

**FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

**In re: the**

<b>APPLICATION FOR CONSENT</b>	)	
<b>TO TRANSFER OF CONTROL</b>	)	<b>WC DKT. NO. 05-65</b>
<b>FILED BY SBC COMMUNICATIONS,</b>	)	<b>DA 05-656</b>
<b>INC., AND AT&amp;T CORP.</b>	)	

**COMMENTS OF THE INDEPENDENT ALLIANCE**

**TO THE COMMISSION:**

The Independent Alliance, a group of rural independent telephone companies,<sup>1</sup> submits herein its comments on the proposed merger of AT&T Corp. (“AT&T”) and SBC Communications, Inc. (“SBC”). The Independent Alliance urges the Commission to include in its consideration of the proposed merger an analysis to determine whether such a merger would foster the goals of the Communications Act of 1934, as amended (the “Act”), specifically, to “promote competition” and to “encourage the rapid deployment of telecommunications technologies,” *see* 47 USC § 153. The Independent Alliance submits that meaningful conditions to an SBC/AT&T merger are necessary in order to ensure these goals are met.

**I. INTRODUCTION**

The member companies of the Independent Alliance are small and rural telecommunications carriers. These companies were founded originally in order to provide telephone service in areas that were not served by the local service affiliates of American Telephone & Telegraph, predecessor entity to AT&T. These independent companies were and are today an integral component in the provision of universal service across America. The Independent Alliance urges the Commission to take action so as to ensure that rural telephone customers continue to enjoy, at a minimum, the same quality, level, pricing, and “rapid deployment of telecommunications technologies” in a post-merger

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<sup>1</sup> The member companies are set forth in Attachment 1.

environment as they do today. The Commission should ensure that a marketplace dominated by a merged SBC/AT&T leads to improved, rather than diminished, opportunities.

## **II. THE PROPOSED MERGER CONTEMPLATES THE INTRODUCTION OF A FORMIDABLE VERTICALLY INTEGRATED ENTITY TO THE MARKET.**

The proposed merger of AT&T and SBC constitutes vertical integration of two very large telecommunications carriers and implicates issues of market and facilities dominance. The proposed SBC/AT&T merger does not simply raise the specter of whether the industry will see a return to the era of the large consolidated telephone company that existed before the break-up of AT&T. Historically, the general interest of rural and independent telephone companies *vis-a-vis* AT&T local affiliates and Long Lines was to connect rural customers to the nationwide switched network in order to enable rural communities to reach, and be reached by, the world. The provision of basic dial-tone was the overriding concern. Current technological, regulatory, and market conditions, however, demand a new analysis when confronting the possibility of a major vertically integrated entity that controls essential transport and backbone facilities.

### **A. The proposed merger could harm access to tandems and transport facilities.**

Independent Alliance members and similarly situated carriers have endeavored to bring more than universal basic dial-tone service to their communities. Many rural independent carriers offer interstate toll services and broadband connectivity. These interstate and broadband services often rely upon access to Bell Operating Company (BOC) tandems and the transport facilities of large interexchange (IXC) carriers like AT&T. The proposed merger of AT&T and SBC, two very large companies that control tandem and transport facilities, raises questions as to how smaller carriers might obtain fair access to facilities that are controlled by a single vertically integrated entity. Natural market forces and economic theory warn that the smaller party is at a competitive disadvantage. The Independent Alliance urges the Commission to ensure that this does not occur, since the “smaller entity” in telecommunications is not only the independent carrier, but its rural

customers, too. The size and market power of a combined firm like a merged SBC/AT&T invites the opportunity for broad and effective discrimination that reaches local, long-distance and Internet backbone facilities. Appropriate merger conditions are necessary in order to ensure that neither purposeful conduct nor unchecked market power allow for discrimination against smaller entities, and their consumers, that rely upon the transport and facilities of the larger carriers.

The Commission and the parties to the merger are familiar with these issues. In the early 1900s, AT&T built its network empire in part by refusing to interconnect with smaller independent providers until the smaller carrier capitulated and “sold out” to AT&T. The practice was halted by what came to be known as the “Kingsbury Commitment.” AT&T agreed to stop muscling the smaller carriers, and the Federal government permitted AT&T to continue as a regulated monopoly.<sup>2</sup> Ironically, AT&T is now aware of this very concern from the perspective of the smaller party seeking access to the facilities of a larger entity. In *AT&T Corp. v. BellSouth Telecommunications*, AT&T complained to the Commission about BellSouth pricing plans for special access services that had the effect of favoring BellSouth’s retail interexchange services affiliate, BellSouth Long Distance, over other carriers. See *AT&T Corp. v. BellSouth Telecommunications, Inc.: Memorandum Opinion and Order*, File No. EB-04-MD-010, FCC 04-278 (rel. Dec. 9, 2004). The pricing plan offered larger discounts to smaller volume users – at first blush, perhaps, the practice could be perceived as favoring “underdog” entities. The plan, as BellSouth explained, offered relatively low-volume customers “larger discounts than would be available under a plan whose discounts were more closely proportional to volume.” *Id.* at para. 18. But, the BellSouth plan actually favored its own low-volume usage affiliate, and disfavored larger non-affiliated entities such as AT&T. The Commission found that this was a violation of applicable provisions of the Act because it discriminated against entities that were not affiliated with BellSouth.

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<sup>2</sup> Steve Coll, *The Deal of the Century: The Break-Up of AT&T*, Atheneum, New York (1986), at 58.

Similar concerns attend the proposed AT&T/SBC merger: AT&T will gain access to SBC's tandem facilities without the need to enter into a commercial sub-tending arrangement, and SBC will gain access to AT&T's transport facilities. Both the local and long-distance service divisions of the new entity will have natural incentives to favor their respective corporate affiliate over an "outside" carrier. Smaller independent and rural companies, by contrast, that rely upon both the local and long-distance facilities of the newly merged entity will face decreased, if not negligible, leverage and bargaining power. Whereas in the past some degree of SBC's market power may have been neutralized by AT&T's market strength, and SBC may have wielded similar power when negotiating with AT&T, the combination of those companies would eliminate, to the detriment of smaller carriers, any check or balance to their respective power in their markets.

The combined transport facilities and access services of AT&T and SBC would simply have no peer in the geographic regions in which they operate. AT&T and SBC control some, if not all, of the only facilities that carry and switch traffic for rural customers of a smaller carrier when that traffic is destined to terminate beyond the network borders of the rural carrier. If AT&T is absorbed into SBC, there will no longer be a large IXC presence to challenge the BOC in negotiations; small and independent carriers will be left with little leverage to achieve fair pricing. The Independent Alliance submits that these general principles are evidenced by real-world experience.

**B. The proposed merger also threatens the market for interconnection to the Internet.**

The mergers between BOCs and nationwide IXCs that own Tier I Internet Service Providers (ISPs) represent unprecedented consolidation and vertical integration in the Internet marketplace; AT&T is an Internet backbone provider. Efficient interconnection arrangements between ISPs are the lifeblood of a robust public Internet because market forces compel services to be sold competitively. After consolidation, small, independent ISPs will be in the unenviable position of

having to purchase Internet protocol (IP) backbone capacity from giant firms who are also direct competitors of these small ISPs.

Market power is already a problem in the Internet interconnection market. In the past, nationwide ISPs commonly exchanged each other's traffic without payment of settlement charges. Known as "peering," these arrangements have since largely been replaced by commercial agreements in which compensation flows from the smaller ISPs to the large Tier I ISPs, but not *vice versa*. The smaller ISPs rely on the Tier 1 providers in order to link their customers, often residents of rural and non-metropolitan areas of America, to the Internet backbone. The commercial agreements are almost always covered by stringent non-disclosure agreements ("NDAs") resulting in a dearth of publicly available information concerning settlement terms. These confidential agreements afford those with market power the opportunity to discriminate against different customers. The merger of Tier I IP backbone providers, such as AT&T, with BOCs, such as SBC, which themselves already control large, regional ISPs, will increasingly enable the backbone providers to abuse and manipulate interconnection negotiations. The ISPs will be able to either extract monopoly rents or bias favorably their position as competitors in contested markets.

The Commission has examined the ISB backbone and interconnection market in the context of prior mergers. It has long recognized its role in ensuring widespread nondiscriminatory access to the Internet backbone. In its order approving the merger between MCI Communications and WorldCom, for example, the Commission noted, "We seek not to regulate the Internet, but rather to ensure that Internet services, which rely on telecommunications transmission capacity, remain competitive, accessible, and devoid of entry barriers."<sup>3</sup> Protecting access to the Internet backbone is a well-respected FCC function. Imposing the reasonable backbone access conditions suggested by

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<sup>3</sup> *In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd. 18,025, ¶ 142 (1998).

the Independent Alliance would be fully consistent with prior Commission precedent, and would be a measure far short of the complete divestiture of Internet backbone assets that it ordered in the MCI/WorldCom merger.<sup>4</sup>

**C. AT&T NEEDS TO FULFILL ITS UNIVERSAL SERVICE AND ACCESS CHARGE PAYMENT OBLIGATIONS.**

In addition to these concerns, the Commission also should consider AT&T's actions that undermined the Act's universal service goals and harmed local carriers by failing to pay hundreds of millions of dollars in universal service and access fees for which it is liable. As the Commission concluded in *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, for at least six years, AT&T has characterized calls completed using its prepaid calling cards as "information services," rather than as prepaid calling card calls, in order to avoid making contributions to the Universal Service Fund.<sup>5</sup> Additionally, AT&T has characterized most of the intrastate calls made using the cards as interstate in order to avoid paying access fees to local exchange carriers. The Commission found that AT&T had "no reasonable basis" to believe that this mislabeling of calls was proper under applicable law.<sup>6</sup>

The result of AT&T's misrepresentations is that, according to the company's Securities and Exchange Commission Form 10-Q, filed on May 10, 2004, it has avoided paying more than \$350 million in access and universal service fees during recent years. The FCC recently held AT&T retroactively liable for all of its unpaid universal service contributions for prepaid card calls.<sup>7</sup> Local exchange carriers have been shortchanged by hundreds of millions of dollars.

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<sup>4</sup> *Id.* at ¶ 227.

<sup>5</sup> *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 05-68, Order and Notice of Proposed Rulemaking, FCC 05-41 (2005).

<sup>6</sup> *Id.* at ¶ 32.

<sup>7</sup> *Id.* at ¶ 32.

AT&T's actions in avoidance of its universal service and access fee commitments, with no reasonable basis, demonstrate a lack of concern for universal service and the involvement of small and rural telephone companies in the national telecommunications infrastructure. Access fees are a significant expense for interexchange providers such as AT&T, but they are also a primary means by which local exchange carriers are paid for the services they provide. Given AT&T's extensive history of avoiding these obligations, the Independent Alliance is concerned that, without meaningful conditions, the proposed SBC/AT&T merger would create a company with an enhanced capacity to undercut the viability of small and rural telephone companies in the marketplace and to limit their provision of robust services to their customers.

As large companies merge, market power and dominance increase, and access to their facilities by smaller entities can be limited by the natural tendencies of large providers. AT&T, in its complaint about BellSouth's favoring of its own long distance affiliate, has experienced this phenomenon first-hand. The Independent Alliance urges the Commission to recognize the threats imposed by large vertically integrated firms, and to take such action as necessary to ensure that potential damage to rural carriers and their customers by a merged SBC/AT&T is pre-empted by applying conditions to any merger approval.

### **III. RECOMMENDATIONS**

The Independent Alliance submits the following recommendations for conditions to an SBC/AT&T merger:

1. Access to Facilities - Tandems: Rural independent companies rely upon tandem facilities to bring incoming telecommunications traffic to their customers, and to deliver outgoing telecommunications traffic to the world. Any merger between AT&T and SBC must be conditioned to ensure that the combined companies do not (a) deflect inter-exchange traffic from rural

independent tandems to SBC tandems, or (b) impose inordinate and excessive commercial obligations upon rural companies seeking or continuing access to SBC facilities.

(a) Most Favored Nation: The Independent Alliance submits that “Most Favored Nation” (“MFN”) conditions be attached to any merger approval. This would ensure that the smallest of carriers is able to enjoy the favorable terms that a larger carrier, including an affiliate of the underlying service provider, receives. Small carriers and their customers should not be subject to diminished service quality or unreasonable rates. The Commission has previously imposed MFN conditions on mergers. *See, i.e., In re: Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License: Memorandum Opinion and Order, CC Dkt. No. 98-184, FCC 00-221 (rel. Jun. 16, 2000), at Appendix D.*

(b) Tandem Selection: The Independent Alliance urges the Commission to condition an AT&T/SBC merger on a requirement that rural and independent telephone companies can without question select the tandem for traffic that terminates on their network. This is intended to preempt any opportunity for SBC to direct a subsidiary or affiliate AT&T to route all AT&T traffic through an SBC tandem when the terminating rural carrier has elected to utilize its own tandem or the tandem of another provider to connect its network to the world.

2. Access to Facilities – Internet Backbone: The Independent Alliance urges that the FCC ensure fair and open access to underlying Internet telecommunications facilities which have their origin in public funds. Fair and open access to the Internet backbone should not be confused with so-called “regulation” of the Internet. Merger conditions that ensure fair and open access are not at odds with proponents of non-regulated retail Internet services.<sup>8</sup> The Independent Alliance agrees that

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<sup>8</sup> *See, e.g., MCI-Worldcom Merger Order, supra.*

free market forces are strong drivers toward innovation and development. The market, however, dare not confuse the two factors that have contributed to the success of the Internet: (1) non-proprietary, unimpeded access to IP transmission network infrastructure, which is neutral with respect to applications and content; and (2) unrestricted development and implementation of Internet applications at the retail level. While Internet *applications* may continue to be unfettered by regulation, *interconnection* through common carriers to the Internet backbone is imperative to maintain the open, unobstructed access to transmission network infrastructure, especially considering the increased market concentration that would result from an SBC/AT&T merger. Accordingly, the Independent Alliance recommends that the Commission impose “Most Favored Nation” conditions on agreements governing access to the Internet backbone. The Independent Alliance also recommends adoption of the following safeguards as a condition of mergers between BOCs with Tier I ISPs or Internet backbone providers:

(a) Affiliates of merged IXC and BOCs offering access to the ISP backbone should be subject to interconnection obligations and non-discrimination requirements similar to those that are applicable to LEC interconnection obligations.

(b) Non-disclosure agreements with any party regarding the use of facilities of a merged SBC/AT&T should be deemed illegal.

(c) Newly-merged Tier I ISPs providing Internet backbone access, such as AT&T/SBC should be required to file Statements of Generally Available Terms (“SGATs”) for price and quality of service of interconnection. This requirement would be similar to what was required of the BOCs in providing interconnection on the telephone network.

3. Universal Service and Access Fee Proceeding Resolution: Finally, the Independent Alliance urges that universal service and access fee proceedings against AT&T at the FCC and in courts around the country should be resolved before the proposed merger can be approved. Until these

proceedings are concluded, the full extent of AT&T's obligations to the Universal Service Fund and to local exchange carriers cannot be measured, and the Commission can therefore not properly evaluate the risks of a merged SBC and AT&T to the stability and health of the competitive market. Once any merger is approved, the merged company should be required to post a bond for the full amount of any outstanding USF obligations and access charge payments.

#### IV. CONCLUSION

The Independent Alliance urges the Commission to ensure that all carriers have access to transport and access facilities on fair and non-discriminatory terms, and that incentives for larger vertically integrated firms to discriminate be preempted by Commission action in accordance with the recommendations set forth above.

Respectfully submitted,

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April 25, 2005