Before The
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	**)**	
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Applications of SBC Communications, Inc.	**)**	**WC Docket 05-65**
and AT&T Corporation For Consent To	**)**	
Transfer Control of Section 214 and 308 Licenses	**)**	
and Authorizations and Cable Landing License	**)**	

COMPTEL/ALTS PETITION TO DENY

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COMPTEL/ALTS PETITION TO DENY

CompTel/ALTS, pursuant to Section 309(d) of the Communications Act, 47 U.S.C. § 309(d), hereby petitions the Commission to deny the above captioned applications of SBC Communications, Inc. ("SBC") and AT&T Corporation ("AT&T") for transfer of control of AT&T's licenses and authorizations to SBC. SBC and AT&T have not provided anywhere near the full extent of the information the Commission needs to properly analyze the competitive impact of the proposed merger. Without this information, the Commission cannot possibly undertake its statutory obligation to determine whether any competitive benefits of the merger outweigh the competitive harms that are sure to result from the marriage of two of the nation's largest telecommunications carriers. The information that is available to the Commission demonstrates that the merger will not promote competition and, therefore, will not serve the public interest, convenience or necessity. For these reasons, the CompTel/ALTS urges the Commission to deny the applications.

CompTel/ALTS was formed in March 2005 by the merger of CompTel/ASCENT and the Association for Local Telecommunications Services (ALTS). With more than 300 members, CompTel/ALTS is the leading industry association representing

competitive facilities-based telecommunications service providers, emerging VoIP providers, integrated communications companies, and their supplier partners. CompTel/ALTS members compete directly with SBC and AT&T in providing voice, data and video services in the U.S. and around the world. CompTel/ALTS members also purchase essential inputs -- unbundled network elements ("UNEs"), special access facilities and backbone capacity -- from SBC and AT&T in order to serve their end users. As customers and competitors of both SBC and AT&T, CompTel/ALTS acting on behalf of its members is a party in interest with standing to oppose this merger pursuant to Section 309(d).

INTRODUCTION AND SUMMARY

Woodrow Wilson once declared, "[i]f monopoly persists, monopoly will always sit at the helm of the government . . . . "[1] Make no mistake, the regulatory function of the government has been usurped by the Bell monopolies. Over the past four years, the Bells—especially the largest of the Bells—have captured the "helm" of government regulation of their market power. In a very short period of time, the Commission has gone from statements like, "we should no more trust the promised benefits and representations of competitive entrants as we do the promises to do no harm from incumbents"[2] to "a regulatory policy of crossing our fingers and hoping competition will

[1] Woodrow Wilson, The New Freedom: A Call For the Emancipation of the Generous Energies of a People. Prentice-Hall: Englewood Cliffs, NJ (1918) at 286.

[2] FCC Chairman Michael K. Powell, Goldman Sachs Communicopia XI Conference, New York, NY. October 2, 2002. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226929A1.doc

somehow magically burst forth."[3] The merger application in front of the Commission is as much about past regulatory failures as it is about preventing future monopolies that will prove fatal to competition.

In this merger application filed by SBC and AT&T, the Commission is again being asked to abdicate the "helm of government" and, once again, find that SBC's self-interest is consistent with the public interest. Having leveraged its local monopoly to drive many small competitors out of business, and its largest competitor to its knees, SBC now seeks clearance to swallow its largest rival, leaving consumers at its mercy. The proposed merger would only exacerbate the problems consumers face as a result of these monopolies and permit the extension of that leverage into domination of the Internet.

The Bells are still classic monopolies, controlling the bottleneck "last mile" links to virtually every customer. At the same time, the FCC has actually *abolished* regulation of these monopolies, eliminating in almost every case any efficient means by which competitors can reach potential customers.

- The Commission has eliminated access of competitors at cost-based rates to the Bells' last mile bottleneck local loop platform (known as "UNE-P"), the only efficient way that competitors can provide a competing local service to most analog consumers.
- The Commission has eliminated access of competitors at cost-based rates to the Bells' last mile bottleneck local loops to provide DSL services along side the

[3] Dissenting Statement of Commissioner Michael J. Copps, Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), Memorandum Opinion and Order (WC Docket Nos. 01-338, 03-235, 03-260 & 04-48).

Bells' telephone service (known as "line sharing"), driving competing DSL companies from the market.

- The Commission has substantially eliminated access of competitors at cost-based rates to the Bells' high capacity digital loops and transport throughout much of the territories served by competitors.
- The Commission has eliminated rate regulation of the Bells' bottleneck last mile local loops when they are leased by competitors to connect customers to national and global networks (known as "special access").

In each case the FCC has relied upon a *perception* of competition, or worse—the promise of future competition—that does not match *reality*. Cable television networks are only now becoming alternatives for some customers for limited local telephone service and broadband, but they are not now an alternative for most customers. Many cable systems do not offer telephone service, and, in most instances, cable systems do not even pass consumers in business districts. Even where cable systems are an alternative, they are virtually the *only* alternative, because the ILEC bottlenecks, and the FCC's failure to adequately regulate them, makes any more extensive, additional competition impossible. Cellular service may some day become a substitute for the ILECs' telephone services for some consumers, but it is not today; in any event, cellular is another business largely controlled by the Bells. Other technologies and services, like Wi-Max and broadband over power lines are today just ideas; they are not an available alternative to the ILEC last mile bottleneck.

Ignoring mountains of evidence provided by private equity investors, the Commission has also relied on the Bells' cynical "speculation" that competitors, denied

fair access to ILEC bottleneck facilities, will resort instead to construction of their own parallel facilities. That has not happened because the basic premise of the earliest fiber investments—that the government was committed to rigorously enforcing the Act, and requiring cost-based access to facilities that cannot be efficiently replicated—has been repeatedly, and profoundly, abandoned by the Commission.

The Commission has also acquiesced in the position of the Bells that they will not introduce advanced services in competition with cable TV companies unless they are relieved of competitive pressure from companies that require cost-based access to ILEC last mile facilities to succeed. Ironically, in the zeal to align the public interest with the monopolists' "incentives," no regard was given to one of the most basic principles of economics—that market power must be constrained, because of the monopolist's incentive to *restrict output,* and thereby distort resource allocation. Adam Smith, as early as 1776, observed, "[t]he monopolists, by keeping the market constantly understocked, by never fully supplying the effectual demand, sell their commodities much above the natural price . . . ."[4] Reducing competition has never caused the Bells to innovate. Consumers deserve better than "faith-based approaches to advanced services."[5]

To a public told by the media every day about the astounding advances in telecommunications technology and the "intense competition" that technology has promoted, it may seem strange to learn, as the industry already knows, that the monopolies of the last century continue in place today to the detriment of consumers. In that sense, the only good that can be said of the proposed merger is that it will reveal at long last that fact, fully and forthrightly, and the failure of existing regulatory approaches

[4] Adam Smith, The Wealth of Nations, 1776. Vol. I, Bk. I, Ch. 7.

[5] Copps Statement., *supra,* n.2.

to adequately address it. The public will finally understand that the "intense competition" is in fact a battle of businesses small and large to survive against the monopolies and the undue advantages the incumbents have attained by regulation that has ignored the existence of the monopolies.

The proposed merger should be denied, because it will harm consumers in a myriad of ways. *First*, the merger would harm consumers by completely eliminating AT&T as a competitive provider of local connectivity in the extensive SBC region for both local and national and global services. In this way, the merger's anticompetitive effects will be felt throughout the complement of markets served by AT&T and SBC, because today all competitors—and their customers—benefit from AT&T's presence in the wholesale market. CompTel/ALTS believes that it is not unreasonable to expect price increases of up to 10%, or more, for key wholesale inputs. Most customer classes throughout the SBC ILEC region will feel the effects of these wholesale price increases.

Accordingly, the merged SBC/AT&T will have the ability and irresistible incentive to price squeeze competitors who must turn to SBC for local connectivity. The merged firm will also have the ability and incentive to engage in non-price discrimination strategies, such as delaying, or degrading, provisioning of these essential inputs to competitors. The SBC/AT&T and (if formalized) the Verizon/MCI mergers will inevitably foster a classic duopoly in which each merged firm will provide local connectivity to the other in region at reduced rates denied to all other competitors. If the merger were permitted, the incentive to engage in price squeezes and provisioning delays will necessarily be extended to all other services requiring special access and other types of local connectivity, including enterprise services and Internet backbone services.

Second, in a very direct way, consumers in the residential and large enterprise markets will be harmed by the loss of AT&T's competitive presence. It is as misleading as it is shameful that SBC, having used its political muscle to eliminate AT&T's ability to compete for residential customers, claims that it is the government's regulatory policies—and not this merger—that will result in AT&T's exit from the residential market. This argument avoids the point that many competitive carriers, both circuit-switch based and packet-switch based, were working on wholesale offerings to serve those mass market customers currently served by UNE-P based carriers. Since AT&T has the largest base of UNE-P customers, their customers would have been the natural market for these competitive wholesale offers. However, with these customers now destined to return to SBC, it is doubtful that this wholesale market will develop at the same pace at which it would have, if it even develops at all.

For many of the same reasons, the competitive fiber-based carriers that are currently in the market will lose the benefit, and potential benefit, of providing service to AT&T. On the other hand, SBC's ability to foreclose further competitive fiber-based entry will be strengthened as the result of controlling even more excess fiber capacity.

Large enterprise customers, too, will see a competitive choice completely eliminated from the market. The large enterprise customers in SBC's ILEC region have seen a competitive benefit in the past few years as SBC has entered a very concentrated market. For these customers, as well as the large wholesale customers, it is reasonable to expect price increases of up to 10% as a result of this merger.

Third, the proposed merger would also harm consumers by reducing significantly competition for Internet Backbone Services. By permitting SBC to favor AT&T, and

Verizon to (potentially) favor MCI, with their extensive DSL originated traffic, the mergers will strengthen the cartel-like bonds that characterize the closely parallel behavior of Tier 1 providers – behavior such as categorically refusing to peer on a non-discriminatory basis with competitors -- and ultimately tip the market to the merged companies. Furthermore, the merged firms, with their combined traffic, may have even more incentives to discriminate against rival Internet backbones and a greater ability to do so by virtue of not only controlling more Internet traffic, especially as all traffic—wireline and wireless—becomes more packetized, but also by virtue of now being both critical input suppliers (for local connectivity) and competitors in the Internet backbone market.

The Commission's ongoing reluctance to address its failed predictive judgment in the Special Access Pricing Flexibility decision will further complicate the Commission's review of this merger Application. The Commission's virtual (in-everything-but-name only) deregulation of the Bells in 1999 is an inseparable backdrop to this proceeding. The Applicants cannot use their tired "collateral attack" arguments to deflect scrutiny of their market power in the special access market in this proceeding, because accretion of that market power, which is today completely unconstrained by regulation, must be the primary focus of the Commission's inquiry. From the way SBC uses volume commitments and non-cost-based termination penalties to distort the natural geographic market to the way SBC can use control over price, quality, and performance to delay, degrade, and devalue access to large customers by competing carriers and Internet backbone providers, the issue of how the Commission will attempt to resolve the problem of past and future monopoly is undeniably the focus of this Application.

Fourth, the merger effectively represents SBC's acquisition of its most effective regulator of wholesale services. The pro-competitive provisions of the Telecommunications Act were never expected to implement themselves. Congress deliberately adopted a structure whereby the creative tensions between the RBOCs and their largest expected customers – AT&T included – would engage in bilateral arbitrations to establish reasonable wholesale offerings. When the Act was passed, this structure was reasonable – the resources available to competitors and to the incumbents were generally in balance. The proposed mergers, however, will produce a resource imbalance between entrants and incumbents that is so severe that the effectiveness of this regime is destined to fail.

Moreover, these concerns regarding how the merger will enhance SBC's incentives and ability to behave anticompetitively are not merely academic. CompTel/ALTS will show through contemporaneous examples how SBC is able to exercise every ounce of its existing market power with respect to smaller local competitors—fully, completely, and unconstrained by regulation.

Finally, if the Commission determines that the Application does not enhance the public interest, which it does not, the Commission should deny the Application. It would be a mistake, and simply another exercise in futility, for the Commission to attempt to mitigate the many public interest harms created by this merger through toothless merger conditions. Today, SBC is completely incapable of operating within the Commission's regulatory structure, and the Commission today is completely incapable of effectively regulating SBC. SBC disregards the Commissions rules, procedures and merger conditions with impunity and with no consequence beyond a perfunctory, insincere act of

contrition in the form of a "voluntary" payment in a meaningless consent decree. Much like "Otis" on the old "Andy Griffith Show," when SBC's unlawful behavior becomes obvious enough to be embarrassing to both itself and the Commission, SBC simply "punishes" itself by 'fessing up to a consent decree that the Commission promises will not adversely affect SBC's character qualifications to hold Commission licenses and authorizations presently or in the future. However, unlike the situation with Otis—whose behavior was essentially harmless—SBC's actions create enormous costs which are borne by consumers, competitors, and their investors; yet never by SBC.

We are now finally at the cross-roads. It is now time for the FCC to decide how it will address for consumers *the problem of the monopolies*. The present merger application, if approved, will be the logical—and regrettable—conclusion to several years of regulatory capture and law enforcement failure-- regulatory *capitulation*. This outcome need not be inevitable. It is not too late for the Commission to embrace competition by denying the merger application and developing a commitment to enforce those few regulations designed to promote competition as a means to constrain the Bells' market power. To paraphrase Milton Friedman: "It is up to the [regulator] to promote the public interest by fostering competition across the board and to recognize that being pro-free enterprise may sometimes require that we be anti-existing business."

I. The Present Merger Is Inextricably Related to the Commission's *Special Access NPRM*

In its *Special Access NPRM*[6], the FCC asks significant questions about the nature of the special access market in each price-cap LEC's market region. The Commission asks questions regarding the extent of the Bells' market power, their ability to exercise that market power to raise prices to wholesale and retail customers, and their ability to use contract arrangements to exclude entry by smaller, efficient competitors. The Commission also asks what the appropriate geographic market is for special access services. All of these questions must be answered by the Commission as it analyzes the present merger Application. SBC's ability to exclude competitors, and raise special access input prices to retail, wholesale, and Internet backbone customers post-merger is one of the most significant, if not *the* most significant concern raised by the proposed merger. Thus, SBC's market power in the special access market is a *central*, not collateral (as the Applicants contend), issue in this merger.[7]

While the issue of SBC's market power in the special access market is a critical issue, which is discussed throughout this Petition, *infra*, the preliminary question of how to define a relevant geographic market for special access is a critical issue that the Commission must confront from the outset of its analysis. The FCC notes that it has previously found an MSA to be a relevant geographic market for special access

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6 *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, rel. January 31, 2005.

7 See, *e.g.*, Public Interest Statement, p. 103, n. 345.

services.[8] The Commission also notes, however, that AT&T contends the proper geographic market is much smaller than an MSA, because "competition is concentrated in a small number of areas within MSAs and that, therefore, the MSA is too large to be the relevant geographic market." [9] Others, including CompTel/ALTS, believe that because the FCC has completely failed to regulate the BOCs, once the Bells are granted pricing flexibility, they have been free to demand huge, region-wide term and volume commitments for special access services.[10] Accordingly, the Bells have been able to raise the minimum geographic scale of entry that might effectively discipline the BOC's prices to include the *entire Bell region*. For example, in the AT&T Petition for Rulemaking, Sprint noted,

> The BOCs are the only providers that can offer that geographic and service scope. In an effort to get any discount on interstate special access services, the IXCs must sign up for these broad contracts. To meet the discount terms, the IXCs must leave most if not all of their services with the BOCs. The IXCs are thus obligated to the BOC [sic] services and cannot switch to a competitor, even in the unlikely event that one exists. With the large IXCs locked into the BOC, and competitors locked out, there is no economic reason for a competitor to attempt to build facilities that would provide a competitive alternative to the BOC.[11]

Thus, the Commission must properly define the appropriate geographic market as the entire Bell region, unless or until the FCC decides to limit the Bells', including SBC's, ability to demand exclusionary terms in exchange for volume discounts. However, because the issue of whether the Bells can demand exclusionary volume

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8 *Id.* at ¶ 87.

9 *Id.* at ¶ 88, *citing* AT&T Reply, Reply Declaration of Lee L. Selwyn at ¶¶ 16-21.

10 See, *e.g.*, T. Randolph Beard, George S. Ford, and Lawrence J. Spiwak, "Quantity-Discount Contracts as a Barrier to Entry," Phoenix Center Policy Paper No. 20, November 2004. Available at http://www.phoenix-center.org/pcpp/PCPP20Final.doc

11 *Comments of Sprint Corporation*, FCC Docket RM 10593 at 5.

commitments, and thus determine for themselves the customer's perception of the relevant geographic market, is a question that necessarily must be addressed in the *Special Access NPRM*, the Commission cannot conduct its analysis of this merger until that question is answered.

II. The Proposed Merger Would Harm Consumers By Eliminating Direct Competition or Potential Competition Between SBC and AT&T

A. The Proposed Merger Would Harm Consumers By Eliminating AT&T As A Direct Competitor of SBC In The Provision Of Local Connectivity

SBC controls a virtual monopoly over local connectivity in 13 states. SBC's largest competitor in the provision of local connectivity is AT&T, its acquisition target. The proposed merger will result in the loss of even this limited direct competition with SBC. Consumers will be hurt because the loss of SBC's largest competitor for local connectivity will increase costs in wholesale and retail markets.

While the Applicants acknowledge AT&T's strength as a wholesale carrier in describing the complementarities of the two firms (Carlton and Sider Declaration at ¶ 11), the parties attempt to ignore the fact that AT&T is a wholesale carrier in competition with SBC in SBC's ILEC region. The parties do not even address the wholesale market at all in their public interest statement, relegating any acknowledgement that there may be wholesale issues to a footnote that attempts to diminish AT&T's "limited ownership of local facilities in SBC's territories that AT&T uses primarily in connection with its own provision of retail business services." (Public Interest Statement at 105, n. 347) On the other hand, AT&T's wholesale sales literature posted on its website boasts that AT&T has over 16,000 route miles of fiber (more than 25% of its 61,000 route mile total)

dedicated to local service.[12] Moreover, AT&T also combines "type 2" circuits, provisioned from SBC or another ILEC, with its own on-net facilities to provide lower cost local services to its wholesale carrier customers.

It must be noted that AT&T is an effective competitor because of its significant local fiber mileage for two reasons. The first is the fact that AT&T uses its fiber to provide many wholesale and retail services to its own customers, as noted above. The second reason is that by virtue of its significant fiber resources and its massive amount of retail and non-AT&T wholesale circuits, AT&T is able to obtain lower prices from the ILECs by threatening to groom circuits off the ILEC network and onto its own fiber. This combination of AT&T-controlled traffic and enormous fiber resources allows AT&T to benefit from discounts that smaller carriers simply cannot obtain. However, it should also be understood that while AT&T's unique position allows it to be shielded from the *full* exercise of SBC's market power, AT&T by no means constrains SBC's ability to exercise market power in the same way that a competitive market, or even effective regulation, could. Nonetheless, because of AT&T's ability to get superior discounts on special access, discounts which are passed along to its wholesale customers, the circuits AT&T obtains from SBC must be considered to be part of the AT&T network when considering the extent to which competing facilities and services will be lost as a result of this merger.

AT&T is properly considered a local wholesale competitor of SBC, and the other Bells, because its wholesale service is likely to be a lower priced alternative to the ILEC. In addition. SBC—a little more than two years ago—cited to statements by AT&T's CEO

[12] http://www.att.com/wholesale/docs/gws_sheet.pdf Indeed, virtually all of the network-related benefits that the parties offer in support of this merger are now currently available to any carrier—including SBC—on a wholesale basis from AT&T.

claiming that AT&T had over 18,000 miles of local fiber and 7,000 on-net buildings, had virtually eliminated dependence on ILEC DS3 tails, and provided some 20% of its DS1 equivalent offerings on-net.[13] In the same proceeding, SBC cited to the vast availability of non-ILEC fiber facilities, relying on data from Fiberloops (an online fiber brokerage) to claim that over 34,000 miles of local fiber were available at wholesale to competitive carriers.[14] This would make AT&T's 16,000-18,000 local fiber miles about half of the total non-ILEC fiber facilities available to competitors! Given SBC's previous reliance on AT&T's fiber facilities as a "sword" against attempts by competitors to seek regulatory restraint of SBC's formidable market power over the local bottleneck, SBC cannot now be allowed to use the opposite characterization of AT&T's facilities as a "shield" against regulatory scrutiny of this potentially harmful merger.

Depending on how the FCC ultimately decides to rule on the exclusionary vertical contracts that SBC imposes on its wholesale special access customers (and, thus, on the issue of geographic market definition), CompTel/ALTS believes market concentration could increase significantly as the result of this merger. On the one hand, if the Commission decides to continue to allow SBC to engage in its pattern of requiring wholesale customers to submit to anticompetitive, exclusionary terms in exchange for discounts, then the relevant geographic market is the entire SBC ILEC region. AT&T and MCI, by virtue of their ability to obtain larger special access discounts as well as their extensive local fiber networks, are the only competitors who can provide—through a combination of "type 1" and resold "type 2" circuits—special access services to wholesale customers throughout the SBC ILEC region. Thus, competitive alternatives

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[13] Opposition of SBC, RM No. 10593, at 13.

[14] *Id*. at 14.

will diminish from 3 to 2 (assuming, perhaps unrealistically, that Verizon and SBC are unable to reach a "detente" and Verizon allows MCI to continue to wholesale to competitors).[15]

On the other hand, if the Commission in the *Special Access NPRM* decides to constrain SBC's ability to engage in anticompetitive vertical restraints in the special access market, then AT&T's perception of the geographic market for special access is correct—the relevant market is very small; much smaller than an MSA. In this event, AT&T will be SBC's most significant special access competitor for most relevant geographic markets. Due to SBC's previously-noted anticompetitive practices, AT&T has never as a practical matter been able to compete on a fair "head-to-head" basis, so even these market shares will understate AT&T's likely future impact on a market where purchasers are not "punished" for diverting circuits to more efficient competitors. Moreover, since AT&T's capacity will come off the market and become excess capacity (a barrier to subsequent facilities-based entry)[16] in the hands of SBC , this may be the most accurate way to measure the anticompetitive effects of this merger. In this event, AT&T's exit from the market will clearly reduce alternatives for most carrier customers, and in a very significant way.

The reduction in competition for wholesale customers created by this acquisition will allow the post-merger SBC to exercise market power against the remaining wholesale carrier customers, and increase special access prices significantly. This is because even if there are firms remaining in the market with significant fiber facilities, it

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[15] In any event, SBC is likely to give Verizon/MCI significant concessions based on factors other than reasonable volume discounts, that will significantly skew the competitive landscape.

[16] See U.S. Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines ("the Guidelines"), Section 3.3.

is unlikely that these firms, even in the aggregate, have the *traffic* to effectively exert *any* discipline on the merged firm. In other words, the special access discount structures that are available today will not be available post-merger because this acquisition will eliminate the dynamic that makes today's discount schedules possible. Moreover, the unavailability of cost-based access to local facilities, and the unique ability of AT&T and SBC to construct in-region facilities with minimal regulatory constraint[17] further lessen the ability of other carriers to compete with the merged entity.

While there is currently insufficient evidence in the record for CompTel/ALTS to say with certainty what the anticompetitive effects of this merger will be, we can get a sense of the magnitude of the harm by looking at the special access discount schedule published in the recent *AT&T v.BellSouth* tariff complaint.

Comparison of Discount Levels[18]

Customer size (in eligible revenues)	under TSP (year 5)	under proportional volume discount plan
$3 - $10 million	3%	0.07%
$10 - $100 million	5%	0.24%
$100 - $300 million	9%	2.40%
$300 - $500 million	10%	7.20%
$500 - $600 million	12%	12.00%
over $600 million	12.5%	14.40%

[17] AT&T and SBC as offshoots of the oldest telephone companies in many cases have special authority to construct new facilities that other carriers don't have. For example, in California, AT&T and SBC are not required to obtain any new authorization to construct new facilities in existing rights of way. Most competitors, by contrast, must go through a 6 month or longer process to construct any such new facilities. The existing disparate treatment is intolerable and violates 253 of the Act; however, the effect of the merger would be to further restrict the ability of competitors to construct new facilities in competition with the incumbent. Moreover, it will be difficult for competitors to match the ability of the combined entity to construct new facilities to meet demand.

[18] *AT&T Corporation v. BellSouth Telecommunications, Inc.*, File No. EB-04-MD-010, Memorandum Opinion and Order, FCC 04-278 at ¶ 24 (released December 9, 2004).

As we can see from the table above, the discount received by AT&T from BellSouth is 12.5%. It is CompTel/ALTS' strong belief that there will be very few firms (if any at all) that will remain, post-merger, in any band above $300 million (there are very few firms at this level today). Moreover, we must keep in mind that the table above illustrates AT&T's successful claim that the rates in the $100-300 million band were skewed to favor BellSouth's long-distance affiliate (which was in the $100-300 million band). Because AT&T was successful in proving this contention, the column on the right would be the appropriate discount level for this plan if BellSouth's affiliate were treated the same as any other purchaser. In other words, these are the appropriate rates for us to look at going forward.

Assuming BellSouth's schedule is not terribly inconsistent with SBC's special access discount policies, and also assuming that SBC will correct any deficiencies to reflect a truly proportionate schedule as noted on the right, we can get a sense of the potential for competitive harm resulting from an AT&T/SBC combination. AT&T's traffic, post-merger, would go to the Bell distance affiliate—and thus would be eligible for a 14.4% discount. Even the largest remaining competitors, on the other hand, would be in the new $100-300 million band, and thus only eligible for a 2.4% discount—a full 12% less than the Bell/AT&T affiliate, and a full 10% less than the largest competitor received pre-merger. Smaller competitors will get virtually no discount. Given this analysis, it would seem almost certain that the merged firm will increase equilibrium special access rates by at least 10% to the remaining customers. It is therefore clear that, because AT&T and its wholesale customers are getting the benefit of AT&T's substantial fiber investment, wholesale customers will lose the substantial benefits of this investment

if this Application is approved. Moreover, it is also clear that, because of the enormous size advantage of the merged firm's long distance company, even separate affiliate requirements will not cure the anticompetitive effects of this merger. Finally, the post-merger firm's enhanced incentives and ability to profitably raise input prices will also create the incentives to engage in other exclusionary practices in every downstream market affected by the input price increases, including, *inter alia*, the retail enterprise market, the domestic and global long-distance market, and the Internet backbone market.

Competition in the provision of local connectivity will also suffer as a direct result of the merger because switch-based competitive carriers, including packet switch-based competitors like Covad Communications, will lose the opportunity to provide UNE-P replacements to AT&T as wholesale services. AT&T entered into one such deal to transition its UNE-P customer base to a circuit switch-based CLEC competitor, McLeod Communications.[19] Moreover, Covad Communications also announced plans to make available to UNE-P based competitors an IP-based service that would be a comparable service to ILEC-provided UNE-P.[20] Clearly, the loss of the largest potential customer for these services creates a disincentive for competitive carriers to develop wholesale substitutes for those few firms that might be intrepid enough to continue to compete for local mass-market customers. Thus, the elimination of AT&T as a potential customer virtually guarantees that the remaining AT&T mass-market local customers will

[19] McLeodUSA Press Release, "*AT&T and McLeodUSA Reach Agreement To Provide Customer Choice and Jointly Propose Rules for Continued Competition in Residential and Business Local Phone Service*." July 6, 2004. See also, "*McLeodUSA enters Multi-Year Agreement with MCI to provide Local Service on the McLeodUSA Network*." December 16, 2004.

[20] Covad Press Release, "*Covad to Conduct Trials of Next-Generation DSLAM Technology Supporting New Competitive Choices for Local and Long Distance Service,"* January 13, 2005. ("Line-powered voice access will offer an alternative to competitive local exchange carriers (CLECs) to transition lines off the Bell's UNE-P voice service platform and onto Covad's nationwide UNE-L network.").

have no choice but to revert back to a monopoly provider of local and long-distance services.

Clearly, the Commission must also gather more evidence from SBC and AT&T on the potential for competitive harm to both wholesale and retail consumers likely to result from this merger. In particular, the Commission should supplement its April 18, 2005 Information Request.

With respect to wholesale carrier customers, the Commission, for reasons stated in Section I above, wrongly assumes in Question 5 that the only two possible definitions of the geographic markets are SBC's incumbent LEC franchise area and an MSA. While the Commission properly allows that the entire LEC franchise area may be a relevant geographic market, it FCC ignores AT&T's contention, and its own conclusions in the TRO Remand proceeding with respect to high capacity digital loops and transport, that the proper geographic market may be much smaller than an MSA.

Similarly, in Question 6, the Commission also seems to accept the notion that the relevant geographic market for special access services is an MSA; as explained previously, the Commission should not so limit its investigation. For example, the Commission does not even know whether SBC has *any* special access contracts that provide equivalent discounts on an MSA basis to those available on an entire LEC region basis. If the geographic scope of SBC's pricing differs significantly, then SBC may have no special access contracts with carriers on an MSA-only basis. If SBC does not sell on an MSA basis, on terms that any buyer would purchase, then the MSA is not a properly-defined relevant market.

Moreover, implicit in Question 6, is the notion that only "type 1" facilities matter. However, as explained above, if the proper geographic region for analysis purposes is the entire incumbent LEC franchise area, then it is a *combination* of type 1 and type 2 facilities that matters for purposes of assessing existing competition. Put another way, if the *only* basis on which SBC grants special access discounts is over its *entire* ILEC region, then pockets of type 1 facilities do not explain the entire competitive dynamic. For example, if AT&T's facilities are located in areas that correspond with significant amounts of "embedded" SBC-provided circuits serving long-time AT&T retail customers, then the degree to which AT&T's facilities are being used, or not used, to provide services may not tell the entire story. It may well be that the existence of AT&T's facilities—in locations corresponding with relatively large amounts of SBC-provided "legacy" AT&T circuits—explains why AT&T is able to receive superior discounts region-wide. The import of this dynamic is that the loss of AT&T facilities in any dense pockets within SBC's ILEC region may dramatically understate the effects of the loss of these facilities in areas throughout SBC's ILEC region. Thus, the Commission must require the parties to submit supplemental information describing SBC's special access termination penalties and discounting practices, including terms on which the largest discounts are available. The Commission must also ask AT&T to provide information regarding the special access contracts that it has with SBC, as well as a geographic mapping of AT&T circuit demand (including SBC-provided, self-provided, and third-party-provided circuits in the SBC ILEC region), overlaid against the AT&T and third-party facilities information the Commission has already requested. Finally, the

FCC should ask for any competitive analysis of the pricing, or other performance data related to the special access market prepared by either SBC or AT&T.

With respect to residential retail market foreclosure, the Commission does not ask AT&T to provide information regarding its plans, absent the merger, to transition its residential customers to third party wholesale or retail carriers. The Commission should specifically ask AT&T to provide any UNE-L based or VoIP based strategies for migrating AT&T's UNE-P customers to its own facilities, or the facilities of any third-party carrier—including offers by other competitive carriers to purchase AT&T's UNE-P customers.

Finally, SBC has previously noted that, "the largest special access customers are carriers, like AT&T and WorldCom."[21] The loss of either, or both, of these large sources of demand could be devastating for the few remaining competitive providers of fiber-based transport services. The potential effects of this merger on competitive local transport providers due to outright foreclosure of competitive demand—especially within the SBC ILEC region—are obvious. We have previously discussed, at length, the exclusionary effect of SBC's special access contracts on competitive fiber-based transport providers, as well as the potential barrier to entry created by SBC's acquisition of excess capacity in the form of all of AT&T's fiber facilities. Both of these concerns are factors that the Department of Justice considers to make subsequent entry—in response to an exercise of market power by the post-merger firm—less likely.

> Factors that reduce the sales opportunities available to entrants include: . . . (b) the exclusion of an entrant from a portion of the market over the long term because of vertical integration or forward contracting by incumbents, and (c) any anticipated sales expansion by incumbents in reaction to entry, either generalized or targeted at customers approached

[21]Opposition of SBC, RM No. 10593 at 29.

> by the entrant, *that utilizes prior irreversible investments in excess production capacity*.[22]

Thus, the Commission should obtain information about the potential for vertical foreclosure of competitive wholesalers. In its April 18th Information Request, the Commission completely omitted any questions regarding the critical issue of whether post-merger entry could limit the exercise of the merged firm's market power. The Commission should require the Applicants to produce information that would help the Commission to understand the degree to which AT&T, as both an in-region and out-of-region competitor, uses competitive carriers. Similarly, the Commission should educate itself on the barriers that SBC currently erects to discourage wireless carriers, CLECs, long-haul carriers, and Internet backbone carriers from using competitive sources of special access when they are available.

B. The Proposed Merger Would Harm Consumers By Eliminating SBC As A Significant New Competitor Of AT&T In The Provision of In-Region National And Global Enterprise Services

The Applicants have explained that one of AT&T's major areas of expertise lies in serving large, complex enterprise customers. The Applicants also note, though, that SBC has entered this product market as well—at least in its 13 state ILEC region—within the past few years. (Kahan Declaration) In 2000, at the time of the WorldCom/Sprint proposed merger, the Department of Justice noted that while the BOCs could be considered prospective entrants in this market, the BOCs could not be included in the market at that time since they lacked the ability to provide interLATA services, which are a critical portion of this market.

[22] Guidelines at Section 3.3 (emphasis added).

According to the Applicants, SBC is a new entrant into this market, and beginning in 1999 has spent considerable resources to acquire the expertise and facilities necessary to compete in this market. (Kahan Declaration at ¶ 27) While SBC has not been as successful as it would like in entering the market for large enterprise customers, it has found its "sweet spot" in the large enterprise market with multi-location businesses whose locations are predominately within the SBC ILEC footprint, and which do not have more than 20% of their traffic as international traffic.[23] (Kahan Declaration at ¶ 27) Thus, for a certain, and likely significant, number of in-region large business customers this merger will significantly reduce competition. The Applicants themselves explain that:

> In bidding situations, such as those that occur in procurement for many business customers, it is widely recognized that 'market share' is a poor indicator of a firm's potential market power. If all firms in a bid competition are equally likely to win, it is the number of firms that best measures the extent of competition, not bidders' market shares. The Merger Guidelines . . . recognize that market shares may not be relevant in such situations, and note that '[w]here all firms have, on a forward-looking basis, an equal likelihood of securing sales, the Agency will assign equal market shares.'

(Carlton & Sider Declaration at ¶ 94, internal citations omitted)

Large enterprise customers will see a substantial reduction in competition by virtue of the loss of competition between SBC and AT&T for predominantly in-region services. Indeed, assuming the information identified by the Department in the WorldCom/Sprint complaint is still largely accurate, the concentration of this market will

[23] SBC only completed the process of enterprise long distance market in its 13 state region in 2003 and thus SBC is positioned to ameliorate its slow entry into the enterprise market. For example, SBC reported today its first quarter 2005 enterprise long distance revenues were up 27% over the same period last year.

dramatically increase by over 800 points from a pre-merger HHI of 2500 (25%*25%*4) to a post-merger HHI of more than 3300 (33%*33%*3=3327). Enterprise consumers will also be harmed by the loss of SBC as a potentially substantial competitor for national and global enterprise services.

Even this startling increase in in-region concentration may understate the true reduction in competition caused by the merger of one of the leading network-based providers of large enterprise services with the dominant incumbent LEC. This is because the merged firm will be in an ideal position to "manage" the now-more-concentrated retail market. Specifically, SBC will be able to monitor the success of its rivals (as a dominant key-input supplier, SBC will know the identity of every contract winner with certainty), will be able to be a leader with retail price increases, and will be able to signal (through input price increases) to rivals who take more than their "fair share" of retail contracts that the rival may want to bid less aggressively the next time around. Such anti-competitive behavior by the merged entity is also inevitable in the national and global enterprise market, to the detriment of those consumers.

The Applicants have provided no useful information that the Commission could use to analyze the effects of this merger on the market for in-region large enterprise customers. To the contrary, the only information the parties have provided is both narrative and contradictory. On the one hand, the Applicants contend that SBC needs to acquire AT&T because this market is so difficult to enter without end-to-end control of network facilities. SBC claims it cannot get major contracts because "it cannot guarantee its ability to manage and control the networks over which the service is provided." (Kahan Declaration at ¶ 25, Rice Declaration at ¶¶ 6-18) On the other hand, the

Applicants point to "systems integrators," such as IBM and EDS—entities that lease wholesale transport facilities entirely from other carriers—as a constraining influence on the merged firm's ability to exercise market power with respect to large enterprise customers. (Carlton & Sider Declaration, at ¶101) To add even more confusion, it is equally unclear how the leading firms in this market—AT&T, MCI, and Sprint (all of whom are unlikely to control the end-to-end network facilities used to serve their large enterprise customers)—manage to so successfully provide service while lacking any of the advantages the Applicants maintain they need to serve these customers—especially in the face of SBC's monopoly control over local connectivity, an essential input. The often-confusing and conflicting information provided by the Applicants begs the simple question, "who is providing service in this market today, and how are they providing service?"

The Commission, in its April 18th Information Request, largely asks the right questions; however, the time frame to which Question 4 is limited—basically, the past 6 months—is entirely too narrow to get a representative indication of who has been winning bids in SBC's "sweet spot" since SBC entered the market, and thus which firms will be "equally likely to win" in the future. Question 4 should be expanded to include all contracts on which SBC has bid since entering the market. Moreover, the Commission must only include in the market those firms who seem to have an equal chance of winning—that is, those that have won contracts frequently and consistently during the time SBC has been in the market.

III. The Merged SBC/AT&T Would Have Both The Ability and The Incentive To Harm Other Service Providers Through Price Squeezes And Raising Rivals' Costs.

SBC already has the *ability* to discriminate, given its virtual monopoly over both special access and local network facilities and the Commission's failure to regulate these critical inputs. The merger would give SBC a powerful *incentive* to discriminate, given its instant transformation into a dominant enterprise service provider. The merged company will have the ability to severely harm consumers by raising wholesale prices for essential local facilities to service providers attempting to compete with SBC/AT&T for enterprise customers. As explained in Section II, *supra*, it is reasonable to expect that post-merger SBC will likely be able to raise rates by at least 10% or more to its wholesale rivals. SBC will also have the ability and incentive to provision essential facilities in a manner that favors their own commercial interests. Consequently, enterprise customers will face higher prices, as SBC/AT&T raises its bids to reflect the higher input prices it can charge its rivals. Consequently, the post-merger SBC will be better situated to ensure that customers receive poorer service if they do business with a competitor and, in the longer run, have fewer choices as competitors are driven from the market.

SBC/AT&T will have the ability and incentive to handicap and ultimately destroy competitors by placing them in a classic price squeeze. Even if SBC/AT&T charged all GTS providers identical special access rates, it would still have a significant advantage over its competitors in the enterprise sector, because the "real" price that AT&T would pay to SBC for essential local access inputs would be the substantially lower forward-looking economic cost of such links. As a result, SBC/AT&T could offer retail prices much lower than its competitors and still be able to maintain a profitable offering. The

published special access rate payment made by AT&T, as the downstream affiliate of post-merger SBC, would move from one SBC pocket to another. Enterprise customers will pay higher prices as a result.

The Commission has long recognized the potential for exactly this type of behavior by a vertically integrated Bell company:

> Absent appropriate regulation, an incumbent LEC and its interexchange affiliate could potentially implement a price squeeze once the incumbent LEC began offering in-region, interexchange toll services. . . . The incumbent LEC could do this by raising the price of interstate access services to all interexchange carriers, which would cause competing in-region carriers to either raise their retail rates to maintain their profit margins or to attempt to maintain their market share by not raising their prices to reflect the increase in access charges, thereby reducing their profit margins. If the competing in-region, interexchange providers raised their prices to recover the increased access charges, the incumbent LEC's interexchange affiliate could seek to expand its market share by not matching the price increase. The incumbent LEC affiliate could also set its in-region, interexchange prices at or below its access prices. Its competitors would then be faced with the choice of lowering their retail rates for interexchange services, thereby reducing their profit margins, or maintaining their retail rates at the higher price and risk losing market share.[24]

The "absent appropriate regulation" trigger occurs upon approval of this Application, because currently the Commission exercises no regulatory oversight of prices or exclusionary terms set by SBC. AT&T's facilities, retail presence, and ability to aggressively prosecute violations by SBC—acting as the only security guard in a neighborhood where no police are present—were the only factors that had even limited effect in constraining SBC's market power. Further, in the absence of any, much less meaningful, special access performance measures, the post-merger SBC will, by providing higher quality of service to AT&T, more prompt installation of new circuits and more effective maintenance and repair of existing service, be able to give itself

[24] *Access Reform Order*, 12 FCC Rcd. 15982, ¶ 277 (1997)

benefits that would be very difficult to monitor, but that could seriously harm rival enterprise service providers' ability to compete effectively.

In order to prevent the post-merger firm from acting on its enhanced ability and incentive to harm competitors and their customers through price squeezes, the Commission would have to engage in a level of regulatory vigilance that, quite frankly the laws, rules and procedures by which the Commission must abide, do not allow. At a minimum, and among other things, it would be essential that pricing of such local connectivity over which SBC has market power, including *all* special access links between an SBC installation and a customer, must be at TELRIC rates. The current regulatory trend has prices for monopoly inputs—in the form of both UNEs and special access—moving in the opposite direction.

SBC's ability to discriminate in favor of its own affiliate might have been controlled by the requirements of Section 272 of the Communications Act, which imposes a separate subsidiary requirement and strict rules regarding public disclosure, arm's length relations, and non-discrimination in transactions between an RBOC's ILEC operating companies and affiliated long-distance entities. But Section 272 "sunsets" automatically within 3 years after an RBOC has received long-distance authority in each state under Section 271, unless the Commission acts to continue the application of those requirements – something the Commission has thus far refused to do. In SBC's case, Section 272 has already sunset in 5 states (Texas, Kansas, Oklahoma, Arkansas, and Missouri), it never applied in Connecticut, and it is scheduled to sunset in California by December 2005, and in the remainder of SBC's territory by October 2006. Because a merger would give SBC every incentive to use its market power over local facilities to

competitors' disadvantage, and ultimately destroy its competitors, the FCC must deny the Application.

IV. The Merger May Reduce Competition in the Internet Backbone Market

A. The Basic Concern With Dominance in the Internet Backbone Market

The theory of anticompetitive harm from Internet backbone mergers was first developed by three economists, Jacques Cremer, Patrick Rey, and Jean Tirole, who were retained by GTE to aid in its opposition to the WorldCom/MCI merger in 1998.[25] Relying on game theory, Cremer et al. described the competitive interaction between Internet backbone providers (IBPs) in a market characterized by significant network effects or externalities and the conditions that could lead to the domination of the Internet backbone by a single firm.

A customer of an IBP (*e.g.*, an ISP, a content provider, or a business requiring direct access to the Internet) pays the IBP for access to customer sites across the Internet including customer sites not directly connected to the IBP's own network. In order to meet the demands of its customers for broad Internet access, the IBP must reach interconnection agreements with other IBPs. These are essentially bilateral bargaining agreements where the relative size of each IBP's customer base plays the key role in the bargaining. Relatively larger IBPs (in terms of customer base size) can extract fees from smaller IBPs for access to the larger IBP's customer base. From the perspective of the

[25] The three economists were with the Institute of Industrial Economy in Toulouse, France. The paper they submitted on behalf of GTE is Cremer, et al., "The degradation of quality and the domination of the Internet." This model was later published as "Connectivity in The Commercial Internet," *Journal of Industrial Economics,* v. 48, n.4, pp. 433-472, December 2000.

smaller IBP, the payment of the fee is preferable to the denial of access to the large IBP's more desirable customer base. From the perspective of the larger IBP, it recognizes that its more desirable customer base will allow it to extract fees from smaller IBPs.[26] If two IBP's are of roughly equal size, they will recognize that neither possesses a bargaining advantage and they will decide to interconnect on a settlements-free basis. In the Internet backbone market, this bargaining outcome is referred to as peering.

Cremer et al. discuss strategies that a dominant firm can employ to enhance its dominance including pricing and interconnection degradation strategies. These strategies will work, they argue, because their effect will be to further increase the size of the customer base of the dominant firm and reduce the size of the customer bases of other IBPs. In the absence of dominance, competition among IBPs should yield competitive fees, because an IBP has incentives to increase their number of customers for two reasons: first, customers are a direct source of revenues (through fee payments) and second, a larger customer base increases its bargaining power versus its peers. But if an IBP can achieve dominance, it will gain the ability to impose supracompetitive fees and ultimately harm consumers.

DOJ has opposed at least three Internet backbone mergers, WorldCom/MCI in 1998, WorldCom/Sprint in 2000, and WorldCom/Intermedia in 2000. DOJ stopped the WorldCom/Sprint merger and won partial divestitures in the other two cases. DOJ's theory of antitrust harm in these three cases is similar to the theory contained in Cremer,

[26] More generally, this can be restated in terms of the total losses each party would suffer: the threat to deny interconnection is credible if one's losses are smaller. In practice, smaller IBPs often pay transit fees to the very largest IBPs, called Tier 1 IBPs, to provide interconnection to all of the networks connected to the large IBP's network.

et al. paper as can be seen from the following paragraphs in its WorldCom/Sprint complaint:

> 33. The proposed merger threatens to destroy the competitive environment that has created a vibrant, innovative Internet by forming an entity that is larger than all other IBPs combined, and thereby has an overwhelmingly disproportionate size advantage over any other IBP.
>
> 34. The proposed transaction would produce anticompetitive harm in at least two ways. First, it would substantially lessen competition by eliminating Sprint, the second-largest IBP in an already concentrated market, as a competitive constraint on the Internet backbone market. The elimination of this constraint will provide the combined entity with the incentive and ability to charge higher prices and provide lower quality of service for customers.
>
> 35. Second, the combined entity ("UUNET/Sprint") will have the incentive and ability to impair the ability of its rivals to compete by, among other things, raising its rivals' costs and/or degrading the quality of its interconnections to its rivals. As a result of the merger, UUNET/Sprint's rivals will become increasingly dependent upon being connected to the combined entity, and the combined entity will exploit that advantage. Such behavior will likely enhance the market power of the combined firm, and ultimately facilitate a "tipping" of the Internet backbone market that will result in a monopoly.

The theory of anticompetitive harm developed by Cremer et al. and utilized by DOJ applies with equal force to the SBC /AT&T merger.

B. The Present Merger Presents Classic Internet Backbone "De-Peering" and Dominance Concerns

SBC is one of the largest wireline providers of local, long distance, voice, and data services in the country. SBC also controls the nation's largest wireless carrier. AT&T owns and operates the largest Internet backbone in the country.[27] Thus, SBC possesses two decisive advantages that will enable them to significantly increase the

[27] "AT&T carries more combined data, voice, and Internet traffic than any other carrier in the U.S.: 675 trillion bytes (terabytes) and 300 million voice calls (average day)" http://www.att.com/wholesale/docs/gws_sheet.pdf

customer bases of their respective IBP downstream affiliate at the expense of their IBP competitors. First, with their bottleneck monopoly control over special access to businesses requiring dedicated, non-switched connections to the Internet, RBOCs will have the incentive and ability to discriminate in price and quality against the IBP competitors of the RBOC's respective downstream affiliates. The types of businesses requiring dedicated access to the Internet include ISPs, content providers and other businesses seeking dedicated Internet connectivity.

Second, SBC will have the incentive and ability to route the Internet traffic of its large customer base of residential users and small businesses to their respective downstream affiliates. SBC has ambitious plans to increase sales of DSL to both residential and small business customers[28] and to deploy optical fiber to the home throughout their regions to provide residential customers with high speed bandwidth to connect to the Internet. SBC also notes that one of the benefits of this merger is that while AT&T's innovations were previously only available to AT&T's large enterprise and carrier customers, SBC will now take these innovative, packet-based services and offer them throughout all of SBC's customer classes.

SBC also notes that it is focused on some projects that will allow wireless services to be integrated more fully into the IP-based services backbone. SBC, through Cingular, is already the nation's largest wireless operator, and will aggressively be deploying 3G services, which will cause their level of wireless-originated Internet traffic to explode over the next few years. What is striking in the discussions in the Rice and Eslambolchi

[28] One investment analyst report notes the growth of SBC's DSL and Internet revenues, which show the firm's increasing ability to generate Internet backbone customers. The fourth quarter of 2004 saw "a 27.2% rise in DSL and Internet revenues, which amounted to US $594 million, reflecting a 45.2% growth in DSL lines that amounted to 5.1million." Epsilon, "Results of SBC Communications As of December 31, 2004," February 4, 2005, p. 1.

Declarations is that the parties plan to use the Internet backbone much more extensively than they have used it in the past. So it seems clear that the merged firm will, almost from day one, have more traffic on its backbone than either firm had previously.

Moreover, a historical analysis will dramatically understate SBC's current level of Internet backbone traffic, which has been growing dramatically since SBC has been able to enter the interexchange market in the past few years. While SBC was not prohibited from providing Internet backbone services by the Telecommunications Act, it seems unlikely that it began offering Internet backbone services prior to launching long distance services in the state following Section 271 approval. Without the ability to offer in-region long-distance voice and data services to business customers in a state, it likely was not economically feasible to deploy and operate fiber-based, in-region long distance networks.

Table 1 below shows when SBC launched long distance service on a state by state basis shortly. Each state's share of the population in the SBC 13-state region is shown in the fourth column and the cumulative share is shown in the fifth column. The data show that prior to December 31, 2002, SBC launched long distance service in states representing only 32.3% of the SBC region's total population.[29] The table also shows that prior to September 26, 2003, SBC had launched long distance service in states representing only 62.3% of the SBC region's total population.

[29] It should be noted that using total state population provides only an approximate measure of the significance of state-by-state long distance launches since other ILECs also provide telephone service in most SBC states.

Table 1. Date on Which SBC Launched Long Distance Service Following FCC Section 271 Approval Ranked by Date of Launch

SBC State	Date Long Distance Service Launched	2000 Population	Share of State Total	Cumulative Share of State Total
Connecticut	1993	3,405,565	2.8%	2.8%
Texas	July 10, 2000	20,851,820	17.4%	20.3%
Kansas	March 7, 2001	2,688,418	2.2%	22.5%
Oklahoma	March 7, 2001	3,450,654	2.9%	25.4%
Arkansas	November 26, 2001	2,673,400	2.2%	27.6%
Missouri	December 7, 2001	5,595,211	4.7%	32.3%
California	December 31, 2002	33,871,648	28.3%	60.6%
Nevada	April 25, 2003	1,998,257	1.7%	62.3%
Michigan	September 26, 2003	9,938,444	8.3%	70.6%
Illinois	October 24, 2003	12,419,293	10.4%	81.0%
Indiana	October 24, 2003	6,080,485	5.1%	86.0%
Ohio	October 24, 2003	11,353,140	9.5%	95.5%
Wisconsin	October 24, 2003	5,363,675	4.5%	100.0%
SBC State Total		119,690,010		

Sources: http://www.sbc.com/gen/public-affairs?pid=445
http://www.census.gov/popest/states/NST-ann-est.html

Unlike other potential areas of anticompetitive harm created by this merger, the Applicants actually seem to understand that the Internet is a very big issue, and have devoted an entire declaration to this issue. Dr. Marius Schwartz, in his declaration, attempts to assuage concerns over one of the most significant aspects of this merger. Unfortunately, Dr. Schwartz's declaration dramatically understates the likely effect of this merger on the Internet backbone market. As an initial matter, Dr. Schwartz fails to take into account SBC's existing transit purchases from other Internet backbone providers and assign this share to the post-merger firm. This is a necessary step in constructing an accurate analytical framework. As Christopher Rice, SBC's Executive Vice President—Network Planning and Engineering, explains in his declaration, "we currently use Sprint, Level 3 and WilTel (but not AT&T) for transit traffic. Much of that transit traffic will move onto the AT&T network . . . . " (Rice Declaration at ¶16) Moreover, using 2 year old

numbers, Dr. Schwartz adopts a very static approach to analyzing the impact of the merger on the provision of Internet backbone services. Dr. Schwartz's analysis does not capture the dynamic nature of SBC's entry into the Internet backbone market and, thus, understates the potential for the merged firm to quickly acquire enough traffic to be able to "de-peer" with other Tier 1 backbones and discriminate against smaller rivals.

Table 3. Revenue Gain (Loss) 2002-2003 by Internet Backbone Providers for Internet Backbone Related Functions ($Million) (Ranked by Revenue Gain)

	2002 Revenues	2003 Revenues	Revenue Gain (Loss) 2002-2003	Percentage Revenue Gain (Loss) 2002-2003
SBC	313	396	84	26.7%
AT&T	1,063	1,134	71	6.7%
BellSouth	343	400	58	16.8%
Verizon	350	403	53	15.0%
C&W	64	73	9	14.1%
Savvis	153	107	(46)	(30.2%)
Qwest	227	170	(57)	(25.2%)
Sprint	664	600	(64)	(9.6%)
XO	180	99	(81)	(44.9%)
MCI	931	699	(232)	(24.9%)
Level 3/Genuity	525	283	(242)	(46.0%)

Source: Declaration of Marius Schwartz, Table 3 and Appendix 3. See text above and accompanying footnotes for more details about the sources and methodology

Note: Level 3 and Genuity revenues for 2002 combined to make a valid two-year comparison. Level 3 acquired Genuity in early 2003.

C. This Merger Also Presents Packet-Discrimination Concerns

AT&T's backbone is the largest Multi-Protocol Label Switching ("MPLS") network in the U.S. MPLS enables the network operator to prioritize packets, providing

superior performance over the ordinary method of routing Internet traffic, which requires routing table look-ups for all packets routed.[30] This form of routing has a lower latency rate (the amount of time it takes a data packet to travel roundtrip between two points in the network) and packet loss rate than ordinary Internet routing. Thus, MPLS networks have a big advantage over "ordinary" Internet backbones. SBC Declarant Christopher Rice makes this point when he discusses the benefits associated with integrating SBC's traffic with AT&T's MPLS network, "[t]his reduction in latency and packet loss are especially significant for 'real time' services such as VoIP, video, video conferencing, and collaboration." (Rice Declaration at ¶ 12) Rice goes on to note, "[t]he integrated network will be significantly better suited to IP-based services." (*Id*. at ¶ 15) Similarly, "[t]he benefits of network integration are even more significant for business 'data' traffic (including the traffic traditionally considered data, as well as voice over IP or "VoIP", IP video, and other real-time IP-based traffic)." ([Rice Declaration at ¶ 9)

Dr. Schwartz, in his declaration, does note even attempt to translate the Applicant's claims of "efficiency benefits" into an estimated change in packetized traffic and increased revenue levels that will now be associated directly with the merged firm's IP backbone. This is extremely significant, and consideration must be given not only to what the Applicants' Internet traffic levels are today, but how this merger will change the incentives of the merged firm to put packets on the Internet.

Correspondingly, and perhaps most importantly, the Commission must consider that the nature of the merged firm's Internet traffic will now change in that the merger will dramatically increase the level of "sticky" Internet traffic on the nation's largest Internet backbone. The new traffic can be considered "sticky", *i.e*., likely to remain fixed

[30] Newton, Harry. Newton's Telecom Dictionary, 17th Edition. CMP Books: NewYork, 2001.

to the merged firm's backbone, because the carrier with retail customer control will pick the backbone, and all other backbone providers will now, or in the near future, have a greater amount of "destination" traffic going to SBC's backbone. Thus, the merged firm will be able to perceive a greater degree of demand inelasticity in those seeking interconnection with the merged firm's backbone—be they current "Tier 1" carriers, or purchasers of transit service.

The point to be made is that, while Dr. Schwartz did attempt to address the historical concerns that have been raised about "straight" de-peering, he does not consider the merged firm's increased incentives and ability to better practice price discrimination with respect to what might be termed "priority packet dependent services." Services that are heavily dependent on proper prioritization by AT&T's MPLS backbone (which is built to do just that) are likely to be the higher margin services for which applications providers might try to compete with the merged firm at retail. These same services, though, are most demand-inelastic with respect to service quality. Given the indisputable increase in the post-merger firm's asymmetric market power with respect to rival backbone providers (both rivals in the backbone business, and backbone providers to retail rivals) it seems likely that the post-merger Internet backbone will be in a position to better capitalize on the service-specific, even packet-specific, demand inelasticities of its rival backbone providers and rival service providers, using smaller backbone rivals.

As Christopher Rice explains, "Internet traffic is 'best effort' traffic, such as surfing the web, which can tolerate latency and packet loss with relative little reduction in utility to the customer. The IP-based services traffic . . . , on the other hand, is traffic in which the utility to the (usually business) customer is significantly affected by such

issues as latency and packet loss." (Rice Declaration at ¶ 9) Thus, given the critical role of QoS in ensuring the level of performance that business customers demand, it is not difficult to imagine circumstances in which the merged firm may have both the incentive and ability to practice anticompetitive price discrimination raise its smaller rivals' costs by imposing a more steeply-graduated scale for higher QoS packet-delivery than either firm would have the incentive or ability to extract absent the merger. Thus, in this instance, packet-level QoS becomes just another input over which the merged firm will be able to exercise and exploit post-merger market power, where today the incentive and ability to exercise that market power does not exist with either firm separately.

The ability to control QoS for customers terminated off of SBC's backbone, however, is but one additional method the merged firm will have with which to harm its rivals and customers. For the same reasons discussed in Sections II and III, *supra*, the merged firm will also control a powerful lever over its backbone rivals in the form of local connectivity. The merged firm's monopoly over special access will allow it to engage in the same forms of anticompetitive conduct to which all carriers who require special access are vulnerable, i.e. price squeezes, raising rivals' costs, and degrading access through poor performance to the competitor or superior performance to the affiliate.

D. The Commission Must Obtain More Information to Evaluate the Potential of this Merger to Reduce Competition for Internet Backbone Services

The Commission's April 18th Information Request asked for a lot of useful information about the potential for harm in the Internet backbone services market. However, in addition to the information already requested by the Commission, the

Commission should also ask the parties to produce any forecasts they have of Cingular's likely demand for backbone services as 3G begins to grow. Experience in other countries suggests that these next generation wireless services will be a significant source of traffic on the net in the next few years.

Likewise, the Commission should also ask the parties to describe, consistent with their answers to Question 23, how much of your existing revenues could come from services, which when packetized, would traverse the merged firm's Inernet backbone. Similarly, the FCC should also require the parties to answer, with respect to Question 23, not only whether the alleged efficiency benefits could be obtained via contract (as opposed to acquisition), but also why SBC is not purchasing transit service (and the associated functionalities of AT&T's IP backbone) today. Does SBC believe that AT&T may presently have market power, or the ability to discriminate against SBC?

The Commission should also ask for plans, projections and associated revenue and traffic forecasts for every service identified in the Rice and Eslambolchi declarations. The Commission must learn as much as possible about the Internet as it is likely to exist in the next two years if it is truly to be able to analyze the potential anticompetitive effects which may surface first with this merger.

V. The Applicants Have Failed To Satisfy the Public Interest Requirement

As discussed above, SBC and AT&T have failed thus far to come forward with even the minimum relevant and probative information that the Commission needs to assess the potential anticompetitive effects of the merger. Moreover, the information that is currently available to the Commission compels a finding that grant of the transfer

applications would not promote competition and therefore would not serve the public interest, convenience and necessity.

A. The Proposed Merger Would Permit SBC To Acquire Its Principal Wholesale Services Regulator

The 1996 Telecommunications Act did not intend to culminate in the effective reemergence of the pre-divestiture Bell System with two mega-RBOCs, vertically integrated and dominating regional markets. The failures that led to this proposed acquisition are many, but it is the additional failures *caused* by the proposed merger that are of concern here. In addition to doing violence to the intended goal of the Act (a competitive local and long distance market), the proposed acquisition of AT&T by SBC violates a fundamental assumption underlying the Act itself – that is, that a reasonable resource balance would exist between entrant and incumbent so that the creative tensions of negotiation and arbitration could produce just and reasonable wholesale arrangements.

As the Supreme Court noted, the Telecommunications Act was intended "to reorganize markets by rendering … monopolies vulnerable to interlopers," with provisions "designed to give aspiring competitors every possible incentive to enter local retail telephone markets."[31] Significantly, the Telecom Act did more than attempt to reorganize local markets, it also effected a subtle shift in the regulatory role of government. For all practical purposes, the Act *privatized* responsibility for the regulation of the RBOCs' wholesale services with their competitive customers, relying on

[31] *Verizon*, 535 U.S. 467, 152 L. Ed. 2d 701, 122 S. Ct. (2002).

such entities to arbitrate and enforce their rights.[32] Consequently, the proposed merger represents not only a consolidation and expansion of SBC's market power, it also represents its acquisition of its principal regulator for wholesale services, AT&T.

Prior to passage of the Telecommunications Act, regulation focused on retail pricing and was largely conducted at the state level. The principal resources used to police RBOC behavior were publicly-funded: state commission staffs, Offices of Public Counsel, and other state-level consumer utility advocate organizations.[33] As regulation moved from traditional rate-base/rate-of-return approaches to more flexible forms of price regulation, these public resources continued to monitor earnings, service quality and other issues important to retail regulation.

The Telecommunications Act, however, shifted the focus of regulation from the *retail* level (where competition was intended to take root), to a system of regulation intended to create a *wholesale* level beneath it.[34] The wholesale tools adopted by Congress were comprehensive – resale of the incumbent's services,[35] access to network elements at cost based rates,[36] and, for RBOCs wanting to offer long distance services in-region, the added insurance of the competitive checklist.

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[32] By this comment we do not intend to trivialize the important efforts of this Commission and its counterparts in the States. We recognize that each has committed substantial resources to *evaluating* the respective claims of the RBOCs and their entrant-competitors.

[33] In some states, intervener funding was available to assure that state regulation would be balanced and not distorted by the incumbent utilities' resource advantage.

[34] The Supreme Court recognized this very focus in *Verizon*, describing the Act as having been "…designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbent's property." (emphasis added).

[35] *See* §251(c)(4).

[36] See §251(c)(3).

In addition to its shifting of regulatory emphasis from the retail to wholesale levels, however, the Act also shifted the principal responsibility for regulatory effort from the public sector to the private sector. In the wholesale scheme created by the Act, the principle activities of wholesale regulation – i.e., the creation of open cost models, the development of performance penalty plans, the litigation needed to establish and enforce access rights, as well as the monitoring of wholesale offerings – are substantively born by competitors. To be sure, the states and this Commission must adjudicate the disputes raised by these activities, but the creative tension so central to the Act's implementation depende upon the private resources committed to the regulatory process by competitive entrants.

When Congress decided to rely on the creative tensions between the incumbent RBOC and its "requesting carrier" competitors, it did so because the landscape in 1996 embodied a reasonable resource balance between monopoly and competitive sectors.

The Incumbent-Competitor Resource Balance at Act Passage[37]
($ millions)

Incumbent LEC Sector		**Competitive Sector**[38]	
Company	**Revenues**	**Company**	**Revenues**
GTE[39]	$19,957	AT&T	$79,609
BellSouth	$17,886	MCI	$15,265
Bell Atlantic	$13,430	WorldCom	$3,639
Ameritech	$13,427		
NYNEX	$13,407		
SBC	$12,670		
US West	$9,284		
Pacific Telesis	$9,042		
Total	$109,103	Total	$98,699

As the above table shows, when Congress was crafting the Telecommunications Act, resources were roughly balanced between the monopoly and competitive sectors. The largest expected local entrants were established interexchange carriers,[40] well financed and (at least presumably) positioned to become effective local competitors.[41] The single largest carrier was AT&T, which at the time included the resources of NCR and (what would ultimately become) Lucent. The regulatory model adopted by Congress, with its heavy reliance on bilateral negotiation and arbitration, reflected the relative resource balance that existed at the time.

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37 Source: 1995 10K Reports.

38 In addition to these large competitors, there were a handful of much smaller entrants with comparatively modest revenues and numbers of employees.

39 Table includes only GTE's domestic employees.

40 A fourth interexchange carrier (Sprint) was also an incumbent LEC and has not been included in the above table as either a member of the competitive or monopoly sectors of the industry.

41 It is useful to note that the total revenues of the interexchange carriers is partially inflated by revenues recovered in retail toll rates that ultimately are paid to incumbent local exchange carriers as access payments.

What Congress could not have anticipated, however, was the extent to which the incumbents would successfully frustrate its fundamental objective of achieving a competitive local market. *Twice* promising that prior consolidations would create the necessary scale to compete out-of-region,[42] two super-RBOCs have emerged to dominate the monopoly sector. Coupled with a strategy of perpetual litigation intended to erode their wholesale obligations, the RBOCs have succeeded in tilting the resource balance against the competitive sector.

The Incumbent-Competitor Resource Balance – Pre-Merger[43]
($ millions)

Incumbent LEC Sector		**Competitive Sector[44]**	
Company	**Revenues**	**Company**	**Revenues**
Verizon	$71,283	AT&T	$30,537
SBC[45]	$52,308	MCI	$20,690
BellSouth	$20,300	Level 3	$3,712
Qwest	$13,809	XO	$1,300
		McLeod	$716
		Broadwing	$672
		Time Warner	$653
		ITC^DeltaCom	$583
		Talk America	$471
		Covad	$429
		US LEC	$356
		Trinsic	$251
		Eschelon	$158
		PacWest	$124
Total	$157,700	Total	$60,653

[42] Both SBC (when it acquired Ameritech) and Verizon (when it acquired GTE) claimed that these mergers would provide them the scale they needed for out-of-region entry.

[43] Source: 2004 10K Reports.

[44] Listing includes competitive carriers that have reached sufficient size to (at least, at one time) attract public capital.

[45] SBC revenues include 60% of Cingular's revenues for 2004.

As the table above demonstrates, one consequence of the RBOC consolidation that has already occurred is the ever-tilting resource imbalance favoring the incumbent. The resource imbalance that exists today (as shown in the table above), however, is more manageable than the imbalance that will result from the acquisition of AT&T by SBC (and the acquisition of MCI by either Verizon or Qwest). AT&T and MCI are responsible for approximately 85% of the revenues of the competitive sector, and 80% of its employees.

If SBC is permitted to acquire AT&T (and MCI is acquired by either Verizon or Qwest), the resource balance so critical to the Act's successful operation will be crippled. In practical terms, the RBOCs are poised to acquire their regulators – rendering the Act's reliance on privately-funded arbitrations, cost-proceedings and performance monitoring irrelevant.

The Incumbent-Competitor Resource Imbalance – Post-Merger
($ millions)

Incumbent LEC Sector		**Competitive Sector**	
Company	**Revenues**	**Company**	**Revenues**
Verizon	$71,283	Level 3	$3,712
SBC	$52,308	XO	$1,300
Qwest	$13,809	McLeod	$716
BellSouth	$20,300	Broadwing	$672
		Time Warner	$653
AT&T[46]	$30,537	ITC DeltaCom	$583
MCI	$20,690	Talk	$471
		Covad	$429
		US LEC	$356
		Trinsic	$251
		Eschelon	$158
		PacWest	$124
Total	$208,927	Total	$9,426

[46] Including AT&T and MCI on the "Incumbent LEC" side of the ledger admittedly overstates revenues (by the amount of access charges that will become merely internal transfer payments) and employees (since substantial layoffs are expected). Adjusting for such factors, however, would not materially effect the discussion or conclusion that the proposed transactions are not in the public interest.

As the above table demonstrates, the fundamental predicate to the Act – that privately funded entrants can effectively police the wholesale services of the incumbent – will be violated by the proposed mergers. The Act's reliance on a creative tension between incumbent and entrant (with the requisite arbitration by state utility commissions) will be irreparably harmed. With the simple strategy of attrition through litigation – a strategy that the RBOCs have perfected, basic competitor rights will continue to erode.

B. The Merger Will Not Promote Competition

In reviewing merger applications, the Commission has repeatedly stressed that the Communications Act requires it to actively promote the development of competition in telecommunications markets, not merely to prevent the lessening of competition, which is the province of the antitrust laws. *See e.g., In re Applications of Ameritech Corp., and SBC Communications, Inc., For Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, FCC 99-279 (released October 8, 1999) ("*SBC/Ameritech Order*) at ¶63. In terms of achieving the statutory goal of promoting competition, a marriage between the nation's second largest incumbent local exchange carrier [47] and the nation's largest long distance/competitive local exchange carrier does not pass the red-faced test.

[47] *Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau at Table 7.3 (May 2004).

From the beginning, SBC has attempted to defend itself against the pro-competitive, ILEC monopoly-dismantling provisions of the 1996 Act by engaging in what the Commission itself has characterized as an "acquisition strategy." On the heels of the passage of the Telecommunications Act in February 1996, SBC announced its agreement to merge with PacTel, one of the other six Baby Bell companies. In 1998, SBC merged with SNET, the primary incumbent LEC in Connecticut. The following year, SBC added Ameritech, a third Baby Bell, to its holdings. *Id.* at ¶ 26. And just six months ago, SBC's wireless affiliate, the nation's second largest mobile telephone carrier based on subscribership, acquired AT&T Wireless, the nation's second largest mobile telephone carrier based on revenues, to form the nation's largest wireless carrier. *In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent To Transfer Control of Licenses and Authorizations,* WT Docket 04-70, Memorandum Opinion and Order, FCC 04-255 (released October 26, 2004) ("*Cingular/AT&T Order*"). If the Commission approves this merger, it will allow SBC to swallow its biggest competitor in both the local and long distance markets. With the acquisition of AT&T, SBC will have completed another chapter in the reconstruction of the pre-divestiture Ma Bell, which on its face is inconsistent with the fundamental goal of the Telecommunications Act of 1996 -- bringing the benefits of competition to the American public.

Under these circumstances, SBC and AT&T bear an extremely heavy burden to prove that the merger will serve the public interest. *See, In re Application of GTE Corporation and Bell Atlantic Corporation For Consent to Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application To*

Transfer Control of a Submarine Cable Landing License, CC Docket 98-0184, Memorandum Opinion and Order, FCC 00-221 (released June 16, 2000) (*Bell Atlantic/GTE Order*) at ¶ 171 ("The Commission warned in the *Bell Atlantic/NYNEX Order* and reiterated in the *SBC/Ameritech Order*, that 'future applicants bear an additional burden in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity.'")

In order to make the requisite public interest finding, the Commission must be "convinced that [the merger] will *enhance* competition." *Applications of NYNEX Corporation and Bell Atlantic Corporation For Consent To Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, FCC 97-286 (released August 14, 1997) at ¶ 2 (emphasis added). A merger will not be "pro-competitive if the harms to competition – i.e., enhancing market power, slowing the decline of market power, or impairing [the] Commission's ability properly to establish and enforce those rules necessary to establish and maintain the competition that will be a prerequisite to deregulation – are [not] outweighed by the benefits that enhance competition." *Id.* As discussed above, the paucity of information that SBC and AT&T have presented in their Application precludes a finding that there are competitive benefits to this merger, much less benefits that outweigh the competitive harms caused by the loss of SBC's largest and strongest rival. For this reason, the Commission must deny the merger application.

C. The Merger Will Increase SBC's Ability To Engage in Anticompetitive Behavior

In analyzing the potential impacts of mergers among major carriers in the past, the Commission has correctly recognized that incumbent LECs, such as SBC, have the incentive and ability to discriminate against competitors in the provision of local services, interexchange services and advanced services and that such incentives and ability will increase as a result of the merger. Giving an ILEC the tools to enhance its ability to discriminate harms the public interest by adversely affecting not only the ability of competitive carriers to remain viable alternatives in the market, but also the ability of consumers to choose among carriers, services and pricing plans. *SBC/Ameritech Order* at ¶ 186.

At the time the Commission approved the SBC/Ameritech merger five and one-half years ago, it expressed serious concern about the likelihood that the merger would increase harmful discrimination against competitive providers of local exchange services to small business and residential customers. The Commission acknowledged that SBC had the incentive to discriminate against its retail rivals in order to preserve its customer base and win back the customers its competitors were sure to lose due to the discrimination. The Commission traced SBC's ability to discriminate against its CLEC rivals to its monopoly control over the key inputs, such as interconnection and network elements, that CLECs need to provide service to their end users. *SBC/Ameritech Order* at ¶¶188-190.

Today, SBC continues to maintain the ability to discriminate through control over essential inputs especially against CLEC s that serve the small business and residential

retail markets. SBC also continues to maintain the incentive to discriminate in an effort to regain the millions of mass market customers it has lost to AT&T, MCI and other CLECs offering service using the unbundled network element platform ("UNE-P"). [48]

Although the Commission concluded in 1999 when it approved the SBC/Ameritech merger that the "theoretical and empirical evidence" suggested that SBC may not have been discriminating against its retail competitors to the full extent of its ability, *SBC/Ameritech Order* at ¶191, it could not reach the same conclusion today. At the time of the Ameritech merger, SBC had not received approval pursuant to Section 271 of the Act to provide long distance service in any of its in-region states. With the carrot and stick apparatus of Sections 251 and 271 of the Act still in play, SBC had the most compelling motivation to limit or control its discriminatory conduct because the price of entry into the long distance market was convincing the Commission that it had opened its local markets to competition. Now that the Commission has granted SBC interLATA authority regionwide, that motivation has disappeared.

The only non-interim and non-transition period agreements for network elements for which the Commission has found no impairment that is posted on SBC's website is an agreement for local switching/shared transport. What that agreement demonstrates is that as soon as the Commission deprived CLECs of the ability to access the TELRIC-priced

[48] SBC attributes its loss of retail access lines and the concomitant decline in voice revenues primarily to competitors using UNE-P. SBC Communications, Inc. Form 10-Q for the period ended June 30, 2004, at 16. http://www.sec.gov/Archives/edgar/data/732717/000073271704000525/q204.htm Indeed, in it s first quarter SEC filing issued today, SBC posted positive retail access line growth for the first time in 5 years, reaping the benefits of the Commission's virtual elimination of unbundling rules.

UNEs they need to serve end users,[49] SBC exercised its ability to significantly increase the prices for certain essential inputs and implement a volume discount scheme that unlawfully discriminates in favor of AT&T and against smaller CLECs and may very well even be predatory. Alternatives other than tariffed special access pricing that SBC may be offering for the delisted high capacity loop and transport network elements[50] are veiled in secrecy because SBC insists that CLECs sign non-disclosure agreements before initiating negotiations. By doing so, it has ensured that any such offerings or agreements will not be subject to regulatory scrutiny, thereby eliminating the possibility that it will be called to task for discriminating against its CLEC competitors. For this reason, the Commission will not be able to effectively police or prevent unjust and unreasonable discrimination

D. SBC's 271 Local Switching/Transport Offering Is Discriminatory

SBC and AT&T announced their merger on Monday January 31, 2005. On Friday February 4, the Commission released the *TRO Remand Order*, in which it determined, among other things, that SBC was no longer required to make unbundled switching, and by extension the UNE-P, available to CLECs. [51] On or about March 8,

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[49] *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket 04-313, CC Docket 03-338, Order on Remand, FCC 04-290 (released February 4, 2005) (finding that CLECs are not impaired without access to UNE dark fiber and switching and severely limiting UNE access to high capacity loops and transport).

[50] SBC has made it clear that any traffic on delisted UNE high capacity loops and transport that CLECs do not groom off of SBC's network prior to the end of the 12 month transition period will be priced at special access rates. With respect to dark fiber, SBC has instructed CLECs to remove services they are providing over dark fiber high capacity loops and dark fiber transport between wire centers meeting the criteria set forth in the TRO Remand Order prior to the end of the 18 month transition period or SBC will disconnect the facilities. SBC Accessible Lettter CLECALL05-20, dated February 11, 2005.

[51] *Id.*

2005, SBC posted on its commercial agreement website[52] a "271 Local Switching" offering to replace the Section 251 unbundled switching element previously available to CLECs. The rate for the "271 Local Switching" option covers switching and shared transport only. CLECs must purchase the loops they need separately and must combine the loops with the switch ports and transport to obtain a customer connection capable of making and receiving calls.[53]

SBC has also introduced, for the first time as far as CompTel/ALTS is aware, a volume discount plan for the switching/shared transport product. Carriers purchasing fewer than 450,000 switch ports are required to pay $26.00 per port plus $.007 cents per originating or terminating minute. Carriers purchasing from 450,000 to 749,999 ports are required to pay $19.00 per port plus $.00385 cents per originating or terminating minute. Finally, carriers purchasing 750,000 or more ports pay only $12.00 per port plus $.00070 per originating or terminating minute.[54] Thus, those carriers with sufficient customer volumes to qualify for the maximum discount pay a monthly recurring rate for switching and shared transport that is 56% less than the rate made available to smaller carriers and a per minute switching charge that is 10 times less than the rate made available to smaller carriers.

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52 https://clec.sbc.com/clec/cars

53 *Id.* Attachment 271 Local Switching and 271 LS Transport at ¶ 1.9.

54 *Id.* 271 Switching 12-State Volume Discount Price Schedule.

There are at least two characteristics of this pricing arrangement that are anything but pro-competitive. First, the discount plan appears to discriminate unreasonably in favor of AT&T, SBC's proposed merger partner and wholly-owned affiliate. Second, based on UNE-P and UNE-L pricing and cost information that SBC itself has filed with the Commission, the maximum discount rate appears to result in a below cost price for the loop/port/shared transport combination.

Only AT&T, and possibly one other carrier, have the UNE-P volumes to qualify for the maximum discount. Although SBC does not make publicly available the number of UNE-P lines individual CLECs have in service, the information that is publicly available reveals that SBC's third largest UNE-P purchaser serves approximately 500,000 lines[55] and that SBC's merger partner, AT&T, serves 1.8 million customers in SBC's region using UNE-P. [56] CompTel/ALTS does not have sufficient information available to determine who SBC's second largest UNE-P customer is or whether that customer purchases at least 750,000 UNE-P lines from SBC, but the information that is available clearly demonstrates that (1) AT&T qualifies for the maximum port/shared transport discount price of $12; (2) SBC's third largest UNE-P purchaser qualifies for the $19 rate at best; and (3) all smaller UNE-P CLECs will be paying $26 for the same product.

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[55] SBC Communications, Inc. Form 10-Q for the period ended June 30, 2004, at 23 ("Since the D.C. Circuit's decision, as of June 30, 2004, we have signed one commercial agreement with a CLEC, which happens to be our third largest UNE-P purchaser.") http://www.sec.gov/Archives/edgar/data/732717/000073271704000525/q204.htm; "Nation's First Commercially Negotiated Agreement Ensures Healthy Phone Competition," (describing Sage Telecom as the third largest CLEC in SBC's territory). http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21080; Carlton & Sider Declaration at 29 (Sage Telecom serves 500,000 lines in SBC Territory).

[56] SBC/AT&T Merger Application, Description of Transaction, Public Interest Showing and Related Demonstrations, Appendix A, Description of Applications, at A-2.

Such a skewed pricing scheme will seriously undermine, if not obliterate, the ability of smaller CLECs to remain viable competitors in the residential and small business market.[57] As a result, SBC will almost certainly be able to recoup the retail access lines it has lost to competitive UNE-P providers either through its own efforts or through those of its proposed merger partner AT&T.

The Commission has long held that where costs differ, rate differences that accurately reflect legitimate cost differences are not discriminatory. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) at ¶860. However, price differences, based on such considerations as competitive or affiliate relationships or other factors not reflecting cost differences, are discriminatory. *See In the Matter of AT&T Corp. v. BellSouth Telecommunications, Inc.*, File No. EB-04-MD-010, Memorandum Opinion and Order, FCC 04-278 (released December 9, 2004) (volume discounts that substantially favor ILEC's long distance affiliate and substantially disfavor affiliate's long distance competitors violate the Act). Given the timing of SBC's "271 Local Switching" offer, the fact that SBC has never before offered volume discounts on local switch port/shared transport combinations, and the fact that AT&T is the only identifiable beneficiary of the steepest volume discounts all lead to the conclusion that SBC is willing and eager to exploit the additional market power it will attain with the acquisition of AT&T to discriminate against its rivals in the retail local exchange market. Such discrimination will be particularly harmful in light of SBC's expanded ability to price key inputs under the Section 271 rather than the Section 251 standard.

[57] It is not at all clear that SBC's three-tiered pricing scheme is in any way related to SBC's costs or other rational economic justification.

E. SBC Discounted Rates May Not Even Be Compensatory

According to the UNE-P and UNE-L cost data that SBC submitted to the Commission in support of its comments in the TELRIC rulemaking proceeding, [58] SBC's $12.00 discounted rate for the local switch port/transport product is not only discriminatory; it may also be predatory. CompTel/ALTS in no way concedes the accuracy or legitimacy of the UNE-P and UNE-L costs SBC included in its filings in the TELRIC proceeding. Rather, CompTel/ALTS cites SBC's numbers for the sole purpose of bringing to light SBC's own admission that a $12.00 switch port/transport rate combined with the state set UNE-L rates would not cover its costs of providing service in the vast majority of its in-region states.

In the TELRIC proceeding, SBC's experts prepared and submitted to the Commission the following tables[59] to support the argument that the UNE-P and UNE-L rates established by state commissions are not compensatory:

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[58] Debra J. Aron, E. Gerry Keith, Francis X. Pampush, *State Commissions Sytematically Have Set UNE Prices Below Their Actual Costs*, LECG Working Paper (November 2003), filed by SBC with the Commission on May 24, 2004 in Docket No. 03-173.

[59] *Id.* at 23, 26, Table 2 and Table 3.

Table 2: UNE-P Prices and Costs

State	Price	Cost at 11.25% WACC	Surplus (Deficit)
SBC			
Arkansas	$19.96	$42.31	$ (22.35)
California	$14.48	$25.27	$ (10.79)
Illinois	$12.22	$24.24	$ (12.02)
Indiana	$12.15	$23.25	$ (11.10)
Kansas	$19.60	$30.85	$ (11.25)
Michigan	$14.50	$22.27	$ (7.77)
Missouri	$22.72	$35.60	$ (12.88)
Nevada	$30.63	$37.16	$ (6.53)
Ohio	$13.42	$27.78	$ (14.36)
Oklahoma	$25.03	$33.36	$ (8.33)
Texas	$21.22	$34.79	$ (3.57)
Wisconsin	$21.73	$20.95	$ 0.78

Table 3: UNE-L Prices and Costs

State	Price	Cost at 11.25% WACC	Surplus (Deficit)
SBC			
Arkansas	$13.09	$31.50	$ (18.41)
California	$9.93	$13.78	$ (3.85)
Illinois	$9.53	$13.36	$ (3.83)
Indiana	$8.32	$14.17	$ (5.85)
Kansas	$13.30	$22.80	$ (9.50)
Michigan	$10.16	$13.08	$ (2.92)
Missouri	$15.19	$24.59	$ (9.40)
Nevada	$20.52	$23.92	$ (3.40)
Ohio	$6.93	$13.53	$ (6.60)
Oklahoma	$15.71	$23.30	$ (7.59)
Texas	$14.11	$23.44	$ (9.33)
Wisconsin	$10.90	$11.93	$ (1.03)

CompTel/ALTS created the table below using SBC's UNE-L prices, UNE-P cost numbers and the $12.00 local switch port/shared transport price SBC is offering pursuant to Section 271. What the table shows is that according to SBC's numbers, at the $12 discounted rate, the combined price for the loop/switch port/transport product is below SBC's cost in every state except Wisconsin.

State	UNE-L Price	Discounted Port/Transport Price	271 Combination Price	UNE-P Cost at 11.25% WACC	Surplus (Deficit)
SBC					
Arkansas	$13.09	$12.00	$25.09	$42.31	$ (17.22)
California	$9.93	$12.00	$21.93	$25.27	$ (3.34)
Illinois	$9.53	$12.00	$21.53	$24.24	$ (2.71)
Indiana	$8.32	$12.00	$20.32	$23.25	$ (2.93)
Kansas	$13.30	$12.00	$25.30	$30.85	$ (5.55)
Michigan	$10.16	$12.00	$22.16	$22.27	$ (0.11)
Missouri	$15.19	$12.00	$27.19	$35.60	$ (8.41)
Nevada	$20.52	$12.00	$32.52	$37.16	$ (4.64)
Ohio	$6.93	$12.00	$18.93	$27.78	$ (8.85)
Oklahoma	$15.71	$12.00	$27.71	$33.36	$ (7.65)
Texas	$14.11	$12.00	$26.11	$34.79	$ (8.68)
Wisconsin	$10.90	$12.00	$22.90	$20.95	$ 1.95

Because AT&T is the only identifiable beneficiary of this predatory pricing, the Commission could not possibly conclude that SBC's Section 271 discount pricing plan is just, reasonable and not unreasonably discriminatory as required by Section 202 of the Act. SBC's conduct in this regard raises a red flag that this merger does not promise to yield affirmative public interest benefits.

Section 214(a) requires the Commission to find that the "present or future public convenience and necessity require or will require" SBC to operate the telecommunications lines acquired from AT&T and that "neither the present nor future public convenience and necessity will be adversely affected" by the discontinuance of service from AT&T. *SBC/Ameritech Order* at ¶47. The Commission cannot make such a finding here. The statute obligates the Commission to assess both present and future market conditions. Although the applicants have not submitted sufficient information for the Commission to perform a reasonable assessment of future market conditions, SBC's current activities in the local exchange market show that it has developed "271" prices for at least some delisted UNEs that will adversely affect the ability of its CLEC rivals (AT&T excepted) to compete in the provision of retail local exchange and exchange access services.

The public harms that will be caused by the merger cannot be rectified through the imposition of conditions. Section 214 authorizes the Commission to impose conditions on the grant of licenses if necessary to protect the public interest. As discussed below, the Commission imposed such conditions when it approved the SBC/Ameritech merger. SBC, however, has failed time and time again to comply with those conditions, demonstrating that even at its current size, it is virtually unregulatable. The Commission should not again be lulled into a false sense of security by presuming that it can remedy competitive harms with conditions that have no teeth. The public interest demands far more.

F. The Commission Must Consider The Possible Adverse Effects The Merger May Have On National Security Issues

One casualty of the terrorist attacks on the World Trade Center on September 11, 2001 was Verizon's central office at 60 Hudson in Lower Manhattan. The destruction of Verizon's facilities not only eliminated communication links to much of the financial community, but also the links needed by the rescue workers to communicate with one another. While no one disputes the heroic efforts made by Verizon to restore service, those efforts were in large part facilitated by the redundant facilities, both wireline and fixed wireless, made available to Verizon and rescue personnel by CompTel/ALTS members.[60]

A hard lesson learned from the September 11th attacks is that our telecommunications systems are not invulnerable and that bringing down even one ILEC central communications node can have a devastating impact. The redundant facilities put in place and operated by competitive carriers are vital to the security of our nation's communications systems and are a critical national resource. In evaluating the public interest, the Commission must consider the toll this merger may take on the continuing viability of CLECs and the concomitant continuing availability of redundant facilities to keep our nation connected. The questions the Commission has posed to the Applicants to date do not adequately address this issue. Before determining whether this merger will serve the public interest, convenience and necessity, the Commission at the very least should and must assess the impact the elimination of AT&T and SBC's retirement of its "duplicative facilities" will have on the security of the nation's telecommunications

[60] *See* ALTS Letter to Chairman Michael Powell dated September 28, 2001; CompTel Letter to President George W. Bush dated October 3, 2001; George W. Bush Letter to CompTel dated October 5, 2001.

systems. In addition, the Commission should and must assess the impact the concentration of market power in the hands of SBC will have on the ability of the ever dwindling number of CLECs to remain viable competitors in the market.

VI. Character Qualifications

Section 310(d) of the Act provides that transfer applications, such as those filed by SBC and AT&T, will be treated as though the transferee applied under Section 308 of the Act. Section 308 provides that before granting an application, the Commission must make an affirmative determination that the applicant possesses the requisite character qualifications to be a Commission licensee. As the Commission noted recently, the central focus of its "review of an applicant's character qualifications is conduct that bears on the proclivity of an applicant to deal truthfully *with the Commission* and to comply with *our* rules and orders." *Cingular/AT&T Order* at ¶47 (emphasis in the original). All violations of the Act, the Commission's rules and/or policies are "predictive of an applicant's future truthfulness and reliability and, thus, have a bearing on an applicant's character qualifications." *Id.*

SBC has a well documented history of violating the Act and Commission rules, policies and orders. It is the Commission's statutory duty to carefully weigh these derelictions as predictive of SBC's future truthfulness and reliability. CompTel/ALTS submits that SBC's history of ignoring provisions of the Act and Commission orders, together with its less than stellar record of compliance with Sections 1.17 and 1.65 of the Commission's rules, is disqualifying under Section 310 of the Act.

A. SBC's History of Misconduct

Due to the significant competitive harms threatened by the merger of SBC and Ameritech, the Commission made very clear that it would not have approved the merger absent stringent and enforceable conditions:

> [A]bsent stringent conditions, we would be forced to conclude that this merger does not serve the public interest, convenience or necessity because it would inevitably retard progress in opening local telecommunications markets, thereby requiring us to engage in more regulation. Standing alone, without conditions, the initial application proposed a license transfer that would have been inconsistent with the approach to telecommunications regulation and telecommunications markets that the Congress established in the 1996 Act, ratifying the fundamental approaches enshrined in the MFJ.

SBC/Ameritech Order at ¶ 62. Thus, the merger conditions were an integral part of the Commission's agreement to allow SBC to pursue its efforts to reconstruct the pre-divestiture Ma Bell system. Since the merger was approved, the Commission has found SBC to have engaged in conduct that violates the merger conditions on numerous occasions. Unfortunately, the only punishment the Commission has imposed for these violations has been the assessment of non-material financial forfeitures and in some cases, the extraction of a promise from SBC to try to do better. As a result, SBC has been able to avoid dutiful compliance with the conditions designed to counter the anticompetitive effects of the merger, choosing instead apparently to ignore certain conditions and absorb the financial forfeitures as a cost of doing business if and when the Commission held it accountable.

For the Commission's convenience, CompTel/ALTS summarizes below a sampling of the Commission's enforcement Orders addressing SBC's violation of various merger conditions, provisions of the statute, Commission rules and Commission orders:

1. <u>Violations of Merger Conditions</u>

- In an Order released March 15, 2001, the Enforcement Bureau determined that SBC had willfully and repeatedly materially violated certain of the SBC/Ameritech merger conditions by failing to submit accurate performance data to the Commission over a period of 13 months. The Bureau assessed a forfeiture of $88,000 for these violations. *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-00-IH-0432, Order on Forfeiture, DA 01-680 (released March 15, 2001), *affd,. In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-00-IH-0432, Order on Review, FCC 01-184 (released May 29, 2001). The Order did not provide any remedies for the CLECs who were harmed by SBC's willful, repeated and material violations. Two years later, SBC entered into a Consent Decree following the Commission's initiation of an investigation into SBC's violation of the very same merger conditions. Pursuant to the Consent Decree, SBC agreed to make a "voluntary contribution" of $250,000 to the US Treasury and to implement enhancements to the controls and processes it uses to manage the integrity of the performance data submitted to the Commission pursuant to the merger conditions. *In the Matter of SBC Communications, Inc.*, File No. EB-02-IH-0382, Order, DA03-825 (released March 20, 2003). The Consent Decree did not provide any remedies for the CLECs who were harmed by SBC's violations.
- In an Order released October 9, 2002, the Commission fined SBC $6 million for willfully and repeatedly violating the merger condition relating to shared transport. *In the Matter of SBC Communications, Inc. Apparent Liability for*

Forfeiture, File No. EB-01-IH-0030, Forfeiture Order, FCC 02-282 (released October 9, 2002), *aff'd sub nom. SBC Communications, Inc. v. Federal Communications Commission*, 373 F. 3d 140 (D.C. Cir. 2004). In a separate statement, then Chairman Michael Powell noted that the fine was the "highest in the history of the Commission." [61]

2. <u>Violations of the Communications Act</u>

- In a Memorandum Opinion and Order released October 19, 2000, the Commission found that SBC's Ameritech subsidiary violated Section 271 of the Act by offering interLATA service without having first received the Commission's approval to provide long distance service in-region. *In the Matter of MCI Telecommunications Corporation v. Illinois Bell Telephone Company, et al.*, File No. E-97-19A, Memorandum Opinion and Order, FCC 00-371 (released October 19, 2000). Three years later, SBC entered into a Consent Decree to terminate the Commission's investigation into its violation of Section 271 of the Act through the provision of interLATA services without authorization in the Ameritech states and California. *In the Matter of SBC Communications Inc.*, File No. EB-03-IH-0013, Order, FCC 03-229 (released October 1, 2003). Pursuant to the Consent Decree, SBC agreed to make a "voluntary contribution" of $1.35 million to the US Treasury and to implement a compliance plan to guard against future violations of Section 271.

- In a Memorandum Opinion and Order released April 17, 2003, the Commission found that SBC violated the SBC/Ameritech merger condition relating to shared

[61] http://www.fcc.gov/eb/News_Releases/DOC227216A.1html .

transport and in so doing, engaged in an unjust and unreasonable practice prohibited by Section 201(b) of the Act. *In the Matter of CoreComm Communications, Inc., et al. v. SBC Communications, Inc., et al.*, File No. EB-01-MD-017, Memorandum Opinion and Order, FCC 03-83 (released April 17, 2003).

3. <u>Violations of Commission Rules</u>

- On May 24, 2001 the Enforcement Bureau issued an Order of Forfeiture in which it found that SBC had willfully and repeatedly violated Section 51.321(h) of the Commission's rules by failing to promptly post notices of central office premises in which collocation space was exhausted. The Bureau assessed a forfeiture of $94,500 for the violations. *In the Matter of SBC Communications, Inc. Apparent Liability For Forfeiture,* File No. EB-00-IH-0326a, Order of Forfeiture, DA 01-1273 (EB, released May 24, 2001). In an Order released February 25, 2002, the Commission affirmed the Bureau's liability finding, but reduced the forfeiture SBC was required to pay to $84,000. *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture,* File No. EB-00-IH-0326a, Order on Review, FCC 02-61 (released February 25, 2002). The Order did not provide any remedies for the CLECs who were harmed by SBC's willful and repeated violations.
- In an Order released December 16, 2004, the Commission adopted a Consent Decree terminating an investigation into SBC's violation of the Commission's universal service fund rules and orders in connection with the use and receipt of E-rate funds. SBC agreed to make a "voluntary contribution" of $500,000 to the U.S. Treasury and to implement a compliance program. *In the Matter of SBC*

Communications, Inc., File No. EB-04-IH-0342, Order, DA 04-3893 (released December 16, 2004).

4. <u>Violations of Commission Orders</u>

- In an Order released April 15, 2002, the Commission found that SBC willfully violated an Enforcement Bureau order requiring SBC to provide sworn verification of the truth and accuracy of answers to a letter of inquiry regarding discrimination in the provisioning and maintenance of DSL technology and misrepresentations to the Bureau. The Commission assessed a forfeiture of $100,000. *In the Matter of SBC Communications, Inc.* , File Nos. EB-01-IH-0642, Forfeiture Order, FCC 02-112 (released April 15, 2002).

5. <u>Truthfulness and Reliability</u>

The willfulness of SBC to deal truthfully with the Commission has been called into question on several occasions. In addition to the foregoing, SBC has entered into Consent Decrees with the Commission resulting from investigations into the completeness and accuracy of information filed with the Commission. Significantly, as far back as 1999, SBC entered into a Consent Decree to terminate the Commission's investigation of SBC/SNET's violations of Sections 271 and 272 of the Act and Section 1.65 of the Commission's rules. Pursuant to the Consent Decree, SBC agreed to implement a "Compliance Plan Regarding FCC Rules and Regulations" to detect and prevent legal and ethical concerns relating to compliance with Sections 271 and 272 and to make a $1.3 million "voluntary contribution" to the U.S. Treasury. *In the Matter of*

SBC Communications, Inc., Order, FCC 99-153 (released June 28, 1999) ("*SBC/SNET Consent Decree"*).

One of the goals of the Compliance Plan was to "assure timely and accurate exchanges of information with the FCC." In order to accomplish this goal, the Compliance Plan set forth SBC and Commission standards for interaction with the Commission and required all SBC employees engaged in regular contacts with the Commission to attend annual training programs and to certify that they had reviewed and understood the requirements.

Despite these prophylactic measures, the Commission was forced to conduct at least two subsequent investigations into SBC's compliance with the *SBC/SNET Consent Decree* as well as into the truth and accuracy of factual information contained in employee affidavits filed with the Commission. These investigations terminated with another Consent Decree pursuant to which SBC agreed to make a "voluntary contribution" of $3.6 million to the U.S. Treasury and to implement yet another Compliance Plan covering the training of SBC employees who have contact with the Commission and employees who sign or submit affidavits to the Commission with respect to their obligations under the terms of the *SBC/SNET Consent Decree*, the new Consent Decree and Sections 1.17 (prohibiting misrepresentations and willful material omissions in materials submitted to the Commission) and 1.65 of the Commission's Rules. *In the Matter of SBC Communications, Inc.*, File Nos. EB-01-IH-0339, *et al.*, Order, FCC 02-153 (released May 28, 2002).

In the Notice of Apparent Liability For Forfeiture and Order issued prior to SBC's entry into the Consent Decree, the Commission made very clear that:

> The duty of absolute truth and candor is a fundamental requirement for those appearing before the Commission. Our decisions rely heavily on the completeness and accuracy of applicants' submissions because we do not have the resources to verify independently each and every representation made in the thousands of pages submitted to us each day.

In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture, File No. EB-01-IH-0339, Notice of Apparent Liability for Forfeiture and Order, FCC 01-308 (released October 16, 2001) at ¶ 42. The Commission is authorized to treat even the most insignificant misrepresentations as serious and disqualifying in licensing proceedings. *In re Applications of PCS 2000, L.P. for Broadband Block C Personal Communications Facilities*, File Nos. 00414-CW-L-96, *et al.,* Notice of Apparent Liability For Forfeiture, FCC 97-016 (released January 22, 1997) at ¶ 47. The Commission has gone so far as to revoke licenses in the face of evidence of lack of candor. *Kay v. Federal CommunicationsCommission*, 396 F. 3d 1184 (D.C. Cir. 2005), *rehearing denied,*, 2005 U.S. App.LEXIS 5737 (D.C. Cir. April 5, 2005).

B. The Past Is Prologue

CompTel/ALTS is aware of the Commission's observation that matters resolved by Consent Decree are not considered adjudicated misconduct for purposes of assessing an applicant's character qualifications. *Cingular/AT&T Order* at ¶53. CompTel/ALTS is confident that the Commission did not mean by this observation that an applicant or licensee is free to willfully and repeatedly violate the Act and the Commission rules, orders and policies with impunity, so long as it enters a Consent Decree before an actual

finding of liability and makes a "voluntary contribution" to the U.S. Treasury. A blanket refusal to consider conduct leading up to a Consent Decree as reflecting on an applicant's fitness to hold a Commission license would constitute an abnegation of the Commission's statutory duty under Section 308 of the Act to make an affirmative determination that an applicant possesses the requisite character qualifications before awarding a license.

The sheer size of and concentration of market power in the telecommunications behemoth that will be created by the merger of SBC and AT&T should cause the Commission to conclude that the acquiring entity's past propensity to violate the Act and the Commission's rules and orders is predictive of its future behavior. Based on such an evaluation, CompTel/ALTS submits that the Commission should conclude that SBC is not qualified to be the transferee of AT&T's licenses and authorizations.

CONCLUSION

For the foregoing reasons, CompTel/ALTS urges the Commission to deny the SBC/AT&T merger.

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