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

In the Matter of	)	
	)	
SBC Communications Inc. and AT&T Corp.	)	WC Docket No. 05-65
Applications for Approval of Transfer of Control	)	

COMMENTS OF GLOBAL CROSSING NORTH AMERICA, INC.

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SUMMARY

The proposed merger of SBC Communications, Inc. and AT&T Corp. (together, the "Applicants") will cause substantial competitive harm to the telecommunications marketplace unless the Commission conditions its approval of the merger on appropriate safeguards. The fatal flaw in the Applicants' premise is that the proposed transaction poses no competitive concerns because it combines "complementary" companies. One of the main purposes of the AT&T Divestiture was to separate out the vertical lines of business, the combination of which enabled AT&T to exercise its market power. Contrary to the Applicants' claims, recent market developments exacerbate, rather than alleviate, the potentially anti-competitive effects of the proposed merger. Today, the proposed recombination of AT&T with SBC not only would have vertical market effects, but horizontal as well, because SBC and AT&T now enjoy the regulatory authority to enter market sectors closed to them by Divestiture, and indeed already compete with each other in many of these markets.

The proposed merger raises substantial competition issues in the special access services market. Special access itself is a distinct product market and the Commission must analyze the competitive effects of the merger on that market. Those effects are decidedly anti-competitive. In many geographic markets, AT&T is the *only* alternative provider of special access services in SBC's region; in others, it is one of very few. By increasing SBC's current market power, the proposed merger will increase SBC's ability to impose and to sustain supra-competitive prices to the detriment of all special access services customers. Moreover, through SBC's horizontal and vertical integration of AT&T's services, the combined entity will significantly increase its presence in the enterprise network services market. Therefore, the proposed merger also will have significant anti-competitive consequences in that retail end-user market, where special access services are an essential input.

The merged company's market power in the pricing and provision of special access services so fundamentally changes the competitive landscape that the Commission cannot properly determine whether the proposed transaction serves the public interest unless it fully addresses special access services pricing and provisioning in the context of *this* proceeding, rather than deferring the issues to a separate rulemaking. Indeed, no post-merger rulemaking proceeding would be able to restore competition for special access services once it is eliminated by the proposed merger.

The proposed transaction also will have anti-competitive effects in the switched access services market, and could have a particularly severe impact on voice over Internet protocol ("VOIP") services. In other proceedings, competitors have produced evidence that SBC has used its control of essential facilities to discriminate against providers of VOIP services. The proposed merger of SBC and AT&T, a major competitor in the enterprise VOIP market, will increase the Applicants' incentive and ability to discriminate in the provision of switched access services to competitive providers. The Commission therefore should clarify in this proceeding the form of access to which VOIP providers are entitled, and the type of intercarrier compensation arrangement that will govern such access, and impose conditions on the proposed merger designed to ensure that the Applicants do not discriminate against competing providers of VOIP services.

The anti-competitive effects described above are all the more problematic in light of SBC's historical efforts to frustrate competition. Like the pre-Divestiture AT&T, the recombined SBC and AT&T will utilize the political, legal, and regulatory process to thwart the competitive threats they face in the marketplace. Indeed, one of the strategic benefits to SBC of the proposed recombination is the elimination by SBC of its most vocal political and regulatory opponent. It is important, therefore, that the Commission consider in this proceeding alternative dispute resolution processes because the proposed merger will diminish the diversity of voices in the telecommunications public policy arena and dramatically widen the resource gap between SBC and its competitors.

As the Commission is well aware, inter-carrier disputes are plentiful. Unfortunately, the Commission's existing tools for addressing them are cumbersome, time consuming and expensive. The ability of competitors to obtain equitable relief in a timely and efficient manner is in serious jeopardy, especially in light of the speed with which the telecommunications market is changing. The Commission should reinvigorate and modify its existing "accelerated docket" process and utilize it as a "baseball-style" arbitration panel. Under baseball-style arbitration, the two opposing parties are required to put forth their "best and final" offer and one is selected as the remedy for both parties. This process is quick and efficient and forces opposing parties to narrow their differences before reaching the arbitration stage.

For all of these reasons, the Commission must not approve the merger unless it imposes adequate conditions to guard against abuse of market power by the merged company. The precise form of these conditions should be developed and appropriately tailored as more information becomes available in this proceeding.

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Global Crossing North America, Inc., on behalf of its U.S. operating subsidiaries (collectively, "Global Crossing"), submits its initial Comments in the above-captioned proceeding. SBC Communications, Inc. and AT&T Corp. (together, the "Applicants") have utterly failed to show that approval of the proposed transaction would serve the public interest. To the contrary, the proposed recombination of AT&T with SBC would reverse nearly three decades of pro-competitive U.S. telecommunications policy codified in the Telecommunications Act of 1996 and raise substantial competitive issues, particularly in the access market. For the reasons set forth below, the proposed merger is anti-competitive. Therefore, the Communications Act of 1934, as amended (the "Communications Act") precludes the Commission from approving the proposed merger unless the Commission imposes meaningful conditions to mitigate the proposed merger's clear anti-competitive effects.

Global Crossing has a strong interest in this proceeding because it relies heavily on SBC and AT&T's "last mile" access facilities to reach end-user customers. Global Crossing provides telecommunications solutions over the world's first integrated global Internet Protocol- ("IP-") based network to business customers. Its core network connects more than 300 cities in 30 countries worldwide, and delivers services to more than 500 major cities, 50 countries and 6 continents around the globe. Global Crossing offers a full range of managed data and voice products to enterprise customers, governments, system integrators, carriers and ISPs. The company purchases over $100 million of special access services annually from SBC alone, representing more than a quarter of its total annual spending on all special access services nationwide. Because the proposed merger will substantially increase the Applicants' market power in the access services market, the transaction could cause significant competitive harm to companies, such as Global Crossing, as well as their end-user customers.

Unfortunately, the Applicants have not supplied sufficient data to enable the Commission or commenting parties to evaluate fully the competitive risks of the proposed merger, as the Commission's April 18, 2005 issuance of the 12-page, single-spaced Initial Information and Document Request to the Applicants amply reflects. Moreover, the Applicants' deadline for responding to the Commission's information requests is not until May 9, 2005, only one day prior to the deadline for submitting Reply Comments in this proceeding. Because the Applicants' responses will provide invaluable information regarding, among other issues, the product and geographic markets relevant to the analysis of the proposed merger, as well as issues relating to market concentration, the Commission should provide for comments on the Applicants' responses. Otherwise, the Commission risks making its decision on a less than complete record, which would clearly disserve the public interest.

I. THE PROPOSED MERGER WOULD EVISCERATE DECADES OF UNITED STATES TELECOMMUNICATIONS POLICY

The Commission should scrutinize the Applicants' proposal carefully, because it essentially seeks to reconstruct the pre-Divestiture AT&T in SBC's region, raising many of the historical concerns regarding the Bell System's discriminatory treatment of its competitors. As a statement of the Judiciary Committee of the U.S. House of Representatives explains, SBC's proposed acquisition of AT&T and Verizon's (or Qwest's) proposed acquisition of MCI "ha[ve] created what some have perceived to be a telecom oligopoly comprised of a diminishing number of Baby Bells that increasingly resemble the Ma Bell monopoly from which they were created."[1] In the *Application Narrative*, SBC and AT&T repeatedly tout the complementary aspects of SBC and AT&T's businesses and the efficiencies that would purportedly flow from the transaction.[2] For nearly three decades, however, the courts and then Congress, through the 1996 Act, consistently have guarded against the ability of any single telecommunications company to amass such excessive control over the telecommunications network, and thereby stifle competition. In this proceeding, the Applicants are asking the Commission to reverse this policy.

The last time AT&T wielded such market power, it entered into a consent decree that required it to divest its local exchange carrier assets. In its antitrust suit against AT&T, the United States introduced evidence showing that AT&T had actively suppressed competition by, among other things: (1) stifling long distance services competition by preventing interconnection of private microwave systems to the public switched network; (2) preventing competitors' gradual entry into the market by permitting interconnection to its network only in specific circumstances; (3) refusing interconnection for foreign exchange carriers until ordered to do so by the Commission; (4) pricing access to local distribution facilities in a blatantly anti-

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[1] *House Judiciary Leaders Raise Concerns Over Telecom Mergers*, Communications Daily, Apr. 21, 2005.

[2] *See generally* SBC Communications Inc. and AT&T Corp., Description of the Transaction, Public Interest Showing and Related Demonstrations, WCB Docket No. 05-65, at 6-39 (filed Feb. 21, 2005) ("*Application Narrative*").

competitive manner; and (5) conducting interconnection negotiations with competitors in bad faith.[3]

To remedy this anti-competitive behavior, AT&T was not separated along horizontal lines that would compete in the same market. Rather, the result was the elimination of the *vertical integration* that allowed AT&T to use its monopoly power in certain markets to withhold access to certain facilities essential to competition in other markets; that is, the court restricted the provision of local services to the Bell Operating Companies ("BOCs") and long distance services to AT&T. These retail lines of business continue to be SBC's and AT&T's respective strengths; for over 20 years AT&T and the "Baby Bells" have provided primarily "complementary," not competing, services.[4] It is critical for the Commission to evaluate the extent to which recombining these networks – which the Applicants promote in this proceeding as a "benefit" of the proposed merger[5] – may in fact generate some of the very same anti-competitive issues that the United States attempted to resolve in its antitrust case against AT&T. The Commission has recognized in its review of a previous transaction involving a BOC that allowing a substantial increase in market power "would be fundamentally inconsistent with the primary policy goal of the 1996 Act – the development of competition in, and the deregulation

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3 *United States v. AT&T*, 524 F. Supp. 1336, 1354-1356 (D.D.C. 1981).

4 One key exception, as explained below, is in the access market, where SBC and AT&T are competitors.

5 *See Application Narrative* at 39-43.

of, telecommunications markets."[6] As one congressman aptly noted, "[t]he competitive landscape envisioned by the Act has not been realized, and is receding."[7]

The *Application Narrative*, however, argues that the "dramatic changes" brought on by the 1996 Act necessitate the proposed merger.[8] Among these changes are increased competition in certain markets, but also a dramatic relaxation of competitive safeguards devised to keep the pre-Divestiture AT&T in check. The fact that the telecommunications market is constantly evolving does not permit the Commission to re-write the policies set forth in the 1996 Act. While Congress intended that SBC could grow its own in-region long distance business once it satisfied the competitive requirements set forth in Sections 271 and 272 of the 1996 Act, Congress never contemplated the re-combination of SBC and AT&T.[9] It is one thing to allow SBC to enter the long distance market, starting from zero market presence, pursuant to Sections 271 and 272 of the Act, but it is quite another to allow SBC to recombine its network with AT&T's. Without the proposed merger, it would take SBC considerable time to build a robust national network of the scale and scope of AT&T's.[10]

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6 *Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, 12 FCC Rcd 19985, at ¶ 145 (1997) ("*Bell Atlantic-NYNEX*").

7 *House Judiciary Leaders Raise Concerns Over Telecom Mergers*, Communications Daily, Apr. 21, 2005 (quoting Representative Chris Cannon).

8 *Application Narrative* at 1.

9 The position of policy-makers at the time the 1996 Act was passed is exemplified by former Commission Chairman Reed Hundt, who, in 1997, labeled any merger between AT&T and a BOC to be "unthinkable." *Thinking About Why Some Communications Mergers are Unthinkable,* Chairman Reed E. Hunt, before the Brookings Institute, Washington, DC (June 19, 1997).

10 Ivan Seidenberg, Chief Executive Officer of Verizon, recently provided interesting insight that also appears applicable to SBC. Specifically, with regard to Verizon's ability to build a national Internet network and organically grow its government and corporate contracts business compared to simply buying MCI, Mr. Seidenberg stated, "It would take us longer to

Wholly apart from the anti-competitive implications of the vertical re-integration of AT&T and the former Ameritech, Pacific Bell, and Southwestern Bell, changes to the telecommunications market since the AT&T Divestiture have created horizontal issues that did not previously exist. For example, SBC only recently received all of the necessary regulatory approvals pursuant to Section 271 of the 1996 Act to provide long distance services throughout its region. In addition, the Commission's approval of the recombination of SBC and AT&T would preclude competition between these entities and, therefore, would have significant anti-competitive horizontal effects in at least two distinct product markets: (1) the market for special access services (essentially, an input market); and (2) the market for enterprise network services (a downstream market that relies upon special access services as an essential input).[11]

The Communications Act demands that the Commission not approve the proposed merger unless the Applicants demonstrate that the grant would serve the public interest. The proposed transaction raises significant competitive issues, however, and the Commission should not approve the transaction without imposing the necessary conditions to safeguard against the potential anti-competitive effects of the transaction.

II. THE PROPOSED MERGER WOULD HARM COMPETITION IN THE SPECIAL ACCESS SERVICES MARKET

Special access services are critical to the competitiveness of U.S. telecommunications markets because they provide the "last mile" connection to a customer's premises and are an essential input to all providers of telecommunications services to business

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build ourselves." Todd Wallick, *Verizon CEO sounds off on Wi-Fi, customer gripes; Seidenberg also explains phone company's reasons for wanting to buy MCI*, SAN FRANCISCO EXAMINER, at C-1, Apr. 16, 2005.

11 Statement of Joseph Farrell (attached as Exhibit A) at ¶ 40 ("*Farrell Statement*").

customers.[12] Yet, the Applicants fail to engage in any economic analysis of the product and geographic markets relevant to special access services, and they provide scant analysis of the market power of SBC and AT&T in the special access services market or the effects of the proposed merger on that market or any downstream markets.[13] Instead of providing evidence that the proposed merger would serve the public interest, the Applicants rely on prior, general Commission findings regarding competition in the special access services market which AT&T publicly has called into question[14] and which, in large part, are contradicted by the Commission's own determination that competitors generally are impaired without unbundled access to DS1 loops.[15] As described in the attached Declaration of Joseph Farrell, the Commission's former Chief Economist, the potential anti-competitive effects of the merger on the special access services market are significant.[16] While no Commission-enforced remedy can completely mitigate the proposed merger's diminution of market-based safeguards, it is imperative that the Commission place conditions on the merged company to ensure that the combined company will

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12 "Special access services do not use local switches; instead they employ dedicated facilities that run directly between the end user and the IXC's point of presence (POP) or between two discrete user locations." *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, 20 FCC Rcd 1994, at ¶ 7 (2005) ("*Special Access NPRM*").

13 *Application Narrative* at 103.

14 *Special Access NPRM* at ¶¶ 19-21 (recounting AT&T's petition requesting that the Commission more stringently regulate special access services, because the BOCs are charging "special access rates . . . at supracompetitive levels that are unjust and unreasonable in violation of Section 201 of the Communications Act").

15 *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, 2005 FCC LEXIS 912, at ¶ 178-81 (Mar. 14, 2005) ("*Remand Order*").

16 *See Farrell Statement* at ¶ 46 (finding that the proposed merger poses serious vertical and horizontal competition issues).

not engage in discriminatory practices in the provision of special access services or otherwise exercise pricing power in the special access services market.

Using the analysis contained in the Department of Justice's Merger Guidelines and Commission precedent,[17] the following sections: (1) define the special access services product market and geographic markets; (2) describe the current state of competition in the special access services market and the respective roles of SBC and AT&T in that market; and (3) discuss how, if the Commission approves the merger without conditions, the combined company would have the ability and incentive to use its market power in the provision of special access services to harm competition throughout SBC's region.

A. A Rigorous Analysis of the Special Access Services Market Shows That the Proposed Merger Will Enhance SBC's Market Power

1. Special Access Services Constitute Their Own Product Market

The Commission consistently has reviewed the access services market as its own product market,[18] and most recently recognized the "increased importance of special access

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[17] *See generally*, Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Issued Apr. 2, 1992, Revised April 8, 1997; *see Applications of Ameritech Corp. and SBC Communications For Consent to Transfer Control Corporations Holding Commission and Lines Pursuant to Sections and 310(d) of the Communications and Parts 5, 22, 24, 25, 63, 90, of the Commission's Rules*, 14 FCC Rcd 14712, at ¶ 67 (1999) ("*Ameritech-SBC*"); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc*., 13 FCC Rcd 18025, at ¶ 16 (1998); *Bell Atlantic-NYNEX* at ¶ 37.

[18] *See Special Access NPRM* at ¶ 3; *Performance Measurements and Standards for Interstate Special Access Services; Petition of U S West, Inc. For a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision of Federally Tariffed Interstate Services; Petition of Association for Local Telecommunications Services for Declaratory Ruling; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; 2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements; AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services,* 16 FCC Rcd 20896 (2001); *Local Exchange Carriers' Rates, Terms and*

services relative to other access services."[19] In prior merger proceedings, the Commission has addressed special access services as a discrete product market in determining whether approval of the proposed transactions would serve the public interest,[20] and has found it necessary to impose conditions to guard against the potential abuse of market power for special access services.[21]

Access to unbundled network elements ("UNEs") is not part of the same product market as special access services. Contrary to the Applicants' contention,[22] the requirement to provide unbundled access to DS1 and DS3 loop and transport facilities does not serve as a viable alternative to special access services for most carriers. Commission rules require such unbundling only to facilitate the provision of local services. As the Commission explained in its recent *Remand Order*, "the majority of special access arrangements are used to provide service in the mobile wireless and long distance markets . . . [the Commission has] foreclosed [unbundled network element ("UNE")] access for the exclusive provision of mobile wireless and long distance services."[23] Global Crossing is among a group of carriers that provides predominantly services that are ineligible for UNE access, and thus it derives little or no benefit

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Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, 12 FCC Rcd 18730 (1997).

19 *Special Access NPRM* at ¶ 3.

20 *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations; Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation For Consent to Assignment and Long-Term De Facto Lease of Licenses; Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses*, 19 FCC Rcd 21522, ¶ 183 (2004).

21 *See, e.g., Ameritech-SBC* at ¶ 404 (requiring merging entities to "file reports showing the service quality provided to interexchange carriers, which will include data regarding . . . special access services").

22 *Application Narrative* at 105.

23 *Remand Order* at ¶ 64.

from UNE arrangements. Because the majority of carriers cannot avail themselves of regulated UNE rates, their end-user customers also do not benefit from any cost savings that regulated access to DS1 or DS3 might otherwise provide.

Aside from the unavailability of UNEs, SBC and AT&T imply that the abundance of collocation in the SBC region somehow translates into a competitive force in the special access services market.[24] But this suggestion ignores the fact that SBC exercises considerable pricing power because even collocators are dependent on SBC for two of three rate elements which comprise special access services. Special access services are comprised of three basic rate elements – two channel terminations representing the end points of the special access circuit and the mileage component representing the transport between the two endpoints. Collocators self-provision one channel termination, but rely on SBC for the other channel termination and the mileage component. Under the Commission's pricing flexibility rules, SBC has wide latitude in pricing these elements. Therefore, collocators can only truly compete for one-third of the rate elements that make up a special access service. SBC's control of the other two-thirds greatly diminishes any marketplace benefit potentially derived from this limited competition.

2. The Commission Should Analyze the Special Access Services Market on Both a Route-Specific and a Region-Wide Basis

The Commission should define the geographic market for special access services in two ways: (1) on a route-specific basis (building-by-building); and (2) on a region-wide basis.[25] The more granular geographic market analysis will show that a special access customer has very few competitive choices to reach most business customer end-users, and that there will

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24 *Application Narrative* at 102.

25 *Farrell Statement* at ¶¶ 3, 19. As Professor Farrell explains, "These are not alternative means of analysis. . . . an analysis that uses geographic market definition must consider both of these definitions or risk overlooking important effects." *Id.* ¶ 20.

be even fewer choices if the proposed merger is approved. The region-wide analysis will prove SBC's unmatched ability to reach the majority of end-users region-wide, and expose its practice of requiring special access customers, such as Global Crossing, to enter into high, region-wide volume commitments to obtain discounted rates. These volume commitments constrain the ability of special access customers to utilize the services of lower cost providers of special access services. Under either analysis, SBC wields considerable market power that will be exacerbated if the Commission approves the proposed merger.

A route-specific geographic market analysis demonstrates the limited level of competition to serve particular end-user customers. As Professor Farrell explains in his Statement, customers of special access services "try[] to serve particular [end-user] customers in particular locations."[26] Commission precedent demonstrates that this type of analysis is typically required to determine the competitive effects of a proposed merger.[27] Specifically, where a

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[26] *Id.* ¶ 10.

[27] *See, e.g.*, *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, ¶ 411 (2000) (analyzing "whether it is necessary to impose [the Commission's] international dominant carrier safeguards on the merged entity's international carrier subsidiaries in their provision of service on these [specific] affiliated routes"); *see also Remand Order* at ¶ 79 ("we measure impairment with regard to dedicated transport on a route-by-route basis"); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 17 FCC Rcd 16978, at ¶ 376 (2003) ("Where the record indicates impairment and that only with more granular evidence could a finding of non-impairment be made, we establish triggers to identify non-impairment based on route-specific evidence"); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756, at ¶ 80 (1997) ("Our decision here to examine aggregate data that encompasses all international point-to-point markets does not modify our existing route-by-route approach to consider whether U.S. carriers affiliated with a foreign carrier should be regulated as dominant in the provision of

building is served by multiple special access services providers, there is no assurance of substantial competition in areas adjacent to that building. As one economist has explained:

> Special access competitors desiring to serve a particular end-user require facilities at both ends of the circuit and in between as well. An end-user in a particular building in a city center location may have multiple competitive alternatives available while a customer in a building a block or two away may not have alternatives available for some time.[28]

AT&T itself has acknowledged that special access services competition is concentrated in a small number of routes within metropolitan statistical areas ("MSAs").[29] As AT&T has explained:

> [e]nterprise customers do not confront 'similar choices regarding a particular good or service' throughout an entire MSA – the standard previously adopted by the Commission as the basis for defining a geographic market area . . . . [D]ecisions as to self-provisioning are made on a case-by-case basis, and are only justified where revenues available at the specific location are sufficient to offset the large capital investment that is required to construct facilities to the building.[30]

Even in determining in its *Pricing Flexibility Order* to set competitive triggers on an MSA basis, the Commission properly recognized that a more granular analysis "might produce a more finely-tuned picture of competitive conditions."[31] Here, such a "finely-tuned picture" would

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international services because they are affiliated with a foreign carrier that exercises market power in a foreign market").

28 Daniel Kelley, *Deregulation of Special Access Services: Timing is Everything,* at 10, *available at* http://www.hainc.com/ALTS.pdf (last viewed April 25, 2005).

29 *Reply Declaration of Lee L. Selwyn on behalf of AT&T Corp. (In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers),* at p. 83, 84-85, WC Docket No. 04-313, CC Docket No. 01-338.

30 *Id.*

31 *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order, 14 FCC Rcd 14221, 14260 (1999), *aff'd*, *WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) ("*Pricing Flexibility Order*"). In the *Pricing Flexibility Order,* the Commission did not require a competitive

demonstrate that competition to serve all but the most urban markets is extremely thin, and that there is no competitive choice to reach many end-users even within such urban markets. But because the data relevant to such a showing is not publicly available, the Commission should require that the parties provide it so that the Commission may conduct the necessary analysis.

To complete its market analysis, the Commission also should analyze the special access services market on a region-wide basis.[32] Only SBC provides special access services to virtually all business customers throughout its entire region. No competing special access services provider offers the region-wide coverage of SBC. This forces carriers like Global Crossing to deal with SBC and give SBC as much business as possible if it is to qualify for the best discounts SBC offers. Thus, as a practical matter, even where special access alternatives exist, such alternatives do not present real choice to carriers that seek to provide services to end-users region-wide.

A region-wide analysis is all the more appropriate because SBC has imposed on its special access customers region-wide volume and term commitments which are structured to prevent special access customers from utilizing the services of competing special access providers. SBC's volume commitments span the geographic borders of its three Bell Company components, the former Ameritech, Pacific Bell, and Southwestern Bell companies. Typically, SBC will structure volume commitments in terms of a percentage of the special access customer's embedded base of circuits, or its current annual spend. Special access customers must commit to spend at least 90% of their current spend in the following year or maintain 90%

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showing below the MSA level due to the administrative costs such a showing would entail. *Id.* The Commission's consideration of administrative costs in promulgating general regulatory frameworks, however, is distinguishable from the merger analysis the Commission must undertake to determine whether a particular transaction serves the public interest.

32 *See Farrell Statement* at ¶¶ 15-18 and Technical Appendix.

of its embedded circuit base with SBC in order to be eligible for any meaningful volume discounts. Moreover, SBC's market dominance allows it to impose longer term contracts and high early termination penalties that lock in customers to SBC service even if a lower cost special access services alternative presents itself.

SBC's special access services pricing structure exacerbates carriers' attempts to alter their business plans or implement strategic market plans. For instance, a carrier may elect to exit a particular line of business because it produces low margins or is entirely unprofitable. Canceling special access services associated with these markets, however, could result in the carrier missing its special access services volume commitment level, triggering price increases by SBC, and negatively impacting the level of margin or profitability of other lines of business the carrier continues to serve. These lower overall margins could harm the carrier's competitiveness in its remaining lines of business, thus creating a vicious cycle that ends only when the carrier is out of business entirely. Currently, the carrier would, at least, be able to turn to AT&T as the most viable region-wide special access service alternative, but the proposed merger would eliminate that option.

B. Current Market Conditions Demonstrate that SBC and AT&T Are the Two Largest Providers of Special Access Services and the Reach of SBC's Special Access Facilities Far Exceeds That of Any Other Market Participant

The *Application Narrative* speaks in general terms about competitive choice,[33] but fails to adequately address the fact that SBC and AT&T are the largest and second largest provider of special access services throughout SBC's region. In particular, SBC is, by far, the largest provider of special access services in its BOC service territories. Typical of BOCs, SBC's ILEC subsidiaries serve as the only connection to a customer throughout the majority of

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33 *Application Narrative* at 102-05.

their respective service areas. In many geographic areas, SBC serves as one of only one or two providers of special access services essential to reach a particular end-user.

AT&T owns the largest set of competitive access assets in the country, and throughout SBC's region. Where Global Crossing has any choice at all, AT&T often serves as the one competing provider of special access services to reach a particular end-user. Further, because of pricing flexibility granted to the BOCs, and the huge volume of special access services that AT&T purchases, AT&T has buying power that no other competitor can match. In addition to its own extensive network facilities, AT&T resells some of the special access services it purchases from SBC, thus expanding its own network presence and viability as a regional competitor in the special access services market. When AT&T resells SBC special access services, AT&T passes on some of its discount to its wholesale customers, and provides service at rates lower than offered by SBC. Regardless of whether AT&T provides special access services over its own facilities or on a resale basis, it invariably serves as a lower-cost alternative to SBC. The availability of AT&T's special access services as the primary alternative to SBC will end upon the consummation of the proposed merger, as the merged entity will have no incentive to use its integrated assets to compete with itself (whether or not it seeks to combine these operations to gain synergies).

Due to its superior ability to reach end-users throughout its region, SBC exercises market power in the special access services market in SBC's region, and the proposed merger will only increase that market power. As described above, in those buildings where SBC faces special access services competition, the competitors will serve as a low cost alternative to SBC. At a regional level, however, SBC's unmatched ability to reach more end-user premises enables it to require that special access customers enter into region-wide volume commitments in order to be eligible for price discounts. These volume commitments, in turn, constrain special access customers' flexibility to choose the alternative special access provider, even if the alternative provider offers the service at a lower rate.

Market performance data filed by AT&T itself supports a finding that SBC has considerable pricing power. AT&T filed a Petition alleging that SBC has earned supra-competitive profits for special access services -- a rate of return in 2001 of 54.6% percent -- higher than any other BOC and far in excess of the 11.25% rate of return level that the Commission has found reasonable for other services (and, for that matter, special access services).[34] According to AT&T, if the special access services market were actually competitive, one would expect prices and profits to fall.[35] But this has not occurred. Rather than decreasing, special access services rates steadily have increased in SBC's region.[36]

In Global Crossing's experience, SBC is able to charge high special access services rates due to its region-wide market power through contracts that include volume discounts with high volume commitments. Whenever feasible, Global Crossing uses an alternative provider of special access services at substantial cost savings to the special access services offered by SBC. However, SBC's volume commitment requirements restrict carriers' flexibility to take advantage of competitive alternatives. Aware of the lack of region-wide choices available to market participants such as Global Crossing, SBC chooses not to meet its

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[34] AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, at 8 (filed Oct. 15, 2002) ("*AT&T Special Access Petition*").

[35] *Id.* (discussing the "predictive judgments that market forces would constrain the Bell's special access pricing"). Indeed, prices have fallen dramatically in the long-haul special access market, where prices have dropped 90% since 1999 on most routes in the U.S. and Europe. *2004 International Bandwidth Report*, Telegeography, Chapter 5, at 16.

[36] *See AT&T Special Access Petition* at 9 (showing the upward trend in SBC special access rates).

competitors' rates. For example, Global Crossing often must pass up using competitive access alternatives *at nearly half the price* of SBC's identical product, due to the constraints accorded by Global Crossing's contractual volume commitment with SBC. In those rare instances that SBC loses business to an alternative special access services provider, SBC apparently considers this a cost of doing business. It is far more profitable for SBC to charge high rates to its captive (and thus non-price-sensitive) customers, rather than lower its prices to compete with AT&T for fringe customers.

In sum, special access services competition is, at best, inconsistent throughout SBC's region. Competition varies significantly on a building-by-building basis. On the other hand, SBC is the only carrier capable of serving the entirety of its region's business customers. While AT&T serves as a valuable low cost alternative, SBC wields considerable market power due to its continued preeminence as the primary provider of special access services throughout its region.

C. The Proposed Merger Will Eliminate a Lower-Cost Alternative to SBC's Special Access Services in a Market that Already is Subject to Very Thin Competition

The evidence demonstrates that the Applicants' claims that "there is no basis for concern that this merger will harm either the market for special access services or the customers of those services"[37] are patently false.[38] The proposed merger would give the combined company substantial market power by pairing the number one and number two special access service providers in SBC's region in terms of market share and facilities-based reach. In instances in which SBC and AT&T are the only options to gain access to certain buildings, the proposed merger would be a merger to monopoly. Moreover, AT&T has the greatest geographic

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37 *Application Narrative* at 102.

38 *See generally Farrell Statement.*

reach of any alternative provider of special access services throughout SBC's region, and consistently offers this service at a lower rate than SBC. As such, the proposed merger would increase SBC's market power, to the detriment of special access services users.[39]

In addition, the vertical integration of SBC, a BOC, with AT&T, the largest independent interexchange carrier, will substantially raise SBC's incentives to harm competitors of the former AT&T, such as Global Crossing.[40] SBC currently is not a major competitor of Global Crossing, but AT&T is. Therefore, while the record shows that SBC has substantial market power in the special access services market, SBC currently does not have a substantial competitive incentive to discriminate against Global Crossing. Conversely, AT&T has ample incentive to discriminate against Global Crossing, but today it lacks the market power necessary to charge supra-competitive special access services rates. Consummation of the proposed transaction would change this dynamic. The proposed merger would increase significantly SBC's incentives to exercise its market power in the special access services market to the detriment of Global Crossing and other users of special access services with which the combined company will compete.[41]

It has been suggested that the recombined SBC and AT&T will be more sensitive to special access services pricing because SBC will be a large volume purchaser of special access services in its out-of-region territory. SBC may indeed be, and in fact will likely be the largest purchaser of special access services, based on AT&T's existing use of such services. But that

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[39] *Id.* ¶¶ 23-28 (detailing concerns under a route-specific competition analysis), ¶¶ 29-36 (detailing concerns under a regional competition analysis).

[40] *Id.* ¶ 40 ("With greater horizontal market power in special access, and with a much stronger position in enterprise network services following its acquisition of AT&T, SBC will . . . have increased incentives to raise special access prices to downstream enterprise network services providers . . . such as Global Crossing").

[41] *Id.*

will entitle SBC to the largest volume discounts, and AT&T's extensive local access network (which includes the Teleport Communications Group local access assets acquired by AT&T) will allow SBC to credibly threaten to bypass other special access services providers who do not meet SBC's price points. So SBC's sensitivity to special access services pricing is theoretical at best, and at all events would not redound to the benefit of its own special access customers.[42] Moreover, given SBC's current use of exclusionary volume discounts, the Commission should examine the potential competitive effects should SBC engage in those practices on a nationwide basis.

SBC's post-transaction market position as a competitor and consumer of local access services creates the ability and incentive for SBC to discriminate against competing providers of enterprise services. The merger ultimately will harm end-users, as the combined company will be able to raise and sustain supra-competitive special access services rates. Some competitive carriers will likely be forced from the market due to higher special access services rates. Those competitors that remain, however, likely will find it necessary to pass through these higher costs to their end-user customers.[43] In either case, the merger would disserve the public interest.

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[42] This issue must also be viewed in the broader context of industry consolidation where Verizon (or Qwest) is set to acquire MCI, the next largest user of special access services and the next largest competitive access provider after AT&T. The prospect that SBC and the BOC that merges with MCI could well become each other's largest customer as well as its largest competitive access provider warrants further examination in this proceeding.

[43] *Farrell Statement* at ¶ 42 (stating that one effect of the merger would be to "simply to raise market prices downstream").

D. The Commission's Ongoing Proceeding Examining Special Access Services Rates Does Not Justify Overlooking the Anti-Competitive Effects of the Proposed Merger

The Commission should reject the Applicants' suggestion that the Commission may disregard competitive concerns related to special access services simply because the Commission has initiated a rulemaking proceeding related to special access services rates.[44] First, Section 214 of the Communications Act specifically requires that the Commission find that the proposed transaction would serve the public interest before it can approve the merger.[45] The Commission may not approve the proposed transaction unless it finds that "'neither the present nor future public convenience and necessity will be adversely affected'" by such proposed transaction.[46] Indeed, the Commission already has issued data requests to the parties that will inform the Commission's analysis of the potential competitive impact of *this merger* in various product markets, including the access services market. The Commission cannot determine if the proposed transaction would serve the public interest without examining the potentially anti-competitive vertical and horizontal effects of the proposed merger.[47]

Second, the proposed transaction would create a new paradigm completely changing the market assumptions underlying the special access rulemaking proceeding on which the Applicants rely. No rulemaking proceeding would be able to restore the competition that the proposed merger will eliminate.[48] SBC intends to acquire the primary alternative provider of

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44 *Application Narrative* at 102-105.

45 47 U.S.C. § 214.

46 *Application Narrative* at 12 (quoting 47 U.S.C. § 214).

47 *Farrell Statement* at ¶ 3 ("The Commission's rulemaking does not substitute for competitive analysis of the proposed merger").

48 *Id.* ¶ 37 ("no decision likely to be contemplated by the Commission in the rulemaking proceeding can restore . . . competition").

special access services, not only in SBC's region but throughout the country.[49] The fact that the Commission already is sufficiently concerned to investigate the exercise of market power related to special access services lends credence to concerns that the merger will exacerbate an already critical situation.

Addressing the special access issue as it pertains to this transaction would also be fully consistent with the Commission's approach in other merger proceedings. For example, in *Bell Atlantic-NYNEX*, the Commission enforced a pricing condition on transport services despite the fact that the Commission was "considering industry-wide issues related to shared transport in another proceeding."[50] Precedent further demonstrates that merger conditions do not preempt Commission rules or future action in other proceedings.[51] In *GTE-Bell Atlantic*, the Commission recognized:

> The Commission may . . . adopt additional requirements in other more general proceedings that affect matters addressed by [merger] conditions. In that case, because the conditions are intended to be a floor not a ceiling, the merged firm would be subject to the general requirements as well as these conditions.[52]

Thus, the Commission is not constrained from imposing merger conditions here merely because it has initiated a special access rulemaking. The Commission should impose merger-specific remedies to redress the loss of competition and ensure that the merged entity does not abuse its market power in the special access services market.

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49 And again, when viewed in the broader context of industry consolidation, SBC and Verizon (or Qwest) will become each other's largest customer and competitor in the special access market. This dynamic warrants further consideration by the Commission in this proceeding.

50 *Bell Atlantic-NYNEX* at n.370 and Appendix C.

51 *Ameritech-SBC* at ¶ 356; *GTE-Bell Atlantic* at ¶ 178.

52 *GTE-Bell Atlantic* at ¶ 178.

III. THE PROPOSED MERGER WOULD INCREASE THE NEW SBC'S ABILITY AND INCENTIVES TO DISCRIMINATE IN ITS PROVISION OF SWITCHED ACCESS SERVICES

Just as special access is a distinct product market, switched access is as well. In fact, SBC enjoys a terminating access monopoly for all of the telephone numbers assigned to its customers, and has – by far – the largest customer base in its region. And just like special access services, switched access services are a critical input for all telecommunications carriers and service providers. The proposed transaction enhances the incentives and ability of the combined SBC and AT&T to utilize its terminating monopoly in a discriminatory manner and negatively impact downstream markets.

The Commission should be particularly concerned about the increased incentives that a post-transaction SBC will have to discriminate against competing providers of VOIP services. SBC already has used its dominance over the local loop allegedly to favor its own VOIP services affiliate to the disadvantage of competing VOIP providers.[53] In particular, SBC faces allegations that it has stifled competition from competing VOIP service providers by preventing interconnection of VOIP provider networks and equipment to the public switched telephone network and critical support services such as 911.[54] Competitive carriers also have complained about SBC's limiting competitors' ability to interconnect to its network and pricing access to local distribution facilities in a discriminatory way.[55] These anti-competitive activities

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53 *See, e.g.,* Letter from William B. Wilhelm, Jr. to Marlene H. Dortch, WC Docket no. 04-36 (filed April 18, 2005) ("*SBC Ex Parte*") (noting its concern regarding SBC discrimination in favor of its own VOIP affiliate).

54 *Id.*

55 *See, e.g., id.*; *FCC to Review SBC's TIPTop Service*, COMMUNICATIONS DAILY, Nov. 29, 2004 (discussing the Commission's decision to open an investigation of SBC's new VOIP access tariff); *Wireline*, COMMUNICATIONS DAILY, Apr. 3, 2003 (discussing AT&T's allegations regarding SBC's failure to develop procedures for line splitting, in contrast to

mirror many of the charges against the pre-Divestiture AT&T, and demonstrate SBC's current hostility toward competition from providers of VOIP services.

Consummation of the proposed transaction will combine SBC's relatively new residential VOIP product with the more mature AT&T VOIP product that AT&T aggressively markets to residential and business customers,[56] sometimes in direct competition with Global Crossing. The proposed transaction would recreate the circumstances which gave rise to AT&T's original forced Divestiture – but only now it is not long distance competition that is at stake, but rather it is competition from IP-enabled service providers. This vertical integration of switched access facilities and VOIP infrastructure will increase SBC's incentives to treat originating and terminating VOIP traffic in a manner that will encourage SBC's dominance in the VOIP market. The Commission therefore must address the potential anti-competitive effects of the merger to the VOIP services market in this proceeding. For the same reasons that require the Commission to examine the special access services issue in the context of this merger, no general rulemaking proceeding will be able to undo the anti-competitive effects that the proposed merger will have on the VOIP services market if the Commission approves the merger without sufficient conditions.

The Commission therefore should clarify in this proceeding the form of access to which VOIP providers are entitled, and the type of intercarrier compensation arrangement that

SBC's representations that it had); *AT&T Special Access Petition* at 7-8 (alleging grossly excessive special access rates charged by all BOCs, with SBC's rate-of-return for special access service exceeding that earned by any other BOC).

56 *Application Narrative*, Appendix A, at A-1 to A-3.

will govern such access, and impose conditions on the proposed merger designed to ensure that the Applicants do not discriminate against competing providers of VOIP services.[57]

The most obvious solution of course is to eliminate switched access charges altogether since the proposed transaction effectively eliminates the historic basis for switched access payments in SBC's region. After all, SBC and AT&T (together with Global Crossing and others) have advocated explicitly to eliminate switched access charges in the Commission's intercarrier compensation proceeding.[58] Those payments were intended to carry forward into the competitive long distance arena the historic subsidies that existed in the pre-divestiture AT&T -- implicit subsidies that the 1996 Act requires be eliminated. SBC's proposed acquisition of AT&T, Verizon's (or Qwest's) proposed acquisition of MCI, and Sprint's merger with Nextel and effective abandonment of the long distance business in favor of the wireless business eliminate the overwhelming majority of long distance competition, leaving the long distance market mainly to the BOCs themselves. If these acquisitions are approved, the largest local exchange carriers will be the largest payers of switched access -- to themselves. Rather than leave this system of self-dealing in place where SBC can utilize it to wreak havoc on downstream markets, the Commission should eliminate it entirely.

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[57] In separate proceedings, Global Crossing consistently has asserted that the Commission should clarify that switched access payments do not apply to VOIP services, and that it is unlawful to charge switched access charges in relation to such services. *See* Reply Comments of Global Crossing, WC Docket No. 04-36 (filed Jul. 14, 2004); Comments of Global Crossing, WC Docket No. 04-36 (filed May 28, 2004); Comments of Global Crossing, WC Docket No. 03-266 (filed March 1, 2004).

[58] *See Ex Parte* Brief of the Intercarrier Compensation Forum in Support of the Intercarrier Compensation and Universal Service Reform Plan, CC Docket No. 01-92 (filed October 5, 2004) (advocating elimination of today's access charge regime in favor of a uniform bill-and-keep compensation framework).

IV. THE PROPOSED MERGER REQUIRES THE COMMISSION TO REFORM AND REINVIGORATE ITS "ACCELERATED DOCKET" PROCESS

As mentioned at the outset, one the strategic benefits to SBC of the proposed recombination is the elimination by SBC of its most vocal political and regulatory opponent. It is important, therefore, that the Commission consider in this proceeding alternative dispute resolution processes because the proposed merger will diminish the diversity of voices in the telecommunications public policy arena and dramatically widen the resource gap between SBC and its competitors.

As the Commission is well aware, inter-carrier disputes are plentiful. Unfortunately, the Commission's existing tools for addressing them are cumbersome, time consuming and expensive. The ability of competitors to obtain equitable relief in a timely and efficient manner is in serious jeopardy, especially in light of the speed with which the telecommunications market is changing. The Commission should reform and reinvigorate its "accelerated docket" process and utilize it as a "baseball-style" arbitration panel. Under baseball-style arbitration the two opposing parties are required to put forth their "best and final" offer and one is selected as the remedy for both parties. This process is quick and efficient and forces opposing parties to narrow their differences before reaching the arbitration stage.

Absent such a process, SBC's competitors are continually faced with a "Hobson's choice" of spending more money to fix a problem than the problem is worth. In other words, if a carrier has a dispute with SBC valued at $100,000, it must decide if it is worth $200,000 to resolve the problem in the regulatory arena. In most instances, competitors will obviously opt out of the regulatory arena and absorb the $100,000 problem. But as this process is repeated, the competitors become incapacitated and suffer the proverbial "death by a thousand cuts."

Competitors therefore must have available to them a quick and efficient (low-cost) dispute resolution process. Baseball-style arbitration is ideal for this purpose because it is quick and easy and forces parties to negotiate and narrow their differences before reaching the arbitrator. Under a reformed “accelerated docket” process, inter-carrier disputes could be resolved within 30 days using baseball-style arbitration. The results could be interim, pending further rulemakings (but not subject to retroactivity) in order to give the Commission opportunity to address problems more holistically, but the revised accelerated docket process would at least permit carriers to continue operations in a more certain environment. This process is all the more important in the context of this merger because the political, legal, and regulatory resources of the recombined SBC and AT&T would be unmatched by anyone in the industry, and all of SBC’s competitors combined.

V. CONCLUSION

For the foregoing reasons, the Applicants have failed to meet their burden to show that the proposed transaction would serve the public interest without the imposition of mitigating conditions. Global Crossing urges the Commission to conduct a rigorous review of the potential anti-competitive effects of the merger and impose conditions to ensure that the Applicants cannot exercise market power post-merger to the detriment of the telecommunications marketplace.

Respectfully submitted,

GLOBAL CROSSING NORTH AMERICA, INC.

_/S/______________________________

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April 25, 2005

VERIFICATION STATEMENT

I, Paul Kouroupas, Vice President, Regulatory Affairs for Global Crossing North America, Inc., declare under penalty of perjury that I have reviewed the foregoing Comments, and that the facts stated therein regarding Global Crossing and its experience as a customer and competitor of SBC Communications, Inc. and AT&T Corp. are true and correct, to the best of my knowledge, information and belief.

Executed on April 25, 2005.

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ATTACHMENT A

STATEMENT OF JOSEPH FARRELL

Statement of Joseph Farrell

25 April 2005

1. I am Professor of Economics and Chair of the Competition Policy Center at the University of California, Berkeley, where I am also Affiliate Professor of Business. In 1996-1997 I served as Chief Economist at the FCC. In 2000-2001 I served as Deputy Assistant Attorney General and chief economist at the US Department of Justice Antitrust Division. I am a Fellow of the Econometric Society and former President of the Industrial Organization Society. From 2001 to 2004 I served on the Computer Science and Telecommunications Board of the National Academies of Science. My curriculum vitae is attached as Appendix 1.
2. I have been asked by counsel for Global Crossing to comment on likely competitive effects on special access of the proposed merger between SBC and AT&T. Neither time nor data availability permits a full analysis, but in this declaration I identify some concerns that, in my view, the Commission and its staff should fully investigate. In particular I offer a preliminary economic analysis of region-wide merger effects in the presence of percentage-of-requirements contracts such as I understand SBC uses in special access.
3. Of most direct concern is the elimination of the horizontal competition between SBC and AT&T where both offer facilities-based special access to a building or other appropriately granular geographic market that is not so served by several other carriers.[1] While the granular geographic market definition is the most obvious, it must be supplemented (not replaced) by a region-wide market definition and analysis capable of assessing the competitive effects of such a loss of competition in the presence of a loyalty or volume pricing program such as I understand that SBC offers, linking

[1] In their public interest statement, SBC and AT&T suggest that the markets where both offer special access are served by multiple others, but the specific facts they cite concern geographic areas far broader than buildings. A full inquiry into appropriate granularity is evidently needed.

competition in different granular markets. In addition, vertical concerns arise, especially given the Commission's pending special access rulemaking. All of these concerns demand much more scrutiny in the light of adequate data, which the Commission is well positioned to demand and analyze, and important parts of which SBC and AT&T are likely to be uniquely positioned to provide. The Commission's rulemaking does not substitute for competitive analysis of the proposed merger.

Special Access Market

4. Firms such as Global Crossing build facilities over which they offer business customers a range of telecommunications and data services. In general however they do not build facilities all the way to customers' premises. Rather, they procure last-mile connections, known as special access, from ILECs such as SBC and in some cases from competitive access providers (CAPs), including AT&T.
5. In its region, SBC can offer special access to essentially all major business premises. No CAP can offer access to a large percentage of such premises. However, I understand that AT&T offers special access connections to substantially more buildings than can any other CAP.[2]
6. I further understand that, whatever may be the case in consumer markets, intermodal (wireless or cable) alternatives are not generally regarded as viable alternatives to special access by Global Crossing and similarly situated firms, nor by their customers.
7. Unbundled network elements do not generally offer a viable, independently priced, alternative way for Global Crossing or its customers to acquire the

[2] I also understand that AT&T is a major reseller of SBC special access. While the role of resellers in competition is not straightforward, it certainly need not be null, especially when incumbents offer volume discounts, and the Commission should investigate the extent to which resellers collectively, and AT&T in particular, may constrain SBC's effective pricing in ways that promote competition and consumer welfare.

last-mile connection, because of the FCC's decision not to require unbundling of network elements unless used primarily for local competition.[3]

8. I also understand that the Commission has treated special access as a market in itself.[4]

9. These considerations suggest that special access is a relevant antitrust product market. More subtle issues arise in geographic market definition, as I discuss next.

Geographic Market Definition

Granular Analysis

10. From the point of view of final demand-side substitution, the natural and correct market definition is likely to be extremely localized. A business located in a certain building and wishing to procure telecommunications services is unlikely to substitute special access to a *different* building in response to a small but significant and nontransitory increase in the price of special access services to its building. For a business with established premises, such substitution would involve costly relocation. Perhaps some businesses seeking new premises might seek out buildings to which special access is more competitively supplied, but it is unlikely that this effect would be strong enough to change the presumption that the correct geographic market based on demand-side substitution would be highly localized, as is the case with many telecommunications markets. For the same reason, the direct

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[3] *Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket 04-313, CC Docket 01-338, 2005 FCC LEXIS 912 at 64 (March 14, 2005).

[4] *See Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, 20 FCC Rcd 1994 (2005); *Performance Measurements and Standards for Interstate Special Access Services; Petition of U S West, Inc. For a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision of Federally Tariffed Interstate Services; Petition of Association for Local Telecommunications Services for Declaratory Ruling; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; 2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements; AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services*, 16 FCC Rcd 20896 (2001); *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, 12 FCC Rcd 18730 (1997).

customers of special access (such as Global Crossing) do not find special access to different geographical points to be worthwhile substitutes, as they are trying to serve particular customers in particular locations.

11. It is legitimate and often helpful to aggregate such highly granular markets when they face the same competitive conditions. But of course that condition can be affected by the pattern and structure of competitors' pricing and other competitive behavior.

12. One natural form of competitive behavior would be for SBC and any CAPs who can provide special access to a particular building to compete, perhaps by bidding, on terms specific to that building.

13. With that form of competition, the geographic market definition based on demand substitution by end users would be the correct framework in which to analyze the effects of a merger such as this one between SBC and a leading CAP.

14. In that framework, one would identify geographic markets (buildings, for instance) in which SBC does not compete with AT&T, markets in which SBC faces competition only from AT&T, and markets in which SBC faces competition from AT&T and from one, two or more other CAPs. The analysis of competitive effects would then proceed separately for each of these classes of highly granular market.

Regional Analysis

15. I understand that, today, SBC's pricing does not fully respond to such granular competitive conditions, building by building, and that SBC is content to price well above CAPs where it does face CAP competition and offers substantial discounts in return for region-wide commitments to give SBC not simply a large amount of business but a large share of the carrier's business. Thus Global Crossing reports that:

> "Typically, SBC will structure volume commitments in terms of a percentage of the special access customer's embedded base of circuits, or its current annual spend. Special access customers must commit to spend at least 90% of their current spend in the

> following year or maintain 90% of its embedded circuit base with SBC in order to be eligible for volume discounts,"[5]

and that, as a result, "SBC chooses not to meet its competitors' rates."[6]

16. Such a pricing practice links special access pricing in different buildings, and—while it persists—argues for a region-wide market definition because (as I explain below) it can make region-wide concentration a more important determinant of competitive behavior and overall pricing than concentration and entry possibilities specific to a building or route.

17. This does not mean that customers can substitute across routes, nor that only carriers who offer special access region-wide (which indeed would mean only SBC) are "in the market." Rather, a region-wide geographic market definition is likely to be a sensible way of summarizing the competitive impact of CAP presence at multiple locations, as I describe in a simple formal model in the technical appendix below. In that model I show how the price paid by special access customers on SBC monopoly routes (denoted p in the model) depends on the percentage of routes that are SBC monopolies. The aggregate share of CAPs, or more precisely the share of routes served by CAPs in aggregate (denoted θ in the model), turns out in that model to be a constraint on SBC's (discounted, i.e., effective) pricing p even on monopoly routes, *if* SBC pursues a pricing strategy of the kind described. It is in this sense that a region-wide geographic market definition is appropriate.

18. I do not suggest that my simplified, incomplete formal model is the final or only answer. Rather, it illustrates that when a dominant firm's pricing policies link competition across routes, a simple route-level competitive analysis, which inevitably misses such links, can readily yield wrong predictions for pricing, while a region-wide competitive analysis can help by incorporating analysis of such links.

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[5] In the matter of SBC Communications Inc and AT&T Corp. Applications for Transfer of Control: Comments of Global Crossing, at 14 (April 25, 2005).
[6] *Id.* at 17.

Using Both Approaches

19. The analysis above indicates that, to capture both the effects of limited potential for end-user substitution across addresses, and also the effects of pricing practices that link (perhaps quite widely separated) buildings, intelligent geographic market definition in this transaction involves using at least two definitions: one highly granular (perhaps as granular as individual office buildings), the other corresponding to the geographic scope of SBC's pricing practices, i.e., region-wide.[7]

20. These are not alternative means of analysis. As always, definitions should not pre-empt analysis; but an analysis that uses geographic market definition must consider both of these definitions or risk overlooking important effects.

21. Because it is at least plausible (see below) that SBC's reported pricing practices are exclusionary, it presumably is comparably plausible that the Commission's separate inquiry into the special access market will constrain SBC's ability to sustain those practices. If so, then the granular, perhaps even building-by-building geographic market definition would become relatively more appropriate. On the other hand if SBC's pricing practices survive (whether or not because they are benign), the region-wide geographic market definition remains the natural way to capture potentially important competitive effects. Thus a choice of one of these geographic market definitions would pre-judge the Commission's treatment of SBC's pricing policies. (As I discuss below, none of this is to suggest that the pendency of the Commission's special access rule-making is a reason not to consider the effect of this proposed merger on the special access market.) In this sense as well as the more substantive sense above, the two geographic market definitions must both be pursued at this stage, and are not alternatives in the sense that the Commission can simply choose one.

22. SBC's pricing policies might also change as a result of changes in competitive conditions over time, or even as a result of a change in thinking by SBC's

[7] I understand that this may correspond to RBOC "footprints" such as Ameritech's, not (yet) reflecting mergers into the current SBC.

management. Thus, while it would certainly be wrong to analyze the merger only on a granular basis, as if SBC's actual current policies were off the radar screen, it would also be wrong to analyze the merger only on a region-wide basis, or as if those policies were certain to be permanent.

Competitive Effects of SBC-AT&T Merger in Special Access

Analysis with Granular Markets

23. For many office buildings in-region, SBC is at present the only provider of special access. The merger would nevertheless have a competitive effect in those granular markets if the merger eliminates an important potential of entry by AT&T; that is, if AT&T is an especially likely entrant. AT&T is a large customer of special access and supplier of enterprise network services, and one likely mechanism through which entry into special access (that is, the construction of special access facilities) could occur is via the customer's enterprise network services provider deciding to build its own facilities to bypass SBC's special access charges. It therefore is credible a priori that AT&T would be an especially likely entrant into granular special access markets that are currently monopolies. Such a view would be reinforced if (a) the majority of non-ILEC construction of special access facilities is by an enterprise network services provider to its customer's premises, and (b) AT&T has a persistently high share of the enterprise network services market. Both of these conditions are consistent with my general understanding of the market, but the data required to examine them in detail is not publicly available; I urge the Commission and its staff to obtain this data and perform this analysis..

24. For a substantial number of other buildings, I understand, AT&T and SBC are the only two alternative providers of special access. For businesses in such a building, or for the telecommunications carriers (such as Global Crossing) who compete to serve them using special access, this is a merger from duopoly to monopoly, which should surely raise a very strong concern at the Commission.

25. As usual, such concerns could be assuaged to some degree if entry were likely to be timely and sufficient to deter or repair any competitive problems. Given the large sunk costs involved, that it is unlikely to be the case, but Commission analysis of previous entry decisions by AT&T as well as by others could confirm this.

26. There may be other buildings where SBC and AT&T both offer special access, and one other CAP (such as MCI) does so;[8] as to such buildings, this is a "three-to-two" merger, which should also raise significant concerns.[9]

27. If the granular market accurately describes competition, then it should be possible for the Commission to quantify the likely effects of such changes. In particular, it would be possible (with suitable data from the parties) to study average special access prices with and without route-level competition.

28. However, such a study will underestimate competitive effects—perhaps drastically so—if SBC pursues a geographically averaged pricing policy supported by discount plans that link competitive conditions across different routes. In the extreme, if SBC prices uniformly without regard to route-level competitive conditions, but its overall price level is sustained above the competitive level by its localized monopoly power in some routes, then such a cross-section study would miss the effect. Rather, in that case, one must analyze competitive conditions across as well as within granular markets to understand these effects and correctly predict the competitive consequences of a merger, as I discuss next.

Analysis with Region-Wide Market

29. Presumably SBC implements its discount plan in the expectation that it will affect customers' behavior. The effect is that a customer will (sometimes) pass up lower CAP prices in a particular building in order to meet its SBC volume commitment. That behavior, or the pricing plan that induces it, links

[8] There may well be other buildings where MCI provides the only competition to the ILEC, which will be important in analyzing a merger involving MCI.

[9] By stopping here, I do not mean to suggest that four-to-three mergers are unproblematic, but the basic point should be clear by now.

competitive conditions across the separate buildings or other highly granular (what would otherwise be) geographic markets. Customer behavior then cannot be properly understood, nor competitive conditions examined, on a purely granular basis.

30. In the technical appendix, I offer a simple preliminary model to help understand the role of CAP competition in constraining prices when the dominant ubiquitous firm, SBC, offers volume discounts large enough to be tempting, based on share commitments big enough to be constraining.

31. The model assumes that SBC's discounted price is constrained by special access customers' "break-out" option of instead buying from CAPs wherever they offer a better price, and paying SBC's undiscounted price where there are no CAPs (or where SBC offers a better price on a granular basis, although the model predicts, consistent with what I understand is the evidence, that this is not the pattern).

32. That break-out alternative is more appealing the higher is the gap between the percentage of buildings where there are CAPs and the percentage of business that a customer can give to CAPs without losing its SBC volume discount. As a result, the loss of a special access competitor through merger makes the break-out alternative less appealing (given SBC's volume threshold for discounts) and thus allows SBC to raise its discounted price without losing business.

33. In the model, one can (recognizing that it is very preliminary) calculate the likely competitive effect of the loss of a CAP such as AT&T. In the model, that effect is proportional to the change in the fraction of buildings that are served by one or more CAPs. That is, it is proportional to the fraction ($\Delta\theta$ in the model) of buildings served, pre-merger, by SBC and AT&T alone.

34. In this model, if one can assume that SBC's volume commitment requirement and its undiscounted price do not change with the merger, the overall average price effect from the merger is equal to that fraction $\Delta\theta$, times the difference between SBC's undiscounted price and the CAP price. This appears to be about as strong as, or arguably stronger than, the average competitive effect of

the merger-to-monopoly aspects of the merger would be in the granular mode of competition.

35. Because the model predicts that a pricing policy like that attributed to SBC can create very strong competition among CAPs even at different locations, it may make entry incentives very weak even where SBC is charging prices well above cost. If so, entry would be unlikely to repair or deter anticompetitive effects in a timely fashion. Again, this is not an analysis ready for prime time: instead, it illustrates why further analysis is needed.

36. Because the model is preliminary and incomplete, and the necessary data is not publicly available, I view it as illustrating an at least initially plausible region-wide mechanism through which the loss of a special access competitor causes a "unilateral effect" price increase by the dominant firm, given pricing policies broadly akin to SBC's. This buttresses the argument that the Commission should carefully consider region-wide geographic markets as well as granular markets.

Special Access Competition, Special Access Regulation, and Leverage

37. Whatever its legal status, any suggestion that the Commission should ignore competitive concerns in special access because it has a pending rulemaking on the topic makes no sense from a general policy or economic viewpoint. If the merger harms special access competition, no decision likely to be contemplated by the Commission in the rulemaking proceeding can restore such competition.

38. To be sure, the Commission might find some policies to implement. But most policies would be available with or without the competition lost by merger, so their availability does not change that fact that losing competition is harmful.

39. Furthermore, if the rulemaking proceeding might (or might be thought apt to) involve price regulation of special access, that will create (or strengthen) incentives for leverage that the merger would simultaneously facilitate; such

regulation could even be prompted by the loss of special access competition due to the merger.[10]

40. With greater horizontal market power in special access, and with a much stronger position in enterprise network services following its acquisition of AT&T, SBC will in any event have increased incentives to raise special access prices to downstream enterprise network service providers (or generally special access customers) such as Global Crossing.

41. The effect of such a price increase, holding fixed the retail price charged by SBC's downstream affiliate, would in part be to shift business from independent downstream providers to SBC's downstream affiliate; this is more likely to happen, and the alternative outcome of the customers dropping out of the market is less likely to happen, if SBC's downstream affiliate is larger and more attractive to customers, as will be the case post-merger. Thus this component of the incentive will grow stronger with the merger.

42. Another part of the effect will be simply to raise market prices downstream; this is likely to be the primary effect if (as I understand) customers face significant portability or switching costs. This gives SBC more profits, the larger the market share of its downstream affiliate. Again, this indicates that the incentive for price increases to independent downstream firms will grow with the proposed merger. This incentive must be set against the potential elimination of double marginalization internally.

43. There may also be an incentive for non-price discrimination, especially if SBC fears that its special access pricing may be regulated, since that will create an incentive for regulatory bypass by taking rents at the enterprise network service level rather than at the special access level.[11]

[10] I am not suggesting (see my article cited below) that regulation of a bottleneck is the only condition that leads to incentives for leverage into an unregulated, competitive or potentially competitive complement. Rather, it is one well-established condition that predictably does so.

[11] For a recent discussion of a range of leverage incentives, and the link with regulation of a bottleneck, see Joseph Farrell and Philip Weiser, "Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age," *Harvard Journal of Law and Technology* 17:1 (Fall 2003), 85-135.

44. Increased incentives for leverage, in turn, will lead either to harm to competition in downstream markets such as enterprise network services, or to vertical regulation to try to stop such leverage, or quite possibly to both.

45. Opinions can differ on the right degree of vertical restraint to impose on dominant firms with incentives for leverage, and I am not expressing a position here on whether special access prices should be regulated or whether vertical regulation such as non-discrimination should be imposed.

46. For the reasons above, I conclude that (a) the proposed merger involves a loss of direct horizontal facilities-based competition in special access; (b) the geographic market definition and the competitive analysis involve consideration of SBC's pricing policies for special access, and this could well lead to a region-wide (or similar) geographic market definition being more informative than one based narrowly on consumer substitution; (c) there may well also be vertical issues, especially if the state of competition in special access is problematic; and (d) the Commission should vigorously investigate these concerns, including demanding the data with which to investigate them, and a general regulatory proceeding on special access cannot replace the investigation of merger-specific competitive effects.

Technical Appendix: Pricing with Share-Contingent Discounts

Consider the following market structure. A dominant firm, S, offers service at all locations. It sets a price p^* and a discounted price p that it gives to each customer who buys at least a fraction $1-\varepsilon$ of its volume from it.[12]

Rivals (CAPs) collectively offer service at a fraction $\theta < 1$ of all locations. They set a price p_c; I discuss the determination of p_c below, but for simplicity I assume that it is the same for all CAPs.

Each customer needs to buy service at a number of locations, and I assume that service is available from CAPs (collectively) at a fraction θ of these locations. I assume that the dominant firm's volume condition for the discount, that the customer buy at least a fraction $1-\varepsilon$ of its volume from S, is binding, which means (assuming $p_c < p$) that $\varepsilon < \theta$.

Thus the customer has two buying strategies. First, it could buy from CAPs wherever they offer service, but must then pay S the undiscounted price p^* in the fraction $1-\theta$ of cases where there is no CAP. This "break-out" strategy leads to an average price paid of:

$$\theta p_c + (1-\theta) p^* .$$

Alternatively, the customer can "manage to the discount" and limit its procurement from CAPs to a fraction $\varepsilon < \theta$ of locations, so that it pays the discounted price p in the remaining cases. This leads to an average price paid of:

$$\varepsilon p_c + (1-\varepsilon) p .$$

In reality, different customers may make different choices, but for a simple model, consider limit pricing by S so that all customers choose the latter option. (There would

[12] As noted above, Global Crossing reports that SBC's volume commitment plans specify 90% of previous-year in-region special access spend. In order to meet such a commitment, assuming for simplicity that there is no growth, the customer would have to serve no more than a fraction ε of customers via CAPs, where ε is such that $(1-\varepsilon)p = [0.9][(1-\varepsilon)p + \varepsilon p_c]$; this yields $\varepsilon = [1 + 9\, {p_c}/{p}]^{-1}$. If $p_c \approx \frac{1}{2} p$ then $\varepsilon \approx 0.15$.

be no point in the discount program if all customers chose the former option.) At least given θ and p^*, S presumably wants to maximize p, subject to keeping customers on the discount program, which implies:

$$p = \frac{(1-\theta)p^* + (\theta-\varepsilon)p_c}{1-\varepsilon}$$

Note that since the customer is offered CAP service at θ locations but will not buy it at more than ε of them, CAPs at different locations actually compete with one another. This is a possible reason why, I understand, a single CAP offering special access to a building otherwise served only by SBC will price well below SBC, not just below as would presumably be the case (adjusting for quality) without the volume pricing.

From the formula for p one can derive the effects on the average price paid if a merger removes a CAP and θ thus falls, assuming that p^* and ε remain unchanged:[13]

$$\Delta p = -(1-\varepsilon)^{-1}(p^* - p_c)\Delta\theta$$

Perhaps more usefully, we can plug the formula for p into the expression $\varepsilon p_c + (1-\varepsilon)p$ for the average price $\overline{p}$ actually paid, yielding $\overline{p} = (1-\theta)p^* + \theta p_c$. This is the same average price as would be paid if (a) there were no linkages among locations; (b) S priced at p^* at its monopoly locations; and (c) customers paid p_c at locations with CAPs. We then have $\Delta\overline{p} = (p^* - p_c)[-\Delta\theta]$.

If (in the world with discount pricing) S expects that many customers will not break out and pay p^*, but will instead manage to the discount and limit their purchases from CAPs so as to avoid p^* and pay p instead, then p^* plays the role of a penalty inducement to manage to the discount scheme as well as a market price for break-out customers in monopoly buildings. Thus it appears that S has an incentive to set p^* *above* the monopoly level p^m, roughly in proportion to the fraction of customers who manage to the discount rather than break out. On the other hand, p_c reflects artificial inter-location competition as described above, as well as any intra-location competition from the presence of multiple CAPs at a building, so p_c will be decreasing in $(\theta-\varepsilon)/\theta$.

[13] One of the ways in which this model is preliminary and incomplete is that it does not model SBC's choice of those variables.

The net effect of the discount pricing program on the average price paid is thus not obvious from this preliminary analysis, but to the extent that $p^* > p^m$ and/or that p_c is below the average oligopoly price that would emerge under granular competition, the program apparently exacerbates the average competitive effect of a loss in θ, i.e. the average competitive effect of a merger.

The model also seems to suggest that such a program may be exclusionary, in the sense of making entry even by an equally efficient CAP unprofitable even though the incumbent S prices well above cost. The gross return to entry is p_c times the probability that a CAP will make a sale. In the simple model, that probability is $\varepsilon / \theta < 1$. That is, despite pricing well below the incumbent S, a CAP will sometimes (perhaps often) lose business to S. Although this is not a deep or complete analysis, I believe it is enough to establish that the possible anticompetitive effect of such a pricing plan is a question well worth investigating, and that competitive analysis of the proposed merger should not assume with certainty that these pricing practices will survive the Commission's policy response to such an investigation.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Comments of Global Crossing North America, Inc. was served via electronic mail this 25th day of April, 2005, upon the following:

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