

by a business customer, and as the Commission has recognized, there is ample competition.<sup>295</sup>

B. Because the Business Market Includes Highly Sophisticated Customers, Bidding, and Customized Proposals, the Proposed Transaction Is Unlikely To Increase the Risk of Unilateral Anticompetitive Effects or Collusion.

Even for the subset of business customers where AT&T and SBC compete head-to-head, the proposed merger will not result in higher prices or lower quality for those customers.

As detailed above, simpler business telecommunications needs can be met with one of the numerous commoditized options available from numerous competitors in several categories. Indeed, the vibrant wholesale fiber market has enabled numerous carriers to meet and commoditize simpler business telecommunications needs. For those business needs that are more advanced and particularized, a variety of factors – all in addition to the abundance of competitors on every permutation of business customer demand – confirm that the proposed transaction will result in neither anticompetitive unilateral conduct nor coordinated interaction:

- Large business customers with particularized needs are generally sophisticated and employ rigorous competitive bidding processes to drive down prices and ensure high-quality service. Customers are unafraid to structure procurements to maximize competition, whether by seeking bundles of differentiated services and applications, dividing requirements by service or geography, or other means of ensuring competition from one bid to the next. Many customers employ knowledgeable and experienced consultants to assist them in obtaining the best possible terms for their telecommunications needs. As Professor Carlton and Dr. Sider explain, because competition for business telecommunications services is often carried out through bidding, historical

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<sup>294</sup> See *id.* ¶¶ 93-95, 107.

<sup>295</sup> See *id.* ¶¶ 96-106.

and current market share data is of limited utility in determining the relative strengths of bid market participants.<sup>296</sup>

- Large business customers have a “high demand for a variety of sophisticated telecommunications services,”<sup>297</sup> and enterprise contracts involve complex, heterogeneous services and requirements. Heterogeneity of demand both makes coordination among bidders difficult and suggests that any two particular suppliers are not likely to consistently be the two low-cost or preferred competitors.<sup>298</sup>
- Business customers large enough to have unique needs tend to make purchasing decisions based on intangible and shifting criteria such as network robustness, application integration, network reliability, customer service, and reputation, as well as price. The variability of selection criteria makes coordination difficult and results in competitors having varying strength from bid to bid.<sup>299</sup>
- Many large business customers frequently use large value, complex term contracts, which make each opportunity extremely valuable to competing bidders. As one leading antitrust commentator notes, with large intervals between bids market shares become meaningless: “the firm that won the one contract awarded in a particular year has 100 percent of that year’s sales – a mostly meaningless number when other firms bid and win in other years.”<sup>300</sup>

1. The Business Market Includes Sophisticated Customers with Bargaining Power.

It is well established that the sophistication of customers is likely to ensure competition even in highly concentrated markets.<sup>301</sup> Many business telecommunications customers (and particularly large businesses) are sophisticated and employ rigorous bidding processes to choose from the many market participants to find the competitor best able to supply their specific needs. The number of competitors, as discussed above,

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<sup>296</sup> *Id.* ¶ 94.

<sup>297</sup> *Triennial Review Order*, 18 FCC Rcd. at 17012 ¶ 197 n.624.

<sup>298</sup> Carlton & Sider Decl. ¶¶ 90-95.

<sup>299</sup> *Id.* ¶ 96-106.

<sup>300</sup> Areeda & Hovenkamp, *ANTITRUST LAW* ¶ 535 (2d ed. 2002).

<sup>301</sup> *United States v. Baker Hughes Inc.*, 908 F.2d 981, 986 (D.C. Cir. 1990).

enhances business customers' bargaining power, putting them in a position to drive prices down while demanding services and particularized bid specifications.<sup>302</sup> Medium-sized businesses vary in their sophistication and approach but, particularly for those with the greatest need for more advanced services, can take advantage of the same dynamics to ensure efficient delivery of services.<sup>303</sup>

For customized, non-commoditized (and even often for commodity) services, larger business customers typically issue requests for proposals ("RFPs") designed to limit the bidding firms to those able to supply the desired specifications.<sup>304</sup> Others employ more advanced systems, including online bidding systems.<sup>305</sup> However, the efficiency of this practice is not limited to the largest companies; smaller companies may not issue formal RFPs, but they conduct informal competitions, asking various service providers to submit customized proposals. Indeed, in 2004, SBC's department that provides customer pricing for businesses handled about 30,000 separate requests.<sup>306</sup> Thus, several bidders are considered for each contract and are on roughly equal footing.<sup>307</sup> Some buyers use consultants to assist in their evaluation of which bidders to invite to participate, as well as their analysis of bids submitted.<sup>308</sup> As Professor Carlton

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<sup>302</sup> Kahan Decl. ¶ 22; Carlton & Sider Decl. ¶¶ 90-95.

<sup>303</sup> Carlton & Sider Decl. ¶¶ 103-106.

<sup>304</sup> *See id.* ¶¶ 90-93.

<sup>305</sup> Enterprise customers such as Dell and PeopleSoft have employed this bidding strategy, designed to encourage competitors both to undercut each other's prices and to out-deal each other by offering more advanced bid responses. Kahan Decl. ¶ 22.

<sup>306</sup> Kahan Decl. ¶ 22.

<sup>307</sup> *See* Section IX.B *supra*.

<sup>308</sup> Kahan Decl. ¶ 22.

and Dr. Sider note, both practices indicate the highly competitive nature of the business telecommunications marketplace and reduce the likelihood of anticompetitive effects.<sup>309</sup>

Moreover, recent information indicates that enterprise customers are becoming increasingly more likely to change service providers as contracts come up for renegotiation. The Yankee Group reported in January 2005 that “[i]n 2003, only 38% of [enterprise] respondents indicated that they changed service providers while in 2004 that number increased to 47%.”<sup>310</sup>

2. Services Provided to Many Customers Are Both Heterogeneous and Provided Through Complex, Valuable Contracts.

For most businesses, particularly medium-sized businesses, the array of commoditized voice, data, and converged services available from a plethora of competitive providers will present options satisfying all their needs. Some businesses, however, especially among the largest businesses, also seek unique or customized services. Such services by definition are not “one size fits all”; nearly every bid is different.<sup>311</sup> As the Commission has previously recognized, “[l]arge enterprises demand extensive, sophisticated packages of services.”<sup>312</sup> Because the services requested by such business customers are heterogeneous, collusion would be extremely difficult to maintain.<sup>313</sup> As the Department of Justice has recognized:

[R]eaching terms of coordination may be limited or impeded by product heterogeneity or by firms having substantially incomplete

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<sup>309</sup> Carlton & Sider Decl. ¶¶ 90-95.

<sup>310</sup> Yankee Group, “Network Service Providers Alter Their Business Models to Capture a Greater Share of Increasing Enterprise Budgets,” at 7 (Jan. 2005).

<sup>311</sup> Kahan Decl. ¶ 22.

<sup>312</sup> *Triennial Review Order*, 18 FCC Rcd. at 17063 ¶ 129.

<sup>313</sup> See Carlton & Sider Decl. ¶¶ 90-95.

information about the conditions and prospects of their rivals' businesses, perhaps because of important differences among their current business operations. In addition, reaching terms of coordination may be limited or impeded by firm heterogeneity – for example, differences in vertical integration or the production of another product that tends to be used together with the relevant product.<sup>314</sup>

For those customers requiring customized telecommunications services, *all* these characteristics are present. As discussed above, the firms providing these services are themselves heterogeneous, approaching customers from vastly different positions of strength. For example, systems integrators emphasize their experience in applications and complex systems, and persuade customers that the underlying transport of data is a mere commodity; carriers may emphasize preexisting relationships, reputation, and their control of their own networks and ability to offer end-to-end service and monitoring. The heterogeneity of firms makes both coordination and the possibility of two bidders recurrently being the two top choices highly unlikely.<sup>315</sup>

Moreover, medium-sized and large business customers often base their purchasing decisions on an array of tangible and intangible factors going well beyond price. Larger business customers are particularly willing to “pay a premium” for “reliability, availability, and experience.”<sup>316</sup> The Commission has previously discussed at some length the complexity of enterprise customers' desired services, and their willingness to pay higher prices to receive these services:

*128. Small and medium enterprises are willing to pay higher prices for telecommunications services than the mass market. ... Because their*

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<sup>314</sup> Merger Guidelines, Section 2.11.

<sup>315</sup> See Carlton & Sider Decl. ¶¶ 90-95.

<sup>316</sup> Frost & Sullivan, “U.S. Communication Services Market Overview and Future Outlook,” at 70, 85 (2004).

ability to do business may depend on their telecommunications networks, they are typically very sensitive to reliability and quality of service issues. These customers buy larger packages of services than do mass market customers, and are willing to sign term contracts. These packages may include POTS, data, call routing, and customized billing, among other services.

129. *Large enterprises demand extensive, sophisticated packages of services. Reliability of service is essential to these customers, and they often expect guarantees of service quality.* The services they might purchase include an internal voice and data network, local, long distance, and international POTS service to one or multiple locations, provisioning and maintenance of a data network such as ATM, frame relay or X.25, and customized billing. The large revenues these customers generate, and their need for reliable service and specialized equipment to serve them, provide a large incentive to suppliers to build their own facilities where possible, and carry these customers' traffic over their own networks.<sup>317</sup>

The varying emphasis placed by enterprise customers on intangible criteria such as network reliability, robustness and service<sup>318</sup> means that there is an ever-shifting permutation of strongest bidders for these business accounts. As Professor Carlton and Dr. Sider explain,<sup>319</sup> “the importance of non-price elements of competition further reduces the likelihood that firms can exercise market power either unilaterally or through coordinated effects.”<sup>320</sup>

In addition, the largest business customers are often willing to enter into long-term, high-value contracts, making each opportunity extremely valuable to the bidding

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<sup>317</sup> *Triennial Review Order*, 18 FCC Rcd. at 17063 ¶¶ 128-29 (emphasis added).

<sup>318</sup> For example, many enterprises are placing increasing value on service level agreements (“SLAs”) and have become “increasingly willing to partner with hardware providers, software providers, integrators or VARs.” Yankee Group, “Network Service Providers Alter Their Business Models to Capture a Greater Share of Increasing Enterprise Budgets,” at 10 (Jan. 2005). Others place more value in the trust and perceived reliability of the telecommunications carriers with which they have long term business relationships. *Id.* at 9. Still others focus on, for example, “stringent design and operational standards with higher capacity and more reliability,” such as that provided by ATM/frame relay. *Triennial Report Order*, 18 FCC Rcd. at 17013 ¶ 46.

<sup>319</sup> Kahan Decl. ¶¶ 20, 24; *see* Carlton & Sider Decl. ¶¶ 6, 31.

parties and further decreasing the likelihood of collusion.<sup>321</sup> Large business contracts often generate enormous revenues, which give suppliers substantial incentive to win each contract, and create enormous lost opportunity costs when contracts are lost. Where “large buyers engage in long term contracting, so that the sales covered by such contracts can be large relative to the total output of a firm in the market, firms may have the incentive to deviate,” especially where “the duration, volume and profitability of the business covered by such contracts are sufficiently large as to make deviation more profitable in the long term than honoring the terms of coordination, and buyers likely would switch suppliers.”<sup>322</sup> Thus, for those businesses with needs beyond commodity voice, data, and converged services, marketplace conditions insure that the benefits of competition still flow to the customer.

C. AT&T and SBC Focus on Different Customer and Service Segments.

Although their businesses overlap in the provision of services to some business customers, SBC’s and AT&T’s strengths are far more complementary than competitive. Whereas AT&T’s focus is increasingly on the largest enterprise customers with the most complex needs, SBC does not serve the needs of truly nationwide and international customers and instead focuses on customers with a predominance of locations within the

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<sup>320</sup> Carlton & Sider Decl. ¶ 95.

<sup>321</sup> See, e.g., *Triennial Review Order*, 18 FCC Rcd. at 17063 ¶¶ 128-29 (Enterprise customers “are willing to sign term contracts” for their large packages of services.).

<sup>322</sup> Merger Guidelines, Section 2.12; see also Areeda & Hovenkamp, *ANTITRUST LAW* ¶ 404c4 (2d ed. 2002) (stating that where “sales opportunities are rare, . . . each [participant] has a powerful incentive to prevail at each opportunity”).

SBC 13-state region plus the 30 out-of-region markets and who generally require less complex voice and data solutions.<sup>323</sup>

SBC's and AT&T's internal categorizations of business opportunities demonstrate their fundamentally different roles in the business marketplace. For SBC, any company with more than \$48,000 per year in business is considered an "Enterprise" customer.<sup>324</sup> For AT&T, the "Enterprise" label applies to customers expected to spend \$1 million per year or more. Moreover, whereas AT&T separately categorizes companies expected to spend tens of millions of dollars or more annually as "Signature" customers, SBC has no such high-end segmentation.<sup>325</sup> As is suggested by this categorization, AT&T is focused on customers with the most geographically dispersed, complicated needs, whereas SBC is focused on (1) customers with more basic telecommunications requirements, and (2) customers with locations predominantly in its region and a limited number of out-of-region MSAs. The distance between the areas of competitive focus for the two companies would be unlikely to narrow in the foreseeable future even if the companies did not merge.<sup>326</sup>

AT&T has historically been a leading provider of a broad range of "primary" services and solutions for the largest (Fortune 1000) businesses. In particular, AT&T possesses two important assets that SBC could not economically create on a national or international basis in the near term: reputation and experience as a leading provider of complex voice and data services to the world's largest businesses, and an advanced

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<sup>323</sup> Kahan Decl. ¶¶ 20, 24; *see* Carlton & Sider ¶¶ 6, 31.

<sup>324</sup> Kahan Decl. ¶ 22.

<sup>325</sup> *See* Carlton & Sider Decl. ¶ 105.

<sup>326</sup> Kahan Decl. ¶¶ 17-19.



network with both national and international scope. As Forrester Research recently summarized:

AT&T's great strength lies in assets that SBC lacks; its enterprise business customer base and the national and global network that supports their requirements. To retain its status as enterprises' primary voice and data provider, AT&T offers multiple VPN and VoIP services and has modernized its network infrastructure and network management systems to state-of-the-art status.<sup>327</sup>

As described above, given competitive market conditions, AT&T has recently undertaken to make best use of its resources by focusing on the most complex needs of the largest enterprise customers, with a concomitant shift of focus away from attracting customers in the mass market and smallest business segments.<sup>328</sup>

AT&T's focus on larger businesses and managed services forms a natural complement to SBC. SBC does not have a nationwide or global network or a track record of providing, or the expertise necessary to provide, the complex managed networks and services demanded by many customers, who already enjoy an intensely competitive marketplace populated by many established domestic and international network owners and systems integrators. As a result, although it operates a business called "Global and Enterprise Markets," SBC in fact focuses its competitive efforts on a limited subset of businesses centered in SBC's region.<sup>329</sup>

Most enterprise customers have needs outside of SBC's region and outside of SBC's 30 targeted MSAs, and these customers are particularly demanding of the most feature-rich, cost-effective, flexible, reliable and secure communications services

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<sup>327</sup> Forrester Research, "SBC-AT&T Merger Makes Sense: Complementary Assets And Customer Bases Make A Logical Combination," at 2 (Feb. 4, 2005).

<sup>328</sup> Polumbo Decl. ¶¶ 2, 9; Horton Decl. ¶¶ 2,7.

available.<sup>330</sup> As indicated in connection with the 1999 SBC/Ameritech merger, SBC had aspired to become a more robust national player for the complex needs of these customers. Because SBC does not own its own dense national long-haul network, SBC attempted to serve those needs through an arrangement with WilTel, using WilTel's network. SBC found, however, that its particular arrangement with WilTel did not give it enough end-to-end network management control and flexibility to meet these customers' demanding requirements for system integration and accountability, performance and provisioning and trouble-shooting speed and flexibility.<sup>331</sup> The capability seamlessly to integrate highly competitive international services and network capabilities has also become increasingly important, and SBC's arrangements with Infonet and other global providers likewise provided insufficient integration and network management control.<sup>332</sup>

Moreover, just as SBC was completing the Ameritech transaction and implementing its national/local strategy, the telecom sector suffered a major slowdown, retarding customer expenditures and heightening competition among the many established national and global suppliers that have spent years and decades cultivating reputations in this space, significantly limiting opportunities for growth. And SBC's initial investments in voice-centric out-of-region capabilities have been made less useful by the emerging emphasis on unified data networks.

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<sup>329</sup> Kahan Decl. ¶ 22.

<sup>330</sup> *Id.* ¶¶ 24, 26.

<sup>331</sup> *Id.* ¶ 25.

<sup>332</sup> *Id.* ¶ 26.

At the same time, AT&T and the many other national network providers and system integrators have continued to enhance and improve their abilities to provide the differentiating managed and system integration capabilities and sophisticated network applications, such as call routing and service management tools that SBC has no track record in providing.<sup>333</sup> Although SBC has made substantial efforts to close the gap, those efforts have not created an effective competitor for large business customers with out-of-region national or international needs.<sup>334</sup> As one new AT&T customer has explained:

“Many of our offices have different providers of telecommunications,” said John Kozero, a Fireman’s Fund spokesman. “There’s no coherent connections. I can’t send a voice mail to any other office on my own.” Not only that, he said, but “if there’s a problem, we have to run down a couple of dozen service providers” to find out who needs to fix what. “With a single provider, you have one throat to choke,” he said. With AT&T’s network, Kozero said, about 4,400 employees and 3,600 independent agents will be connected with fiber optics that will boost quality and speed of voice and information transmission. “We traded a couple of dozen vendors for one coherent provider that maintained the whole network,” he said of AT&T. “That’s their business.”<sup>335</sup>

For all of these reasons, SBC focuses on customers with a predominant in-region presence. SBC’s “Global and Enterprise Markets” sales, while marginally growing, remain predominantly focused on local services and equipment sales, and are a small

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<sup>333</sup> *Id.* ¶ 26; Almar Latour, *For SBC, Fading AT&T Offers A Rich Prize: Business Customers*, WALL ST. J., Jan. 28, 2005 at A1 (“But AT&T would fill a big gap in SBC’s portfolio, SBC has trouble being taken seriously by the phone industry’s most lucrative customers: big corporations who spend millions of dollars on phone and data services.”).

<sup>334</sup> Kahan Decl. ¶ 27.

<sup>335</sup> Bobby White and Jim Fuquay, *SBC Bid for AT&T Could Mark End of Era*, FORT WORTH STAR-TELEGRAM, Jan. 28, 2005, available at <http://www.rednova.com/news/display/?id=122886>.

fraction of AT&T's and other significant national competitors' sales. As AT&T's CEO has noted:

[T]he RBOCs are going to be most competitive in their regional footprint for companies that fit nicely in that. It's not to say they don't compete out of region, but the more they get away from their in region footprint, obviously, their cost structures change and they also have a deficit not only in facilities but actual service and support. And that's where, from both national and global type enterprises, we remain with a pretty clear differentiation.<sup>336</sup>

Whatever ability SBC might have in the future to compete for national customers, it plainly would have no unique advantages in that regard.<sup>337</sup> SBC has no greater ability to construct a national network, or provide national services over the facilities of other carriers, than many other providers seeking to become significant national and global players.<sup>338</sup> Accordingly, the proposed transaction should not raise concerns about a loss of potential SBC competition in the national and international enterprise marketplace. Indeed, as discussed above, the complementarity of SBC's and AT&T's strengths will uniquely offer business customers of all sizes numerous benefits that neither company is likely to achieve on its own.<sup>339</sup>

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<sup>336</sup> AT&T Corp., Q4 Earnings Call (Jan. 20, 2005).

<sup>337</sup> *Accord, MCI/WorldCom*, 13 FCC Rcd. at 18098-99 ¶¶ 128-29 (Where one of the merging parties is "not a significant competitor" in the market or do "not possess any special retail assets or capabilities that would make it more likely than other carriers to become a major participant in the mass market," the merger "is not likely to affect adversely competition.").

<sup>338</sup> *See* Kahan Decl. ¶¶ 23-24.

<sup>339</sup> *See* Carlton & Sider Decl. ¶¶ 35-37.

D. SBC's Position as a Provider of Special Access in Its ILEC Territory Raises No Merger-Specific Issues, and Any Concerns About Special Access Should Be Addressed in Ongoing Industry-Wide Proceedings and Not Here.

There is no basis for concern that this merger will harm either the market for special access services or the customers of those services. Competition in special access services has existed since long before the 1996 Act. During the past twenty years, competitive providers have been building out their fiber networks, prompting the Commission to recognize not only that “competing carriers have deployed significant amounts of fiber transport facilities to serve local markets,” but that they also have “built fiber loops to buildings that carry a significant portion of the competitive traffic in certain MSAs.”<sup>340</sup>

The Commission has responded to growing competition in special access by beginning to deregulate partially some of the incumbent LECs' special access services. For example, in 1992, it permitted ILECs that had established collocation arrangements to offer volume and term discounts and deaveraged rates.<sup>341</sup> Four years later, it eliminated certain price floors that had constrained LECs' ability to lower prices in response to competition.<sup>342</sup> In 1999, the Commission found, in light of marketplace

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<sup>340</sup> *Triennial Review Order*, 18 FCC Rcd. at 17155, 17211 ¶¶ 298, 378.

<sup>341</sup> *In re Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd. 7369, 7451 ¶ 172 (1992) (“Excessive constraints on LEC pricing and rate structure flexibility will deprive customers of the benefits of competition and give new entrants false economic signals”), *vacated in part and remanded*, *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

<sup>342</sup> *In re Access Charge Reform*, Third Report and Order, 11 FCC Rcd. 21354, 21484-88 ¶¶ 300-04 (1996).

developments, that these deregulatory measures had not gone far enough.<sup>343</sup>

Accordingly, it established a pricing flexibility framework that further deregulated incumbent LEC special access services in areas where competitors had made irreversible investments in facilities. The Commission found that the deregulatory measures it was taking in such areas would be unlikely to result in exclusionary behavior because “when competitors have made irreversible investments in facilities within a given MSA . . . efforts to exclude competitors are unlikely to succeed.”<sup>344</sup> Today, most of SBC’s special access revenues are derived from areas in which competitors have made the requisite “irreversible investment in facilities” to permit pricing flexibility.

ILECs, IXCs, CLECs and others have disagreed as to whether the deregulatory measures in the *Pricing Flexibility Order* went too far or not far enough. However, that disagreement is irrelevant to this merger proceeding. The regulation of ILEC provision of special access services is an industry-wide issue, and the Commission has consistently held that industry-wide issues are not within the scope of merger proceedings.<sup>345</sup>

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<sup>343</sup> *In re Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd. 14221, 14232-33 ¶ 19 (1999) (“*Pricing Flexibility Order*”), *aff’d WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

<sup>344</sup> *Id.* at 14262 ¶ 77.

<sup>345</sup> “The Commission has regularly declined to consider in merger proceedings matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability.” *In re Applications of Southern New England Telecommunications Corporation and SBC Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21292, 21306 ¶ 29 (1998) (“*SBC/SNET*”); *see also AT&T/TCI*, 14 FCC Rcd. at 3183 ¶ 43 (“Accordingly, this is like other cases where the Commission has declined to consider, in merger proceedings, matters that are the subject of rulemaking proceedings before the Commission because the public interest would be better served by addressing the matter in a broader proceeding of general applicability.”); *Cingular/AWS*, 19 FCC Rcd. at 21592 ¶ 183 (holding that the concern that the merged entity could “discriminate against competitors, whether such carriers are wireless or wireline, in the provisioning of special access services, . . . is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing. By

Instead, they should be reserved for rulemakings of general applicability. The Commission has initiated just such rulemakings on both special access pricing and performance measures.<sup>346</sup> Thus, with all the various arguments of the parties before it, the Commission on January 31, 2005, commenced a comprehensive re-examination of its regulatory regime for price cap LEC special access services. If, after developing a complete record there, the Commission finds in that proceeding that its existing regulatory regime does not adequately address ILEC provision of special access services, it will presumably modify its regulations as necessary and appropriate. Those regulations, of course, will apply to the special access offerings of the combined

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addressing these issues in the context of a rulemaking, we will be able to develop a comprehensive approach based on a full record that applies to all incumbent LECs so that the Commission treats similarly-situated incumbent LECs in the same manner.”) (footnote omitted); *In re Applications of Comcast Corporation, AT&T Corp., and AT&T Comcast Corporation*, Memorandum Opinion and Order, 17 FCC Rcd. 23246, 23257 ¶ 31 (2002) (noting that not the license transfer proceeding, but rather “[t]he Commission’s pending rulemaking on cable horizontal ownership is the more appropriate forum for consideration of the potential effects of industry-wide clustering on the distribution of programming by MVPDs to consumers.”); *In re Application of EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, Hearing Designation Order, 17 FCC Rcd. 20559, 20583 ¶ 48 (2002) (noting that the Commission “disagree[d] with Consumers Union’s recommendation that this license transfer proceeding is the appropriate vehicle to restructure the public interest set-aside obligations for the proposed New EchoStar. . . . [because t]he conditions requested by Consumers Union raise issues that have application on an industry-wide basis. Accordingly, we find that the specific recommendations made by Consumers Union with respect to public interest set-aside issues are properly addressed in the rulemaking setting rather than a subset thereof in the context of a merger application.”) (footnote omitted); *In re Applications of OTI Corporation, MCI Communications Corporation, and MCI/OTI Corporation*, Order, 6 FCC Rcd. 1611, 1613 ¶ 18 (1991) (“With regard to USTA’s comments, the Bureau views the possible shortage of CIC codes as a separate industry-wide issue which is not related to the pending merger.”).

<sup>346</sup> See *supra* n.316; see also *In re Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Dkt No. 05-25, 2005 WL 235782 (Jan. 31, 2005); *In re Performance Measurements and Standards for Interstate Special Access Services*, Notice of Proposed Rule Making, 16 FCC Rcd. 20896 (2001).

company. It is in that context, therefore, not this merger proceeding, that debates over the competitiveness and the proper regulation of special access services should be conducted.<sup>347</sup>

Moreover, specific special access regulatory issues aside, SBC must provide unbundled access to DS1 and DS3 loop and transport facilities to the extent that the Commission has found that competitors are impaired without such access. In its February 4, 2005 *TR Remand Order*, the Commission required such unbundling in the overwhelming majority of SBC's wire centers.<sup>348</sup>

X. THE MERGER WILL NOT HARM COMPETITION IN THE PROVISION OF INTERNET SERVICES

The merger will not harm competition for Internet backbone services or broadband and narrowband Internet access services.

A. There Is No Issue Regarding Reduced Competition in the Backbone Sector.

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The Commission, in prior actions, has identified "Internet Backbone Providers" ("IBPs") as occupying a distinct space, separate from end users and Internet Service

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<sup>347</sup> Nor are any significant competitive issues raised by AT&T's limited ownership of local facilities in SBC's territories that AT&T uses primarily in connection with its own provision of retail business services. AT&T's local network facilities have very limited coverage, and there are numerous other competitive carriers that have deployed local network facilities comparable to those owned by AT&T. Indeed, there are more than twenty five competitive carriers in SBC's service areas that are on AT&T's approved list for special access purchases. *See, e.g., MCI/WorldCom*, 13 FCC Rcd. at 18098-99 ¶¶ 128-29 (where one of the merging parties is "not a significant competitor" in the market and does "not possess any special retail assets or capabilities that would make it more likely than other carriers to become a major participant in the mass market," the merger "is not likely to affect adversely competition").

<sup>348</sup> *Triennial Review Remand Order* ¶ 65 ("the availability of UNEs is itself a check on special access pricing").



Providers (“ISPs”). End users send and receive information; ISPs provide those end users with access to the Internet backbone networks; and the major IBPs route traffic between those ISPs and smaller IBPs, thereby facilitating their interconnection. The Commission has therefore determined that Internet backbone services, defined as the transporting and routing of packets between and among ISPs and regional backbone networks, constitutes a separate relevant product market.<sup>349</sup>

In the prior actions involving WorldCom,<sup>350</sup> the Commission addressed the combination of two Internet backbone service providers by assessing the impact such a combination would have on the degree of concentration in that market.<sup>351</sup> The primary concern articulated by the Commission and the Department of Justice was that an increase in concentration could have a detrimental effect on existing peering relationships. Specifically, if one IBP became so much larger than all the others, it would have the ability, and the incentive, to “de-peer” with other IBPs, thereby forcing them to pay for services now available at no charge.<sup>352</sup> Alternatively, it could degrade the quality of the interconnection, to the detriment of the smaller competitors.<sup>353</sup>

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<sup>349</sup> Schwartz Decl. ¶ 5 (citing *MCI/Worldcom*, 13 FCC Rcd. at 18106-07 ¶ 148).

<sup>350</sup> These include the WorldCom-MCI merger in 1998, the WorldCom-Sprint Merger in 2000, and the WorldCom-Intermedia merger, also in 2000. *See In re Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 18025 (1998); *In re Intermedia Communications, Inc., Transferor, and WorldCom, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses*, Memorandum Opinion and Order, 16 FCC Rcd 1017 (2001); *Commission Seeks Comment on Joint Applications for Consent to Transfer Control Filed by MCI Worldcom, Inc. and Sprint Corporation*, Public Notice, CC Dkt No. 99-333, DA 00-104 (Jan. 19, 2000).

<sup>351</sup> *See, e.g., MCI/Worldcom*, 13 FCC Rcd. at 18106-07 ¶¶ 150, 155; *In re Worldcom/Intermedia*, 16 FCC Rcd. 1021-22 ¶ 10.

<sup>352</sup> *See DOJ WorldCom-Sprint Complaint* ¶¶ 40-44; *DOJ WorldCom-Intermedia Complaint* ¶¶ 34-38. Interconnection is achieved through one of two ways. In a non-

These concerns, it should be noted, arose in evaluating mergers involving the largest, and at that time, the nearly dominant, IBP; further, in WorldCom-MCI and in WorldCom-Sprint, the merger involved the proposed combination of the number one and number two backbones.<sup>354</sup> Even without the dramatic changes that have occurred since 2000, which are discussed in more detail below, this transaction between AT&T and SBC, if presented to the Commission in 2000, would not have raised any competitive concerns.

In any event, the structure of the Internet backbone business has changed drastically since the last time the Commission addressed it. First, since 2000, the sector has become much less concentrated and much more competitive. In prior transactions, the leading provider had over one-third of the traffic, and in two of the cases reviewed the combined entity's share would have exceeded 50% of total Internet traffic.<sup>355</sup> Today, the

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compensatory peering arrangement, the parties exchange traffic that originates from an end user on one network and terminates with an end user connected to the other network without charge. In a transit arrangement, one IBP pays the other IBP to carry its traffic, with the amount charged for this service dependant upon the capacity of the connection. While transit arrangements allow the IBP buying the transit service to reach all customers reachable by the selling IBP (as opposed to those customers that are on the selling IBP's direct network), it does increase the costs of providing IBP services. *See* DOJ WorldCom-Sprint Complaint, ¶¶ 23, 24; DOJ WorldCom-Intermedia Complaint, ¶¶ 18, 19.

<sup>353</sup> Schwartz Decl. ¶¶ 10-11; *MCI/WorldCom*, 13 FCC Rcd. at 18108-09 ¶ 150; *United States v. WorldCom, Inc. and Sprint Corporation*, Compl. ¶ 150 (filed D.D.C., June 26, 2000) ("DOJ WorldCom-Sprint Complaint"), available at <http://www.usdoj.gov/atr/cases/f5000/5051.pdf>; *United States v. Worldcom, Inc. and Interedia Communications, Inc.*, Compl., ¶¶ 33-34 (Nov. 17, 2000) ("DOJ WorldCom-Intermedia Complaint"), available at <http://www.usdoj.gov/atr/cases/f7000/7043.pdf>.

<sup>354</sup> Schwartz Decl. ¶¶ 15-16.

<sup>355</sup> *See* Schwartz Decl. ¶ 18 & Table 1; *see also* DOJ WorldCom-Sprint Complaint, ¶ 32; Address by Constance K. Robinson, Director of Operations and Merger Enforcement, Antitrust Division, U.S. Dep't of Justice, "Network Effects in Telecommunications Mergers: MCI WorldCom Merger: Protecting the Future of the Internet," at 10-11 (Aug. 23, 1999), available at <http://www.usdoj.gov/atr/public/speeches/3889.pdf>.

shares of the top providers are less than half as large (in the range of 15% or so), and the top 5-7 providers are roughly comparable. There are myriad smaller providers as well.<sup>356</sup> Moreover, the combined company would not have shares even exceeding 20%, let alone the over 50% shares presented by the WorldCom-Sprint merger.<sup>357</sup> This is not surprising, since while AT&T is fully peered (that is, it pays no other IBP for transit), SBC is not.<sup>358</sup> Indeed, SBC is one of the many smaller new entrants into this business, and does not control a significant share of traffic or revenue.<sup>359</sup>

The deconcentration of the Internet backbone sector is consistent with the technological and other developments in the past four years that have both created huge new demand for Internet backbone services, and reduced the cost of Internet backbone equipment, thereby lowering entry barriers.

Thus, the level of concentration is much lower today, the increase in concentration that would result from this transaction would not be material, and the combined company cannot credibly be portrayed as even approaching the range of dominance that was the source of the Commission's concerns in prior transactions.<sup>360</sup>

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<sup>356</sup> Schwartz Decl. ¶ 22 & Table 2.

<sup>357</sup> *Id.* ¶ 31 and Tables 2 & 3. As to public peering points, AT&T neither owns nor controls any. SBC owns two, only one of which is operational. *Id.* ¶ 13 & n.6.

<sup>358</sup> *Id.* ¶¶ 20, 30.

<sup>359</sup> *Id.* ¶ 31.

<sup>360</sup> *Id.* ¶ 38.

B. The Merger Will Not Lessen Competition in the Provision of Internet Access Services.

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Similarly, the merger will not lessen competition in the provision of Internet access services. The Commission has previously treated broadband access and narrowband access as separate markets.<sup>361</sup> AT&T has a minimal presence in these markets and is no longer actively competing for such customers and therefore eliminating AT&T as an independent competitor will not harm competition.

1. Broadband Internet Access.

The Commission concluded in its most recent report on broadband deployment that there has been a “proliferation of new advanced telecommunications networks.”<sup>362</sup> The number of residential and small business high-speed broadband lines more than tripled from 7.8 million in mid-2001 to 26.0 million in December 2003, and that was expected to have increased to 33.5 million by the end of 2004.<sup>363</sup> These lines are offered by multiple, facilities-based competitors that will be unaffected by the merger. Cable companies provide more than half of all broadband access lines. In addition, “Wi-Fi joins an increasingly lengthy list of other wired and wireless methods of accessing the Internet, . . . [including] WiMax, personal area networks, satellite technologies, fiber-to-the-home, and broadband over power lines, in addition to the more familiar cable modem and [DSL] services.”<sup>364</sup> The Commission concluded that “the competitive nature of the

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<sup>361</sup> See *Time Warner/AOL*, 16 FCC Rcd. at 6574 ¶ 69.

<sup>362</sup> FCC, *Availability of Advanced Telecommunications Capability in the United States*, FCC 04-208, GN Dkt No. 04-54, Fourth Report to Congress, at 8 (Sept. 9, 2004).

<sup>363</sup> *Id.* at 30.

<sup>364</sup> *Id.* at 8.

broadband market, including new entrants using new technologies, is driving broadband providers to offer increasingly faster service at the same or even lower retail prices.”<sup>365</sup>

The merger will not reduce this competition in any measurable way.<sup>366</sup> AT&T provides broadband Internet access solely through facilities secured through its purchases of UNE-P. AT&T has a commercial arrangement with Covad, in which AT&T pairs its local services with Covad’s DSL services through a line splitting or line sharing arrangement. As explained above, however, AT&T has ceased actively competing for mass market customers, and is not attempting to win new DSL customers.<sup>367</sup> Indeed, AT&T has only a limited number of DSL customers; by contrast, Comcast has almost 7 million broadband subscribers (and added 1.4 million in 2004 alone), and SBC has 5.1 million DSL customers in its region (and added 425,000 in the fourth quarter of 2004). AT&T is simply not a significant competitor in the broadband market, and provides no price-constraining competition to SBC or other broadband providers.

## 2. Narrowband Internet Access.

Removing AT&T from the narrowband Internet access market will likewise have no adverse effect on competition. The Commission has consistently found that “there are a large number of firms providing Internet access services . . . and these markets are quite competitive today.”<sup>368</sup> Indeed, the Commission has found that the “preconditions for

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<sup>365</sup> *Id.* at 13.

<sup>366</sup> *See* Schwartz Decl. ¶¶ 33-34.

<sup>367</sup> Polumbo Decl. ¶ 12.

<sup>368</sup> *AT&T/TCI*, 14 FCC Rcd. at 3206 ¶ 93.

monopoly appear absent.”<sup>369</sup> Moreover, the narrowband ISP market is dominated by AOL, which has more than 22.7 million customers. The remainder of the market is fragmented among dozens of providers. SBC offers narrowband ISP services in its region in partnership with Yahoo; AT&T offers ISP services nationwide through its AT&T WorldNet offer. None of these other providers (including SBC or AT&T) has a large market presence, and many are larger than AT&T. More importantly, however, as with mass market services generally, AT&T is not pursuing new ISP customers: AT&T has stopped actively marketing its AT&T WorldNet services and has selectively raised retail rates. Thus, AT&T is not actively competing for narrowband ISP services, and removing AT&T as an independent competitor could not harm competition.

XI. THE MERGER WILL NOT ADVERSELY AFFECT COMPETITION IN THE PROVISION OF WIRELESS SERVICES.

The Commission has repeatedly recognized that there is vigorous competition in the provision of wireless communications services, with numerous providers, low barriers to switching, aggressive introduction of new services and features, tremendous growth in penetration and usage, and continually falling prices.<sup>370</sup> This strong competition will be unaffected by the merger.

SBC participates in the wireless industry through its Cingular Wireless joint venture with BellSouth Corporation. AT&T has no present or planned facilities-based

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<sup>369</sup> *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd. 2398, 2323 ¶ 48 (1999).

<sup>370</sup> *See, e.g., Ninth CMRS Report*, 19 FCC Rcd. at 20600 ¶ 2.

mobile wireless service operations and resells wireless services to only several thousand residential consumers under a legacy arrangement with AT&T Wireless that was terminated last year.<sup>371</sup> In the spring of 2004, AT&T announced a plan to market wireless services under resale or mobile virtual network operator (“MVNO”) arrangements. Following its decision to cease actively competing for mass market customers, AT&T significantly scaled back its MVNO plan and repositioned it as an offering primarily aimed at enterprise customers. The scope and scale of AT&T’s current plans – which pre-date consideration of a merger with SBC – are quite limited and would not materially increase competition. This is especially true with respect to sophisticated large business customers that are able to negotiate directly with facilities-based wireless carriers or to purchase wireless services or service bundles from numerous other MVNOs or resellers. Thus, no detailed analysis is required to conclude that the proposed transaction cannot adversely affect competition in any wireless service market.<sup>372</sup>

The combination of SBC, a majority owner of Cingular Wireless, and AT&T, which is not a facilities-based provider of mobile wireless services, cannot significantly increase concentration in the combined market for wireless services.<sup>373</sup> Indeed, because

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<sup>371</sup> Polumbo Decl. ¶ 12.

<sup>372</sup> See *Cingular/AWS*, 19 FCC Rcd. at 21556 ¶ 69 (“Transactions that do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis”); see also Carlton & Sider Decl. ¶ 40.

<sup>373</sup> In *Cingular/AWS*, the Commission determined that “there are separate markets for interconnected mobile voice and mobile data services and also for residential and enterprise services.” 19 FCC Rcd. at ¶ 74. The Commission recognized, however, that since “most mobile data services are currently sold as add-ons to mobile voice services rather than as separate data only service offerings,” *id.* ¶ 75, there is generally no need separately to analyze voice and data. *Id.* ¶ 76 (“by employing an analysis that does not distinguish mobile data subscribers from mobile voice subscribers, we are unlikely to overlook adverse competitive effects in the mobile data market using this approach”). Likewise, because “enterprise customers tend to be high-volume users of mobile voice

AT&T provides mobile wireless services today only as a reseller,<sup>374</sup> there will be *no* increase in concentration under the framework for concentration analysis that the Commission has applied in prior proceedings.<sup>375</sup> But, even if the loss of AT&T as an actual resale competitor could have theoretical relevance, it plainly has no practical significance because, as noted, AT&T serves only a few thousand of the more than 160 million<sup>376</sup> subscribers to wireless services. Moreover, in the wake of AT&T's decision to cease actively competing for mass market customers and the termination of its legacy arrangement with AT&T Wireless, AT&T no longer markets these wireless services.<sup>377</sup>

Nor can AT&T be considered a significant, much less a unique, potential competitor. Following its decision last year to cease actively competing for mass market customers, AT&T cancelled plans announced earlier in the year to sell AT&T-branded wireless service to its mass market customers pursuant to an arrangement with Sprint.<sup>378</sup>

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services, competition among carriers to attract and retain enterprise customers is likely to be relatively intense," an analysis "based on combined mobile telephony services is unlikely to understate potential competitive harm to the market for enterprise services." *Id.* ¶ 79. Accordingly, the Commission concluded in that proceeding – and should conclude here – that there is no need "to distinguish mobile data subscribers from mobile voice services, or enterprise subscribers from residential subscribers." *Id.* ¶ 74. Rather, the Commission can instead "analyze all of them under the combined market for mobile telephony services." *Id.* ¶ 74.

<sup>374</sup> Polumbo Decl. ¶ 12.

<sup>375</sup> *See Cingular/AWS*, 19 FCC Rcd. at 21563 ¶ 92 ("Generally, we limit our analysis to only facilities-based carriers, either nationwide or regional, for example excluding mobile virtual network operators ('MVNOs') and resellers from consideration when computing initial concentration measures.").

<sup>376</sup> *Ninth CMRS Report*, 19 FCC Rcd. at 20601 ¶ 5 ("In the 12 months ending December 2003, the United States mobile telephony sector increased subscribership from 141.8 million to 160.6 million").

<sup>377</sup> Polumbo Decl. ¶ 12.

<sup>378</sup> *Id.*; see Press Release, AT&T, AT&T To Offer Wireless Services To Consumers And Businesses Nationwide Through Agreement With Sprint (May 18, 2004), *available at* <http://www.att.com/news/2004/05/18-13067>.



And although AT&T continues to consider offering mobile wireless services to its enterprise customers through a resale or MVNO arrangement, there are many other actual and potential facilities-based and non-facilities-based providers of these services. As the Commission has recognized, because “enterprise customers tend to be high-volume users of mobile voice services, competition among carriers to attract and retain enterprise customers” is “intense.”<sup>379</sup> Post-merger, no less than pre-merger, competitive market outcomes are assured by the ability of these sophisticated enterprise customers to negotiate directly with any of the facilities-based providers of mobile wireless services or with wireline enterprise service providers or others who have equal ability to provide these services – either separately or as part of service bundles – pursuant to resale or MVNO arrangements. Thus, as Professor Carlton and Dr. Sider conclude, the loss of “a narrowly focused entrant reseller would not be expected to adversely affect competition.”<sup>380</sup>

## XII. THE MERGER WILL NOT ADVERSELY AFFECT COMPETITION IN THE PROVISION OF INTERNATIONAL SERVICES

The proposed transaction will have no measurable impact on competition in the provision of international services. The Applicants have certified in their applications<sup>381</sup>

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<sup>379</sup> *Cingular/AWS*, 19 FCC Rcd at 21560 ¶ 79.

<sup>380</sup> Carlton & Sider Decl. ¶ 57.

<sup>381</sup> As detailed in the international 214 and submarine cable licenses, AT&T is presently affiliated with non-dominant carriers in a number of countries, all of which, with the exception of the Russian Federation (Russia), are in countries that are members of the World Trade Organization (“WTO”). As the Commission has pointed out, if a U.S.-based carrier’s non-dominant “foreign carrier affiliates operate or will operate in WTO member countries, [the U.S.-based carrier] is entitled to a presumption that its foreign carrier affiliations do not raise competition concerns.” *See, e.g., In re Qwest Communications Int’l Inc. and U.S. West Inc.*, Memorandum Opinion and Order, 15 FCC