

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
AT&T Corporation	)	
	)	WC Docket No. 05-65
and	)	
	)	
	)	
SBC Communications Inc.	)	
	)	
Application Pursuant to Section 214 of the	)	
Communications Act of 1934 and Section	)	
63.04 of the Commission's Rules for Consent	)	
to the Transfer of Control of AT&T Corp. to	)	
SBC Communications Inc.	)	

**COMMENTS OF THE NEVADA DEPARTMENT OF JUSTICE,  
OFFICE OF THE ATTORNEY GENERAL,  
BUREAU OF CONSUMER PROTECTION**

Adriana Escobar Chanos  
Consumer's Advocate  
Nevada Department of Justice, Office of the  
Attorney General  
Bureau of Consumer Protection  
555 East Washington Ave., #3900  
Las Vegas, NV 89101  
Telephone: (702) 486-3256  
Facsimile: (702) 486-3283

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## **I. INTRODUCTION AND SUMMARY**

SBC Communications Inc. (“SBC”) and AT&T Corp. (“AT&T”) seek approval from the Federal Communications Commission (“Commission”) for the transfer of control of AT&T Corp. to SBC Communications, Inc. SBC is a holding company with a public utility registered in Nevada, NEVADA BELL TELEPHONE COMPANY d/b/a SBC Nevada, Inc. (“SBC Nevada”). AT&T is a holding company for AT&T Communications of Nevada, Inc. (“AT&T Nevada”), which is also a public utility registered to do business in Nevada. According to the Merger Agreement between the companies: (1) SBC will create a wholly-owned subsidiary, Tau Merger Sub Corporation (“Tau”), specifically for the purpose of consummating the transaction; (2) Tau will merge with and into AT&T, with AT&T being the surviving entity; (3) AT&T shareholders will exchange their stock for SBC stock; (4) AT&T will become a wholly-owned subsidiary of SBC. Thus, SBC will now be the parent company of AT&T Nevada, a public utility doing business in Nevada.

The Nevada Department of Justice, Office of the Attorney General, Bureau of Consumer Protection (“Nevada BCP”) offers these comments in response to the Commission’s Public Notice released March 11, 2005 (DA 05-656). The proposed merger, as currently structured, raises the following competitive concerns which have not been adequately addressed or answered by the merging parties’ current petition:

1. The merger may result in further concentration of an already highly concentrated market for certain services in Nevada, including, but not necessarily limited to, landline long distance services.

2. The merger will result in the elimination of a key competitor to SBC in certain markets in Nevada.
3. The merger may adversely impact retail customers of certain telecommunications services in Nevada through significant and non-transitory price increases and/or declines in the quality of services offered to small business and residential consumers.<sup>1</sup>

For these reasons, this merger, as currently structured, may not be in the public interest. The Nevada BCP urges this Commission to take the necessary and appropriate steps to (a) require the merging parties to address and resolve these concerns to the satisfaction of the Commission, (b) determine whether conditions must be imposed upon the merger before the Commission approves the transfer of control of AT&T to SBC, and (c) arrive at a regulatory position that is consistent with the United States Department of Justice Antitrust Division and/or Nevada regulatory officials regarding this merger.

## **II. THE APPLICABLE REVIEW STANDARD**

The Commission's task in reviewing the proposed merger pursuant to 47 U.S.C § 214(a) is to "determine whether the Applicants have demonstrated that the public interest would be served" thereby.<sup>2</sup> As the Commission stated in the *SBC/Ameritech Order*, "The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on

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<sup>1</sup> Additional questions, issues or concerns may arise during the course of the Commission's review.

<sup>2</sup> *SBC/Ameritech Order*, ¶ 46.

balance, serves the public interest.”<sup>3</sup> The Commission is to “weigh the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that the Applicants have shown that, on balance, the merger serves the public interest, convenience and necessity.”<sup>4</sup>

### **III. THE MERGER’S IMPACT ON COMPETITION & NEVADA RETAIL CUSTOMERS**

It is premature to conclude, without further review, that SBC’s increase in market share will result in market power (or increased market power), higher consumer prices, and/or lower service quality. But it is equally premature to conclude that the proposed merger, as it is currently structured, would serve the public interest, convenience and necessity.

SBC Nevada is the incumbent local exchange carrier (ILEC) in northern Nevada. SBC Nevada serves the vast majority of residential customers in northern Nevada and approximately eighty-two percent (82%) of all business customers in northern Nevada.<sup>5</sup> SBC Nevada has

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<sup>3</sup> *Id.*, ¶ 48, citing *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd at 3160, 3169-70, para. 15 (1999) (*AT&T/TCI Order*). See also *WorldCom/MCI Order*, 13 FCC Rcd at 18031, para. 10 n.33 (citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant); *American Telephone and Telegraph Co. and MCI Communications Corporation Petitions for the Waiver of the International Settlements Policy*, File No. USP-89-(N)-086, Memorandum Opinion and Order, 5 FCC Rcd 4618, 4621, para. 19 (1990) (applicant seeking a waiver of an existing rate bears the burden of proof to establish that the public interest would be better served by the grant rather than the denial of the waiver request); *LeFlore Broadcasting Co., Inc.*, Docket No. 20026, Initial Decision, 66 FCC 2d 734, 736-37, paras. 2-3 (1975) (on the ultimate issue of whether the applicants have the requisite qualifications and whether a grant of the application would serve the public interest, as on all issues, the burden of proof is on the licensees).

<sup>4</sup> *Id.* (citation omitted).

<sup>5</sup> Testimony of Manuel N Lopez on behalf of the Regulatory Operations Staff of the Public Utilities Commission of Nevada, Docket No. 05-2012 (SBC Nevada's Application to Reclassify Certain Business Services as Competitive) before the Public Utilities Commission of Nevada, April 4, 2005.

significant flexibility in pricing and terms involving business subscriber access services. It can package its business local exchange service with other products and services without seeking regulatory approval for the pricing and terms of such packages. SBC Nevada can also exercise flexibility in the pricing and terms of any tariffed business service, including basic services, in an individual case basis contract, to respond to competition by alternative providers. In short, a number of the services offered by SBC are not subject to state regulatory constraints which might otherwise neutralize or eliminate anticompetitive effects arising from this merger.

The proposed transaction may possibly combine two of the largest providers of long distance services in SBC Nevada's ILEC territory, resulting in a more highly concentrated long distance market in SBC Nevada's territory. In addition, the proposed transaction may lead to an increase in market concentration that, on its face, exceeds threshold tests the Commission has used to evaluate other recent telecommunications mergers.<sup>6</sup> If so, the proposed transaction would appear likely to create market power for SBC or enhance its existing market power in certain markets in Nevada.

There is evidence and there have been regulatory findings to at least suggest, if not establish, that there are no reasonably interchangeable products or close substitutes for landline long distance service in SBC Nevada's ILEC territory. Services provided by intermodal

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<sup>6</sup> In the Cingular-AT&T Wireless merger, this Commission employed several initial structural screens to identify local geographic markets that warranted a detailed competitive analysis. For example, the Commission has taken the position that further analysis is required when the merger involves markets in which the post-merger Herfindahl-Hirschman Index ("HHI") would be 2800 or higher and the change in the HHI would be equal to or greater than 100 points, or when the change in the HHI would be 250 or higher, regardless of the post-merger HHI.

competitors (*e.g.* wireless providers and competitors offering service using voice over internet protocol) exhibit qualitative differences sufficient to exclude them from consideration as substitutes.<sup>7</sup> This raises concerns about whether in a post-merger market, there is a competitive presence that would serve as a price discipliner to prevent small, but significant price increases for certain services. The parties' current submission does not adequately address this concern. The parties should be called upon to demonstrate that such price increases are not likely and/or would result in timely competitive responses and/or entry of new competitors offering the same services or close substitutes.

The merging parties may argue that AT&T's decision to exit the residential market helps to minimize the competitive impact of the proposed transaction and raises questions whether AT&T would be capable of constraining SBC's price behavior in the future if it remained a competitor in the market. Whether AT&T would not or could not constrain SBC's price behavior in the future is speculative. What is not speculative is in a post-merger market, AT&T will have no ability to constrain SBC's price behavior as an existing competitor or as a potential competitor.

#### **IV. CONCLUSION**

The Nevada BCP submits that, as filed, the SBC/AT&T petition does not adequately demonstrate the proposed transaction will serve the public interest in Nevada. The Nevada BCP urges this Commission to take the necessary and appropriate steps to (a) require the merging

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<sup>7</sup> WT Docket No. 04-70 before the Federal Communications Commission (In the matter of Application of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, Inc.); Memorandum Opinion and Order; Adopted October 22, 2004; Released October 26, 2004.

parties to address and resolve the concerns described herein to the satisfaction of the Commission, (b) determine whether conditions must be imposed upon the merger before the Commission approves the transfer of control of AT&T to SBC, and (c) arrive at a regulatory position that is consistent with the United States Department of Justice Antitrust Division and/or Nevada regulatory officials regarding this merger.

Respectfully submitted,

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Adriana Escobar Chanos  
Consumer's Advocate  
Nevada Department of Justice, Office of the  
Attorney General  
Bureau of Consumer Protection  
555 East Washington Ave., #3900  
Las Vegas, NV 89101  
Telephone: (702) 486-3256  
Facsimile: (702) 486-3283

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