires that the incentives of all parties are aligned, and reducing the number of companies reduces the number of incentives that must be aligned.<sup>347</sup>

150. Reducing the number of firms also increases each firm's incentive to coordinate its behavior to undermine regulatory processes.<sup>348</sup> Specifically, the merged firm will have a greater incentive to enter into tacit agreement with the remaining firms to convey minimal information to regulators and/or competitors and to eliminate outlying policies and practices that could become industry benchmarks.<sup>349</sup> Moreover, the merger will create a demonstrably large incumbent LEC that can act as an industry leader for collusive purposes.<sup>350</sup>

151. As a result of Bell Atlantic's merger with GTE, the other major incumbent LECs

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<sup>344</sup> *Trends in Telephone Service, March 2000*, Tables 20.1, 20.2 & 20.3, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission; Bell Atlantic/GTE May 22, 2000 *Ex Parte* Letter; Bell Atlantic 1999 Annual Report at 6. See also Sprint Apr. 12, 1999 *Ex Parte* Letter, Farrell & Mitchell Attachment – Table 2; BlueStar, et al. Mar. 1, 2000 Comments at 2.

<sup>345</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14785, para. 156.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 14785, para. 157.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

will also have more incentive to cooperate in attempts to impede comparative practices analysis.<sup>351</sup> Cooperative ventures, either explicit or implicit, involve the risk that one or more parties will deviate from the cooperative behavior, thereby spoiling the venture.<sup>352</sup> With the cooperation of fewer firms necessary, the merger reduces the risk that a venture will fail.<sup>353</sup> By reducing the number of major incumbent LEC benchmark firms to four, each firm has more incentive to cooperate and less unilateral incentive to break an implicit or explicit agreement to impede benchmarking.<sup>354</sup> Thus, the proposed merger will facilitate any attempts, especially implicit attempts, to coordinate behavior to conceal forms of competitive deterrence from regulators and competitors.<sup>355</sup> The merger of Bell Atlantic and GTE therefore increases the incentive and abilities of the merged firm and other incumbent LECs to cooperate in becoming less effective benchmarks for regulators and competitors seeking to promote competitive entry and rapid deployment of advanced services.<sup>356</sup>

#### 4. Continued Need for Major Incumbent LEC Benchmarks

152. Benchmarking among the large incumbent LECs will continue to be a crucial market-opening tool as regulators and competitors carry out the objectives of the 1996 Act. We find that the loss of GTE and Bell Atlantic as relevant independent benchmarks, and the creation of a new merged entity, severely curtails the benchmarking ability of regulators and competitors.<sup>357</sup>

153. Comparative practices analyses are most effective when the firms under observation are similarly situated, including the size of the firms relative to the size of the market. With comparable firms – *e.g.*, in their customer base, access to capital, network configuration, and the volume and type of demands from competitors – regulators and competitors can establish more effectively that approaches and rates adopted by one incumbent would be equally feasible for other incumbents. Significant variation between the major incumbent LECs and the other carriers cited by the Applicants preclude the use of the latter categories as alternative benchmarks in evaluating the major incumbent LECs' compliance with their statutory obligations.

154. We agree with the broad principle that the methods of comparison may evolve

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<sup>351</sup> See *id.* at 14785, para. 158.

<sup>352</sup> See *id.*

<sup>353</sup> See *id.*

<sup>354</sup> See *id.*

<sup>355</sup> See *id.* at 14785-86, para. 158.

<sup>356</sup> See *id.* at 14786, para. 158.

<sup>357</sup> We note that in the context of this merger, the new entity may have new practices, policies and behaviors. While these practices, policies, and behaviors evolve, there is a further loss of benchmarking capability.

over the course of the transition to full competition in local markets.<sup>358</sup> Nonetheless, we find an acute present need for benchmarking to, among other tasks, facilitate implementation of the market-opening measures of the 1996 Act and promote the rapid deployment of advanced services.<sup>359</sup> For these types of comparisons, we predict, as we did in the *SBC/Ameritech Order*, that the high percentage of access lines nationwide controlled by the RBOCs and GTE will keep them at the forefront in establishing benchmark rates, terms and conditions for an extended future period.<sup>360</sup>

**a. Inadequacy of Other Firms As Benchmarks Against Major Incumbent LECs**

155. We reject the Applicants' contention that other types of firms serve as adequate benchmarks to the major incumbent LECs.<sup>361</sup> We are not persuaded that the presence of small incumbent LECs and/or competitive LECs eliminate the need for regulators and competitors to make direct comparisons among the RBOCs and GTE. The Applicants' arguments ignore vital differences in the 1996 Act's treatment of large incumbent LECs, the RBOCs in particular, as compared with other incumbents and competitive carriers. Equally important, structural and operational differences between these carriers and the major incumbent LECs also make direct comparisons between them inappropriate.

**(i) Differences in Regulatory Treatment**

156. We conclude that small incumbent LECs and competitive LECs cannot qualify as adequate alternatives to the RBOCs and GTE as benchmarks for implementation of the core market-opening provisions of the 1996 Act. The Applicants fail to explain how smaller incumbent LECs or competitive LECs could substitute for major incumbent LECs in assessing compliance with certain prominent provisions of the 1996 Act. At a minimum, both regulators and competitors have a strong continuing need for separate comparative practices analyses among major incumbent LECs in order to ensure compliance with the 1996 Act.

157. Equally important, we find a pivotal distinction between the section 251 obligations imposed on the major incumbent LECs versus those of competitive LECs. In contrast to the major incumbent LECs that are subject to section 251(c)'s market-opening requirements,<sup>362</sup> many of the competitive carriers cited by the Applicants are not subject to full

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<sup>358</sup> See Bell Atlantic/GTE Arrow Decl. at paras. 6, 10, 14-19.

<sup>359</sup> *SBC/Ameritech Order*, 14 FCC Rcd at 14786, para. 161.

<sup>360</sup> *Id.*

<sup>361</sup> The Applicants repeatedly assert the notion that adequate alternative benchmarks can be found among independent LECs such as Sprint's operating subsidiaries, ALLTEL, Frontier and Cincinnati Bell. Bell Atlantic/GTE Arrow Decl. at para. 20. See also *SBC/Ameritech Order*, 14 FCC Rcd at 14787, para. 162 & n. 313.

<sup>362</sup> See 47 U.S.C. § 251(c) (requiring incumbent LECs to negotiate in good faith and provide, e.g., interconnection, unbundled access to network elements, resale, and collocation).

section 251(c) obligations. First, by definition, competitive LECs do not fall within the 1996 Act's definition of an "incumbent local exchange carrier" for the given service area, nor do such carriers own the operative facilities for which interconnection and access is sought.<sup>363</sup> Instead, competitive LECs are subject to the lesser requirements of section 251(b) that are applicable to all LECs.<sup>364</sup>

158. Second, many of the smaller incumbent LECs fall within section 251(f)'s exemption from certain section 251(c) obligations for rural carriers.<sup>365</sup> In the *SBC/SNET Order*, for instance, we concluded that the proposed merger was not likely to adversely affect the public interest in part, because SBC and SNET were not comparable in size. The Commission noted that "SNET is substantially smaller than the 'first tier' LECs -- the BOCs and GTE -- and has long been subject to different regulatory treatment."<sup>366</sup> Here, both Bell Atlantic and GTE are among the largest incumbent LECs, and thus are subject to the statutory obligations suitable to those entities. We reiterate, therefore, our finding in *SBC/Ameritech* that regulators and competitors are restricted largely to the class of large incumbent LECs, principally the RBOCs and GTE, in making benchmark comparisons under section 251(c).<sup>367</sup>

#### (ii) Differences in Structure and Operation

159. We also find that crucial distinctions in structure and operation undermine the value of using smaller incumbents and competitors as benchmarks for the RBOCs and GTE.

160. *Small Incumbent LECs.* We find that, because their service areas include fewer large metropolitan areas and thus tend to be subject to less competitive entry and less demand for budding advanced services, smaller incumbent LECs are not likely to provide useful benchmarks for measuring the market-opening performance of major incumbent LECs. In contrast to the smaller incumbents, the major incumbents, including GTE, often operate in markets characterized by high population density or a large number of business lines, which generally are more attractive to new entrants. The level of competitive activity in a given area can implicate the network architecture or capability required of certain incumbent facilities such as OSS and physical collocation. A small incumbent facing little demand for interconnection, collocation or

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<sup>363</sup> See 47 U.S.C. § 251(h).

<sup>364</sup> 47 U.S.C. § 251(b) (requiring all LECs to allow resale, number portability, dialing parity, access to rights of way, and reciprocal compensation).

<sup>365</sup> Under section 251(f), a rural incumbent LEC is exempt from the requirements of section 251(c) until (i) it has received a "bona fide request for interconnection, services, or network elements," and (ii) the state commission determines that "such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254" universal service provisions. 47 U.S.C. § 251(f). See *SBC/Ameritech Order*, 14 FCC Rcd at 14788, para. 166 & n. 319.

<sup>366</sup> *SBC/SNET Order*, 13 FCC Rcd at 21302, para. 21 (citing *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20 (1990); 47 U.S.C. § 251(f)(2)).

<sup>367</sup> *SBC/Ameritech Order*, 14 FCC Rcd at 14788, para. 166.

facilities for advanced services is less likely to have traffic levels or performance measurements that would render meaningful comparisons with a large incumbent who must employ more sophisticated management systems to meet greater demand. Moreover, different market structures may result in different network configurations that limit the usefulness of comparisons. For example, the loop costs of an urban/suburban major incumbent LEC, may not be comparable to those of a small rural incumbent LEC with longer average loops or less densely concentrated customers. Finally, in average-practices benchmarking, no small incumbent LEC could provide an adequate counterpoint to the combined entity's control of one-third of the nation's access lines.

161. *Competitive LECs.* We are not persuaded that competitive LECs presently stand as adequate firms with which to compare the market-opening performance of incumbents. The Applicants' suggestion that competitive LECs can be used as suitable benchmarks for the large incumbent LECs,<sup>368</sup> defies the logic, structure, and reality of the 1996 Act.<sup>369</sup> As discussed above, a primary motivation behind benchmarking is to increase the level of information regarding the incumbents' networks for competitors seeking access to those facilities, as well as for regulators. Moreover, competitive LECs are pursuing numerous strategies using a variety of wireline and wireless technologies, and their limited facilities are far from comparable to the millions of local lines controlled by the RBOCs and GTE.

162. Despite arguing that competitive LECs can serve as interconnection benchmarks by providing wholesale service to other competitive LECs,<sup>370</sup> the Applicants provide no evidence demonstrating that competitive LECs actually are serving as wholesale suppliers in such a way as to generate useful comparisons for incumbent performance. Moreover, even if some competitive LECs decide to act as wholesalers, their incentives are likely to differ considerably from those of the incumbents. These new entrants' strategies are directed at expanding their reach and filling their vacant capacity, whereas incumbent LECs are likely to focus first on protecting their customer base from erosion by competitors. Competitive LECs cannot provide useful benchmarking information for the detection of incumbents' subtle forms of resistance to market-opening measures.

163. All of the foregoing factors suggest that comparisons between a major incumbent LEC and a small incumbent or a competitive LEC are less likely to yield the kind of benefits that would flow from comparisons among the RBOCs and GTE. In this regard, we note that the Applicants fail to provide examples where a regulator or competitor has relied on the performance of these claimed benchmark alternatives, as adequate benchmarks against an RBOC or GTE. We therefore reiterate our conclusion that the large incumbent LECs, because they face relatively similar market conditions, remain the principal sources of benchmarks for their own behavior.

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<sup>368</sup> Bell Atlantic/GTE Arrow Decl. at para. 20.

<sup>369</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14789, para. 170.

<sup>370</sup> See Bell Atlantic/GTE Arrow Decl. at paras. 14-19.

**b. Inadequacy of Parity Requirements**

164. We are also not persuaded by the Applicants' argument that maintaining a large number of major incumbent LECs as benchmarks is no longer necessary because, the relevant benchmarks during the transition to competitive local markets are parity comparisons focusing on how an incumbent LEC treats competitive LECs vis-à-vis itself.<sup>371</sup> According to the Applicants, "the key inquiry is not whether the BOC is treating competitors as well as another BOC, but whether the BOC is treating competitors as well as it treats itself."<sup>372</sup>

165. We certainly agree with the notion that an incumbent LEC's treatment of its retail operations or its affiliates as compared with its treatment of competitors can provide useful benchmarks for regulators and competitors. In certain contexts, such as detecting discriminatory behavior in interconnection, provisioning, and maintenance, parity comparisons provide a useful, and minimally intrusive, way to obtain information regarding an incumbent's performance.<sup>373</sup> As Sprint observes, however, implementation of a parity rule itself may require traditional benchmarking between major incumbent LECs<sup>374</sup> -- e.g., in setting mutually acceptable performance standards to determine if an incumbent LEC has complied sufficiently with the parity requirement.

166. While we agree that parity rules are valuable, we nonetheless find that parity considerations cannot substitute for all forms of benchmarking. Parity rules will not serve the public and protect competition if, for example, an incumbent LEC deems it profitable to provide lackluster service or charge excessive rates to both its own retail affiliates and its competitors. For example, without discriminating, the incumbent LEC may profit from imposing high loop charges, or access charges, on both its affiliates and its competitors, because the charges to its affiliates constitute only an internal transfer. While parity requirements attempt to level the playing field, therefore, traditional comparative practices analyses remain necessary to ensure that this level does not sink below an acceptable standard. Moreover, parity rules will not always suffice for innovative entrants. Exclusive reliance on parity rules, for example, could slow the provision of innovative services to the public.

167. For the foregoing reasons, we conclude that parity rules complement, but do not supplant, the use of traditional comparative practices analyses by regulators and competitors.

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<sup>371</sup> *Id.* at paras. 7-8.

<sup>372</sup> *Id.* at para. 8.

<sup>373</sup> See, e.g., *SBC/Ameritech Order*, 14 FCC Rcd at 14791, para. 175; *Local Competition Order*, 11 FCC Rcd at 15614, para. 224 (Section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself or any other party). See *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, 13 FCC Rcd 12817 (1998), at para. 14.

<sup>374</sup> .Apr. 12, 1999 *Ex Parte* Letter, Farrell and Mitchell Attachment, *Response to Some Criticisms of Benchmarking Analysis*, at 2-4.

Indeed, if parity alone mattered, as the Applicants' analysis suggests, then all the remaining major incumbent LECs would be permitted to merge into one entity, leaving regulators and competitors unable to compare distinct practices of several independently-owned firms.

### c. Sufficiency of Remaining Benchmarks

168. We find that the merger would result in dangerously few major incumbent LEC benchmarks. As BlueStar, DSLNET, KMC and MGC note in their joint comments, after this merger, "there will be three giant carriers controlling 90% or more of the nation's access lines."<sup>375</sup>

169. With technical feasibility concerns, in particular, the loss of one source of observation could in fact eliminate the single observation that would have proven a particular arrangement feasible.<sup>376</sup> This is especially true in making assessments regarding advanced services, where the major incumbent LEC benchmark firms have taken different strategies or are in different stages in terms of their own deployment or cooperation with others. Thus, reducing the number of potential benchmark firms increases the chance that regulators and competitors will lose the ability to observe the decisive benchmark.

170. Although we do not view the instant merger's reduction of the number of major incumbent LECs (the RBOCs and GTE) from five to four to be a presumptive trigger of benchmarking harms, we cautioned in the *SBC/Ameritech and Bell Atlantic/NYNEX Orders*, that these harms increase disproportionately with each additional decline in the number of major incumbent LECs.<sup>377</sup> As explained above, along with further restricting diversity, each successive reduction in benchmark firms exponentially increases the risk that the remaining firms could successfully coordinate behavior, implicitly or explicitly, to reduce the effectiveness of comparative practices analyses.<sup>378</sup> As the number of benchmarks decrease, the greater the likelihood the Commission must use increasingly intrusive and burdensome regulation to oversee the transition to competitive local markets. As such, each successive pair of major incumbent LEC applicants have a greater burden than the previous incumbent LEC applicants to demonstrate their merger serves the public interest. For example, a merger that reduced the number of major incumbent LECs from four to three would so severely diminish the Commission's ability to benchmark that it is difficult to imagine that any potential public interest benefit could outweigh such a harm.

## 5. Conclusion

171. We conclude that, by further reducing the number of separately-owned large incumbent LECs, the proposed merger of Bell Atlantic and GTE would significantly harm the ability of regulators and competitors to rely on comparative practices analyses to carry out their

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<sup>375</sup> BlueStar, et al. Mar. 1, 2000 Comments at 2.

<sup>376</sup> See *SBC/Ameritech Order*, 14 FCC Rcd at 14793, para. 181.

<sup>377</sup> *Id.* at 14794, para. 183; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20062-63, para. 156.

<sup>378</sup> See *CompTel Mar. 1, 2000 Comments* at 7.

obligations under the Communications Act. The Commission warned in the *Bell Atlantic/NYNEX Order*, and reiterated in the *SBC/Ameritech Order* that “future applicants bear an additional burden in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity.”<sup>379</sup> Bell Atlantic and GTE have not overcome that burden.<sup>380</sup>

172. In particular, the proposed merger of Bell Atlantic and GTE poses a significant potential harm to the public interest by: (1) removing a source of potential diversity from independent major incumbent LECs during the transition to competition; (2) creating an incentive for the combined firm to coordinate behavior at the operating company level, thereby reducing other potential sources of innovation; and (3) increasing the incentive and opportunity for collusion and concealment of information among the few remaining major incumbent LECs.

#### D. Increased Discrimination

##### 1. Overview

173. In the preceding section, we explained why this merger would seriously weaken oversight of the Applicants’ behavior toward competitors, thus frustrating the Commission’s ability to achieve two of the key public interest goals of the Telecommunications Act: increased competition and reduced regulation. In this section, we conclude that incumbent LECs, such as Bell Atlantic and GTE, have the incentive and ability to discriminate against competitors in the provision of advanced services,<sup>381</sup> interexchange services, and circuit-switched local exchange services,<sup>382</sup> and that such incentive and ability will increase as a result of the merger. This increased incentive and ability to discriminate potentially creates a public interest harm because it may adversely affect national competitors’ provision of services, and may force consumers to pay more for retail services, with reduced quality and choice.

174. We believe the merger may have particularly harmful, discriminatory effects on

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<sup>379</sup> *SBC/Ameritech Order*, 14 FCC Rcd at 14761, para. 102; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, 20061, paras. 16, 153.

<sup>380</sup> See also *SBC/Ameritech Order*, 14 FCC Rcd at 14761, para. 102.

<sup>381</sup> For purposes of this Order, we define the term “advanced services” as we did in the *Advanced Services Further Notice*, to mean “high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics or video telecommunications using any technology.” *Advanced Services Further Notice*, 14 FCC Rcd at 4762, n.2. The Commission there stated: “[t]he term ‘broadband’ is generally used to convey sufficient capacity -- or ‘bandwidth’ -- to transport large amounts of information. As technology evolves, the concept of ‘broadband’ will evolve with it: we may consider today’s ‘broadband’ services to be ‘narrowband’ services when tomorrow’s technologies appear.” *Id.* For a further description of xDSL technology, see *id.* at paras. 9-12.

<sup>382</sup> Throughout this section, “local exchange service,” refers to circuit-switched local exchange service, otherwise known as Plain Old Telephone Service (POTS), rather than services, such as advanced services, based on digital subscriber line technology or packet-switched technology that may have a local component.