Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Application for Consent to Transfer Control	)	
Filed By SBC Communications Inc. and	)	WC Docket No. 05-65
AT&T Corp.	)	

COMMENTS OF
ACN COMMUNICATIONS SERVICES, INC.
ATX COMMUNICATIONS, INC.
BULLSEYE TELECOM, INC.
CAVALIER TELEPHONE MID-ATLANTIC, LLC
CIMCO COMMUNICATIONS, INC.
CTC COMMUNICATIONS CORP.
GILLETTE GLOBAL NETWORK, INC. D/B/A EUREKA NETWORKS
GRANITE TELECOMMUNICATIONS, LLC
LIGHTSHIP COMMUNICATIONS, LLC
LIGHTYEAR NETWORK SOLUTIONS, LLC
PAC-WEST TELECOMM, INC.
RCN TELECOM SERVICES INC.
USLEC CORP.
U.S. TELEPACIFIC CORP. D/B/A TELEPACIFIC COMMUNICATIONS

Andrew D. Lipman
Eric J. Branfman
Patrick J. Donovan
SWIDLER BERLIN LLP
3000 K Street, NW
Washington, DC 20007
(202) 424-7500

TABLE OF CONTENTS

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Application for Consent to Transfer Control	)	
Filed By SBC Communications Inc. and	)	WC Docket No. 05-65
AT&T Corp.	)	

COMMENTS OF
ACN COMMUNICATIONS SERVICES, INC.
ATX COMMUNICATIONS, INC.
BULLSEYE TELECOM, INC.
CAVALIER TELEPHONE MID-ATLANTIC, LLC
CIMCO COMMUNICATIONS, INC.
CTC COMMUNICATIONS CORP.
GILLETTE GLOBAL NETWORK, INC. D/B/A EUREKA NETWORKS
GRANITE TELECOMMUNICATIONS, LLC
LIGHTSHIP COMMUNICATIONS, LLC
LIGHTYEAR NETWORK SOLUTIONS, LLC
PAC-WEST TELECOMM, INC.
RCN TELECOM SERVICES INC.
USLEC CORP.
U.S. TELEPACIFIC CORP. D/B/A TELEPACIFIC COMMUNICATIONS

ACN Communications Services, Inc., ATX Communications, Inc., Bullseye Telecom, Inc., Cavalier Telephone Mid-Atlantic, LLC, Cimco Communications, Inc., CTC Communications Corp., Gillette Global Network, Inc. D/B/A Eureka Networks, Granite Telecommunications, LLC, Lightship Communications, LLC, Lightyear Network Solutions, LLC, Pac-West Telecomm, Inc., RCN Telecom Services Inc., US LEC Corp., U.S. TelePacific Corp. D/B/A TelePacific Communications (collectively "Commenters") submit these comments in this proceeding concerning the proposed acquisition of AT&T Corporation ("AT&T") by SBC Communications, Inc. ("SBC") (collectively "Applicants"). For the reasons discussed herein,

the Commission may not conclude that grant of the Application as filed would serve the public interest. The Commission should impose significant conditions on any approval of the proposed merger.

I. INTRODUCTION AND SUMMARY

A remarkable feature of the Application is that it fails to provide sufficient information concerning, among other things, market share and market definitions for the services provided by the Applicants. While Commenters are pleased that the Commission Staff has asked the Applicants for important supplemental information, additional, more rigorous, questions should be asked. Commenters provide additional suggested questions in the attached Appendix that the Commission Staff should propound to the Applicants. Answers to these questions are more likely to provide an adequate basis for evaluation of the proposed merger. Until Applicants have provided full responses to all of these questions, the Commission and Commenters are unable to evaluate fully the impact of the proposed merger on the public interest. Consequently, the Applicants now fail to carry their burden of proof.

This merger – which essentially reconstitutes the old AT&T monopoly in almost 40 percent of the United States – will deal a significant blow to the development of telecommunications competition and is clearly not in the public interest. Indeed, even Qwest, one of the four remaining RBOCs and as such well positioned to know the abuses that will be made possible by this type of merger, recently filed comments with the California PUC stating that "it is difficult to see how [the SBC/AT&T and Verizon/MCI] transactions ever could be found to be in the public interest."[1]

---

[1] Protest of Qwest Communications Corp., *In the Matter of the Joint Application of SBC Communications, Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California*, Application 05-02-027 (Cal. PUC), filed April 14, 2005, at 4.

To obtain approval of these transfers of control, SBC and AT&T must show that their merger would serve the public interest by *enhancing* competition. As discussed in detail in these comments, this proposed transaction would accomplish precisely the opposite. First, and most obviously, the merger between the largest provider of local exchange services in its region, SBC, which controls a monopoly share of this market, with its largest and most financially stable competitor, constitutes a competitive injury *per se* that should preclude this Application as a matter of law. SBC will only increase its monopoly share in these markets upon consummation of the merger, when it should rightly be required to compete to regain customers or for new customers. SBC and AT&T make two contradictory claims to support the merger, First they assert that they must combine in order to make it possible for them to compete in other local exchange markets. At the same time, they contend that each is somehow subject today to vigorous competition from a multitude of fledgling entrants – entrants that have only a fraction of each Applicant's current size, and have none of the advantages of already being an incumbent monopoly. Both of these assertions cannot be correct – and, in fact, both are false. Rather, as Applicants are well aware, the chief obstacles to local competition include not only lack of access to capital, but the determination of incumbent LECs, such as SBC, to do everything in their power to defeat competitive entry and to make essential network elements unavailable and otherwise to thwart implementation of the Act. The merger will exacerbate these fundamental obstacles to meaningful competitive entry.

Second, after the merger, SBC will immediately become the largest provider of interexchange services in the world and will have the incentive and ability to exclude other competitors in all product markets within its footprint by engaging in various forms of

discrimination. This is so for two related reasons, one of which results from the prospective merger of MCI, Inc. with Verizon (or possibly Qwest). AT&T is the nation's largest facilities-based long distance service provider. There are, in fact, only a few other national providers of facilities-based long distance service. Yet, these facilities-based providers are critical, since the "unaffiliated" competitors (CLECs, service integrators, wireless providers, VoIP providers, cable providers, etc.) of the newly merged company will remain fundamentally dependent, as they are today, on a vibrantly competitive market for long-distance services as a vital input into the bundled service offers they make to end-user subscribers. The combined purchases of long distance service at wholesale by Verizon (which is simultaneously seeking the Commission's approval to purchase MCI) and SBC (over 5 billion minutes per month) are, however, of such magnitude that withdrawing those purchases from independent facilities-based providers of long-distance service could threaten the continued viability of those unaffiliated providers. Moreover, SBC's control over the interexchange facilities themselves, gives it the ability and incentive to discriminate against third-parties who currently use AT&T's interexchange facilities to compete against SBC, and subjects those competitors to untenable price squeezes.

Third, the merger would further make maintenance of the *status quo*, in which no RBOC competes with another, except for the largest enterprise customers, even more likely. Indeed, this Application concedes as much and does not even attempt to maintain the prior disingenuous claim that underlaid the previous RBOC-RBOC mergers that such combinations were necessary to promote out-of-region competition. Nine years of experience in which no RBOC has made any serious attempt to compete out-of-region must make even SBC ashamed to repeat that claim here.

In contrast to these inescapable and undeniable public harms that will result from the merger, Applicants' claims of countervailing public interest benefits are either contrived, trivial, or both, and mimic the claims of benefit made by SBC to support is 271 long distance application – claims that in retrospect were false. Applicants have failed to offer probative *evidence* (as opposed to rhetoric) to show that the merger will create a more "robust" international competitor or will it benefit customers through increased research, development and innovation. Applicants' discussion of these issues reveals that they will literally say anything to gain approval. And even if the merger did, somehow, promote these "benefits," the harm that will result far outweighs these so-called benefits.

II. LEGAL STANDARD FOR MERGER REVIEW

In reviewing the Merger, the FCC must conduct a public interest analysis pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended ("the Act") to determine whether SBC and AT&T have demonstrated that the public interest would be served by the transfer of control of AT&T's many licenses to SBC.[2]

Pursuant to sections 214 and 310 of the Act, the FCC must weigh the potential public interest harms resulting from the Merger against the potential public interest benefits "to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessity."[3] The burden of proof is upon Applicants to demonstrate through a preponderance of

---

[2] 47 U.S.C. §§ 214(a), 303(r), 310(d). *See Ameritech Corp., Transferor and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporation Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22,24,25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712, 14736 at ¶ 46 (1999) ("*Ameritech/SBC Order"*). Also, because AT&T is seeking authority to transfer control of its submarine cable landing licenses to SBC, the application must be reviewed under the Cable Landing License Act. 47 U.S.C. §§ 34-39.

[3] *See Intelsat, Ltd., Transferor, and Zeus Holdings Limited, Transferee*, IB Docket No. 04-366, DA 04-4034, at ¶ 15 (rel. Dec. 22, 2004) (*"Intelsat Order"*).

the evidence that the Merger serves the public interest.[4] The Commission examines four overriding factors "(1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes; and (4) whether the merger promises to yield affirmative public interest benefits."[5] Finally, the FCC's analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the Merger under traditional antitrust principles.[6]

Applicants have failed to meet their burden of proof that the Merger is in the public interest. In fact, the Merger as proposed, without conditions, would have significant anticompetitive effects that would frustrate the FCC's attempts to implement Congress' objectives expressed through the Telecommunications Act of 1996 ("1996 Act") to ensure a competitive U.S. local and long distance telecommunications market.

III. AT&T'S PREVIOUS ADVOCACY DEMONSTRATES THE APPLICATION'S TOTAL LACK OF MERIT

A remarkable feature of the proposed merger is that SBC is acquiring one of its principal and most articulate opponents on regulatory issues. Until now, AT&T has forcefully opposed all of the BOC mergers as well as all of the principal arguments that Applicants now urge in support of the instant merger.

---

4 *Ameritech/SBC Order,* 14 FCC Rcd 14737 at ¶ 48.

5 *Id.*

6 *Id.* at ¶ 49.

AT&T has stated that "By combining and shielding… [Applicants'] markets from the most powerful, imminent source of competition – each other – Applicants can continue to foreclose the development of local competition by others and further entrench [SBC's] monopoly power."[7] It conceded that "[T]he survival of competition in the long distance market requires that the BOCs' ability to leverage their entrenched local service monopoly into the adjacent – and presently competitive – long distance market be constrained."[8] It has further raised serious additional concerns as to the potential for BOC re-monopolization of the long distance market,[9] something that would obviously be facilitated by SBC's and Verizon's acquisitions of the owners of the two largest long distance networks.

Moreover, AT&T has urged the Commission to reject the pro-competitive promises made by an RBOC in support of a merger, exclaiming that "while each time the merging RBOCs have promised that their combinations would further the pro-competitive purposes of the Act, these mergers have done nothing but create larger, better financed monopolists."[10] AT&T aptly pointed out that "SBC/Ameritech's out-of-region entry pursuant to the merger conditions has

---

7 Petition of AT&T Corp. to Deny Applications, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp., Transferor to SBC Communications, Inc., Transferee*, FCC CC Dkt. No. 98-141 (Oct. 15, 1998) at i-ii.

8 Declaration of Lee L. Selwyn, FCC WC Docket No. 02-112, CC Docket No. 00-175, June 30, 2003, page 104.

9 Declaration of Lee L. Selwyn, FCC WC Docket No. 02-112, CC Docket No. 00-175, June 30, 2003, page 104 (stating that "The extraordinary and unprecedented rate at which BOCs, following their receipt of Section 271 in-region long distance authority, have succeeded in acquiring retail customers – leading to SBC's projection of a 60% end-state market share – raise serious concerns as to the potential for BOC remonopolization of the long distance market.").

10 Petition of AT&T Corp. to Deny Applications, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp., Transferor to SBC Communications, Inc., Transferee*, FCC CC Dkt. No. 98-141 (Oct. 15, 1998) at 2.

been nominal and superficial, despite their pronouncements at the time of the merger that broad out-of-region entry would be aggressively pursued."[11]

In light of AT&T's previous advocacy, the Commission should give little, if any, weight, to the Applicants' arguments in support of their proposed merger, as AT&T's prior statements not only refute and invalidate them but also impeach AT&T's current position. Rather, consistent with AT&T's previous advocacy[12] the Commission should conclude that this merger poses significant public interest harms.

IV. ALLEGED COMPETITION DOES NOT JUSTIFY THE PROPOSED MERGER

Contrary to SBC's contention, the Commission may not ignore the serious anticompetitive aspects of the proposed merger. It is manifestly incorrect that the markets in which the merged company will provide service will be sufficiently competitive after the merger. SBC's arguments to the contrary are vague, conclusory, internally contradictory, and unsupported by any compelling evidence. The fact that the Applicants did not provide market share data is quite revealing on this point. Also, the largest local competitor to SBC is being driven out of the market, and SBC has demonstrated the ability to re-monopolize the long distance market – with or without the merger with its erstwhile competitor, AT&T.

As an initial matter, SBC claims that there is no actual competitive overlap between the companies ("the merger cannot lessen competition in any relevant market" (PI Statement at 44)). But given the undisputed fact that AT&T and SBC each provide local and long-distance service to millions of mass market and business customers, in many cases in the same states and cities (and sometimes even the same customers), the claim, obviously, has no connection to reality.

---

[11] Declaration of Lee L. Selwyn, FCC WC Docket No. 02-112, CC Docket No. 00-175, June 30, 2003, page 28.

[12] *Bell Atlantic/GTE Order*, ¶ 246; *SBC/Ameritech Order*, ¶ 348.

Indeed, AT&T is SBC's biggest competitor in most relevant markets. But Applicants claim that this competition between them is irrelevant for two reasons: first, with respect the business market, Applicants claim that AT&T serves a different "class" of business customers than SBC does – *i.e.*, that AT&T serves national customers with big telecom budgets, while SBC serves smaller, regional customers. PI Statement at 96-99. But this contention is irrelevant, unsupported and begs the essential question raised by this merger. The Applicants do not identify how many small or mid-sized business customers AT&T actually serves in SBC's region, nor how many national customers SBC serves.

Second, the fact that SBC serves few "large enterprise customers," if true, is dispositive of nothing unless SBC is also claiming that absent the merger it will not compete for such customers. Indeed, given that SBC only had region-wide Section 271 authority for 15 months when the merger was announced, it would be surprising if SBC already had a large share of this market, where customers enter into long-term contracts that in many cases have not yet expired, or have only recently expired, and often take many months to put out to bid and negotiate. Thus, many, if not most, of these customers have not yet been free to turn their business over to SBC and negotiate and implement a new contract with SBC by the time that it decided to merge with AT&T, or even today. Also, rather than showing an *inability* to compete nation-wide, SBC's lack of a national footprint shows only that it has never attempted to do so. Noticeably absent from the Application is any evidence that SBC has attempted, but failed, to compete out-of-region. To the contrary, SBC Declarant James Kahan admits that SBC has eschewed even an attempt to seek the business of enterprise customers whose demand was more than 50% outside of SBC's monopoly region.[13] Also, given its relatively recent in-region long distance authority,

[13] Kahan Declaration, ¶ 27.

even that evidence should be offered little weight. Absent meaningful evidence that SBC has tried and failed to compete in this market, the Commission must dismiss as without merit SBC's claims regarding the competitive disadvantages it faces without an AT&T alliance.

SBC also asserts that the millions of mass-market customers that AT&T serves are irrelevant for the purpose of analyzing competition because AT&T has made the unilateral decision to exit that market. But the Applicants' attempt to divert the Commission's attention away from this very large elephant looming over this proceeding is legally unsustainable. Post-merger, AT&T's millions of customers will automatically become SBC customers, without SBC having to fight for them in the competitive marketplace, and SBC's market share – already (presumably) well above monopoly levels – will become even larger. While the Commission could ignore AT&T's customer base if AT&T were a failing enterprise,[14] AT&T is not failing by any means, either in the consumer market or the business market. In an SEC filing made last week, AT&T reported net operating income for the first quarter of 2005 in the consumer market of $575 million and net operating income in the business market of $588 million.[15] This is hardly the financial report of a failing company. And even if AT&T were to have to pay an additional $7 per month to serve each of its approximately 10 million UNE-P with a commercial substitute, the increased expense of $210 million per quarter would leave it with huge operating profits in the consumer market, especially considering that UNE-P operations require relatively little capital expenditures. In addition, while AT&T may have made a decision, which it could

---

[14] *See Citizen Publishing Co. v. United States*, 394 U.S. 131, 136-39 (1969) (authorizing anticompetitive mergers in violation of the antitrust laws under the "failing company" defense only if: (1) the firm being acquired faces a "grave probability of business failure" (i.e., bankruptcy) and (2) there is no less anticompetitive means of avoiding the failure, such as merger with some other firm.

[15] AT&T Corp, Form 8-K, Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (filed April 21, 2005).

change at any time, not to seek new mass market customers, it did not abandon its existing customer base. Applicants have also made no showing that absent the merger, AT&T could not profitably convert millions of its consumer customers to of its Call Vantage VoIP service, particularly in light of the allegations that Applicants make as to the viability of VoIP as a competitive service. Nor is there any showing that AT&T could not have turned these customers into a profitable customer base using a wholesale local service purchased from CLECs. Thus, the Commission may not ratify this merger, which would have such an unmistakable devastating effect on competition.

A. Intramodal Competition Cannot Avert the Competitive Harm from the Merger

Implicitly recognizing, as they must, that SBC's acquisition of AT&T could adversely diminish competition, Applicants argue that the Commission need not worry about those consequences because other wireline providers remain in the market. Specifically, Applicants cite the presence of other CLECs, IXCs, cable providers, and other ILECs as providing competitive options once AT&T exits the market. *See* Public Interest Statement at 67-90. Most ludicrously, Applicants claim that business customers have become increasingly sophisticated users of telecom services who through their business savvy, will be able to negotiate good deals despite the ever decreasing number of competitive alternatives. The invalidity of these claims is underscored by the fact that Applicants make them at the same time as ILECs have begun to increase retail pricing to small and medium business customers as competition recedes in many local markets.

These claims are all obvious make-weights. While the undersigned competitors, among others, remain in the market, they have nowhere near the market power sufficient to avert the

competitive harms posed by this merger. As the Commission is aware, and as explained at greater length below, the competitive foothold in the mass market remains tenuous.

SBC's power in the business market remains unchallenged, as AT&T demonstrated in its recent *Special Access Petition*. A principal defect with SBC's claims regarding competition in the business markets is that it fails to acknowledge that the carriers who SBC contends constitute "the competition" rely on SBC for provision of the last mile facilities necessary to provide service.[16] Indeed, the Commission explicitly found in the *TRO Remand Order* that ILECs, including SBC, retain market power in all relevant business markets, concluding that, "the barriers to entry impeding competitive deployment of loops are substantial."[17] The Commission found that CLECs "face substantial operational barriers to constructing their own facilities;"[18] that Competitors still face "steep economic barriers" to the deployment of last mile facilities;[19] and that these barriers "typically make duplication of such facilities uneconomic."[20] It is natural then that competitors have only built their own last mile facilities to a small percentage of business customers.[21] Facilities based CLECs, such as Time Warner Telecom and Focal, still rely on ILEC-provided loop facilities at 75% of their customer locations.[22] Even AT&T has

---

16 WC Docket 04-405, AT&T Comments at 36-37.

17 *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Order on Remand, FCC 04-290, ¶ 153 ("*TRO Remand Order*")

18 *Id*. ¶ 151.

19 *See TRO* ¶ 199.

20 *TRO Remand Order* Separate Statement of Commissioner Kathleen Abernathy.

21 *See* WC Docket 04-405, Time Warner Telecom *et al* Comments at 9 *citing* RBOC 2004 UNE Report, WC Docket 04-313, filed Oct. 4, 2004 at p. I-2.

22 *See* WC Docket 04-405, Time Warner Telecom *et al* Comments at 10.

demonstrated that it relies on ILEC loops to serve approximately 95% of its business customers.[23] As Chairman Powell explained, in rejecting ILEC claims that competitors did not need access to unbundled last mile broadband facilities, "the record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances."[24]

If the merger were allowed to proceed, AT&T would no longer need to purchase these access services from SBC. Thus, AT&T's "costs" of access would no longer be a genuine external cost of doing business because its access payments would be no more than transfers within the SBC corporate enterprise. The merged company would then be able to provision access facilities to itself without regard to the access prices still faced by its competitors. And, as discussed elsewhere in these comments, those competitors would remain dependent on ILEC facilities that, in turn, would facilitate SBC's ability to engage in various forms of price and non-price discrimination against them.

In view of this reality, the merged firm will have new incentives and opportunities to engage in anticompetitive conduct by taking steps to reduce the competition it faces in these and other markets. These new opportunities arise not only from the increased horizontal concentration that the merger results in but from the newly acquired ability of the merged firm to favor its own operations by enabling them to avoid exorbitant access prices. The merger will thus result in an uneven playing field for *all* services that now require some form of SBC-

---

[23] Reply Decl. of Lee Selwyn, *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, ¶ 18 (FCC RM No. 10593 (filed on behalf of AT&T Corp. Jan. 23, 2003). The fact that AT&T purchases so much special access from ILECs suggests that AT&T's customer base includes a significant number of small and medium-sized business customers, in addition to the large enterprise customers on which the Application focuses, ignoring the small and medium business market.

[24] Separate Statement of Chairman Powell, *Triennial Review Remand Order Press Release.*

provided last-mile access. As a result, other (non-access) markets, including markets for voice services within the SBC region, will face substantially lessened competition if the merger is consummated as proposed.

SBC's claims regarding the impact of cable broadband competition in the business market also lack evidentiary support. As the Commission has recently observed, "cable modem service is primarily residential service."[25] In many markets, cable networks only pass – let alone serve – just a quarter of business customers.[26] Fewer than 1% of cable modem subscribers are medium or large businesses or government entities.[27] The *TRO Remand Order* confirms that cable modem service is unsuited, and therefore not a substitute, for ILEC services for a number of reasons, including that it is asymmetrical, relatively low bandwidth, and lacks sufficient reliability and security.[28] Indeed, the Commission expressly found that the RBOCs provided "little evidence that cable companies are a significant presence in the enterprise loop market."[29] Rather, to the extent that cable companies provide service to business customers, it is in the mass market to "small and medium business … that are near the residential network."[30] Simply put,

---

[25] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report to Congress, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at p. 14 (rel. Sep. 9, 2004) ("*Fourth Advanced Services Report*").,

[26] Ex parte letter of Jonathan Banks, BellSouth, to Marlene H. Dortch, FCC, *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 at p. 5 (filed Nov. 8, 2004).

[27] *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau (December 2003), Table 1 and Table 3.

[28] *Id*.

[29] *Id*.

[30] *Id.*

there is no evidence that cable operators provide a serious alternative to serve the large business customer niche that is currently so well served by AT&T.

Moreover, to the extent that cable does provide a competitive alternative, it does not do so to the extent necessary to justify this anticompetitive merger. The Commission has previously found that competition sufficient to diminish the need for regulation will not exist where the market is primarily allocated between two dominant firms.[31] Courts have recognized that a duopoly in the market is the equivalent of a monopoly because, "firms in a concentrated market … in effect share monopoly power by recognizing their shared economic interests and their interdependence with respect to price and output decisions."[32] A "durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices."[33] Thus, at a minimum, even to the limited extent that SBC shares its service monopoly with cable, it retains market power and the incentive to abuse that power. Moreover, there are numerous areas throughout SBC's service territory where cable does not compete with SBC at all. Many mass-market consumers lack access to cable modem service.[34]

B. Intermodal Competition – To The Extent It Exists – Does Not Eliminate The Competitive Harm Posed By This Merger

The intermodal alternatives cited by SBC are likewise not grounds for approving the merger, as there is no reliable evidence that any "of these technologies and service categories has

---

[31] *See Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, 17 FCC Rcd 20559, 20684 ¶¶ 103-105 (2002) ("*EchoStar Merger Order*").

[32] *Brooke Group v. Brown & Williamson*, 509 US 209, 227 (1993).

[33] *FTC v. Heinz*, 246 F.3d 708, 725 (D.C. Cir. 2001).

[34] *See* WC Docket 04-405 AT&T Comments at 41.

yet posed anything like a significant competitive antidote to the incumbents' market power."[35] Notably, the Commission found in the *TRO Remand Order*, "the record does not indicate that other intermodal options, such as fixed wireless and satellite, offer significant competition in the enterprise loop market."[36]

As the Commission is painfully aware, predictions of expansive broadband competition from the electric power industry and wireless broadband technology have been plentiful over the last decade and beyond. These predictions have, however, yet to come true. The Commission has predicted competition from electric utility communications services for years while no viable competition has taken root.[37] The Commission has also explored the promise of advanced fiber deployments for decades, and despite the promise, it has yet to bring any broad benefit to consumers.[38]

Nor is VoIP the savior of this Application that SBC maintains. In the first place, similar to issues faced by providers seeking to compete with SBC in the business market segment, VoIP requires customer access be provided by local network operators – and in the vast majority of its exchanges that will be SBC, or a CLEC using last mile facilities from SBC. To use VOIP, a

---

35 *See Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services)* Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12618 ¶ 164 (1997) ("*LMDS Order*")

36 *Id*. ¶ 193 n. 508.

37 *1995 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, ¶ 120 (1995) (Commission observed that electric utilities that have incurred substantial costs to deploy networks that reach nearly every household in the country could compete with cable companies).

38 See e.g. Robert Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change*, Office of Policy and Plans Working Paper No. 24, ¶¶ 21, 24 (1988).

customer needs to obtain broadband Internet access, which may not be available for all businesses, except from wireline carriers, such as SBC. Although Applicants cite analysts who view VOIP products as direct competitive threats to the ILECs, the declaration of their economists do not go so far,[39] and for good reason. VoIP has only been deployed in the mass-market for a couple of years at this point, and there are questions about its scalability (*i.e.*, can it serve tens of millions of users) and service quality and reliability. Even leaving aside the problems that VoIP providers have had with 911 and call reliability, long-run future gradual substitution of VOIP for wireline local voice services—assuming that it occurs--does *not* put VOIP in a relevant antitrust market at this time with all wireline services. The fact that VoIP applications may some day replace traditional wireline voice services is, thus, irrelevant, as these potential trends have nothing to do with market definition analysis. Rather, the test is whether VoIP providers other than SBC offer an economic substitute for SBC's traditional wireline telecom services,[40] and Applicants have not shown any evidence of price-related substitution of VOIP for any service, so it is impossible to reach the conclusion that VOIP is in the same market with wireline. But even if customers do migrate to VoIP, it is clear that SBC will be a beneficiary of that trend, as SBC plans to continue marketing AT&T's CallVantage, which is a VOIP service. Thus, even if VOIP is in the same market as wireline, it is unlikely that SBC's market share would be significantly smaller in a wireline/VOIP market than it is in a solely wireline market. And again, most of the VOIP players in the space will be beholden to SBC for last mile access to the end user customer using the VOIP application over those facilities.

---

39 Declaration of Dennis W. Carlton and Hal S. Sider, 2/21/05, ¶ 29.

40 *See, e.g., Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* 17 FCC Rcd 23246, ¶ 41 (2002).

Moreover, SBC continues to aggressively use tactics to stymie existing VOIP competition such as asserting such traffic is subject to access charges and filing lawsuits against carriers that terminate VOIP traffic, in addition to not cooperating in providing 911 access to VOIP carriers.

In addition, in order to transition VoIP service, customers must continue to rely on broadband Internet access that relies on traditional providers and cable providers because market conditions today unequivocally show that there is currently no viable large-scale competitor to DSL or cable modem broadband services.[41] Simply because a market is evolving rapidly does not mean that new entrants are successfully entering the market and providing competitive services. In the face of facts that current entrants have not been able to establish a foothold in the market, the Commission should decline SBC's invitation to speculate that the future of BPL, WiMax and other nascent technologies will succeed where others have failed. Indeed, it may not do so, as the Commission is required to examine *current* market conditions and the incumbents' *current* market power.[42] SBC's claims regarding the "potential" competition from satellite, BPL, and other technologies have already been dispositively rejected by this Commission and foreclose SBC's arguments here. The Commission's focus must be on current market impacts, and these are demonstratively anticompetitive.

Nor is there any evidence that wireless service providers could provide the kind of competitive broadband alternative that SBC claims. The failure of previous efforts to provide commercially viable wireless broadband access are well documented, and the current efforts at

---

41 WC Docket 04-405, Joint CLEC Comments at 18.

42 *See LMDS Order* at 12618 ¶ 165.

delivering wireless broadband remain in the developmental stages. As the Wall Street Journal recently observed:

> Wireless-broadband services have a rocky history. Companies such as Winstar and Teligent tried to offer similar services during the telecom boom of the late 1990s, with limited success. Sprint's efforts with so-called fixed-wireless technology led to a $1.2 billion write-down.
>
> For the technology to get even more affordable, experts say the much-hyped WiMAX technology needs to be certified and standardized, which could still be a year away, and another year after that before it is widely available in laptops and other devices.[43]

In the *TRO*, the Commission discounted mass-market broadband competition from the wireless sector, observing that "fixed wireless and satellite services remain nascent technologies, with limited availability."[44] And while millions of American consumers have started using cell phones in recent years, there is little evidence that cell-phone technology is an economic substitute for wireline technologies. In other words, very few consumers have "cut the cord" and become "wireless only" users.[45]

But even if wireless broadband alternatives were somehow relevant to the analysis (which they are not), SBC owns 60 percent of the country's largest wireless company, Cingular, in partnership with another RBOC.[46] According to the methodology used by the federal antitrust

---

[43] Jesse Drucker and Almar Latour, Internet and Phone Companies Plot Wireless-Broadband Push, THE WALL STREET JOURNAL, January 20, 2005, p. A10, viewed January 24, 2005 at http://online.wsj.com/article_print/0,,SB110617646006230682,00.html.

[44] *TRO* ¶ 231.

[45] Julian V. Luke and Marcie L. Cynamon, *The Prevalence of Wireless Substitution* (presented at 59th Annual Conference of the American Assn. for Public Opinion Research May 15, 2004).

[46] *Merger of SBC Communications Inc. and AT&T Corp., Description of the Transaction, Public Interest Showing, and Related Demonstrations*, Filed with the FCC on 2/21/05.

agencies, partially owned subsidiaries are assigned entirely to their parents when calculating market shares and the Herfindahl-Hirschman Index ("HHI").[47] And although the parties have not provided the data, we can presume that Cingular's market share in SBC's 13-state region is larger than elsewhere in the country. Thus, even if wireless service is included in the relevant market, it is not clear that the concentration levels for a "wireline plus wireless market" in the relevant area would be significantly lower than for wireline alone.

Finally, Applicants' reliance on the presence of systems integrators – who purchase service components from various providers – and the buying savvy of their business customers is laughable. First, if systems integrators are in fact, successful competitors in the market, their success demonstrates the total lack of merit as to SBC's stated rational for purchasing AT&T. Why not simply purchase a systems integrator or attempt to become one itself? Second, the acquisition of AT&T threatens to undermine the very basis for whatever success systems integrators have enjoyed in recent years. Systems integrators rely on the presence of many providers competing with one another at all levels in the market. This acquisition, together with Qwest or Verizon's acquisition of MCI, will extinguish much of the competition on which systems integrators depend. Likewise, the negotiating savvy of business customers will become irrelevant if there are few competitive alternatives from which to choose.

Notably, Verizon owns a majority interest in the second largest wireless company, Verizon Wireless.

[47] "Instructions," Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions, p. v.

V. THE PROPOSED MERGER IS NOT NECESSARY TO RESCUE, OR RESTORE, U.S. LEADERSHIP IN TELECOMMUNICATIONS

The Applicants proclaim that the merger "will produce a flagship U.S. carrier"[48] This statement amounts to little more than a call for re-monopolization of the telecommunications industry through integration of the two largest LECs (SBC and Verizon) with their two largest competitors (AT&T and MCI), and a rollback of two decades of painstaking progress in opening telecommunications markets to competition. The pre-divestiture AT&T was undeniably a "flagship U.S. carrier" with the broadest of customer bases and maximum economies of scale, yet it was slow to bring to market innovations and imposed exorbitant prices. In fact, even after divestiture, the RBOCs let xDSL technology languish for over ten years in order to avoid cannibalizing revenues from other profitable services that required far less investment.[49] Moreover, the rapid growth of advanced services such as DSL and cable modems, as well as basic services such as DS-3 capacity circuits, did not occur until after CLECs and cable companies brought these technologies to market in the 1990s and made significant inroads, leaving the RBOCs with no choice but to begin offering DSL on a widespread basis.

Further, Applicants fail to explain if or how U.S. leadership was supposedly "lost." The United States continues to be a market leader in broadband and the Commission's own reports show that broadband is being provided to U.S. consumers on a reasonable and timely basis.

The Applicants have also failed to provide any connection between U.S. leadership in telecommunications and the merger (unless "leadership" is to be measured simply by the revenues of each country's largest carrier). In fact, the Commission's own reports to Congress

---

[48] California Application, at iv, 17-18.

[49] Annabel Z. Dodd, The Essential Guide to Telecommunications, at 152 (Prentice Hall, N.J. 1998).

have established that the size of any individual provider is not a factor in broadband deployment , and may in fact *hinder* deployment: "[W]e acknowledge that some of the [study] results may be of limited value due to unique circumstances in a particular nation. Factors such as geography, population concentration, industry structure, and government subsidies may all influence the effectiveness of deployment techniques employed by various countries."[50] According to the OECD report, the rapid roll-out of high-speed Internet access in Korea is a result of competition between companies using different technologies and different infrastructures. And while Korea Telecom was able to offer DSL service to 92 percent of the Korean population by the end of 2000, this stemmed in part from the fact that a high percentage of Koreans live in apartment buildings.[51] This also appears to be the reason for high penetration in Sweden.[52] The Commission concluded by stating that "we believe [as in the Second Report] that competition among service providers increases the quality of services made available to consumers."[53]

Accordingly, the Commission should reject Applicants' view that the merger is necessary for, or in any way related to, U.S. leadership in the telecommunications market.

---

[50] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket 98-146, Third Report, FCC 02-33 para. 125, Released: February 6, 2002. This conclusion was reconfirmed in the recent Fourth Report. FCC 04-208 at 40-43.

[51] *Third Report* para. 127.

[52] *Id.* para. 129.

[53] *Id.* para. 131.

VI. THE PROPOSED MERGER WOULD PRODUCE SERIOUS HARMS

A. The Merger Would Result in Undue In-Region Market Concentration

In order to make a valid public interest determination, the Commission must evaluate the merger's likely effect on future competition. Although Applicants bear the burden of proof,[54] they have provided no market share data for any of their services. Commenters are pleased that the Commission has asked, in an April 18, 2005 data request, that SBC and AT&T provide "the market shares analyzed by any appropriate metric separately for AT&T, SBC, and each of the competitors cited in pages 73-88 of the Public Interest Statement, separately for each class of business and wholesale customers." This market share information is indispensable for the Commission and parties to evaluate the impact of the proposed merger adequately. This information is also necessary given the Commission's contemporaneous consideration of Verizon's and MCI's proposed merger,[55] which will also affect most of the same markets that are affected by the SBC/AT&T merger. The Applicants must also base their market share information on reasonable market definitions. As noted above, Commenters recommend that the Commission promptly supplement its initial data request with further questions set forth in the attached Appendix. Despite the paucity of data with the Application, it is clear based on available market share information that the proposed merger would significantly increase concentration in the voice and data markets and would diminish competition.

---

[54] *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, ¶ 12 ("*WorldCom/MCI Order*").

[55] *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket 05-75 (filed March 11, 2005).

1. The Merger Would Unduly Concentrate the In-Region Mass Market

SBC currently has an 80% market share in the in-region local wireline market, which should increase to an approximate 90% share after the merger.[56] In long distance, SBC has an estimated 40% market share in its service region, while AT&T has approximately 30%.[57] Thus, the post-merger in-region long distance share would be in the range of 70%.[58] Consequently, since the above figures include mass market customers, the merger would likely result in concentration over 70% in SBC's region for mass market services under any reasonable definition of the mass market.[59]

SBC and AT&T attempt to avoid the obvious fact of vastly increased concentration in the mass market by claiming that AT&T has made an "irreversible" decision to stop pursuing mass market customers.[60] The decision to announce a cessation in marketing, which came not long

---

[56] *Competition in the Communications Marketplace: How Technology is Changing the Structure of the Industry; Hearings Before the House Energy and Commerce Committee*, (2005) (statement of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America) (*citing* Federal Communications Commission, *Local Telephone Competitions: Status as of June 20, 2004*, December 2004).

[57] *Id.* (*citing* Precursor, *Telecom Vital Statistics: Pillars of the Bell 2005 Competitive Respite Thesis*, January 24, 2005 and Industry Analysis and Technology Division, *Trends in Telephone Service*, Federal Communications Commission, May 2004). In those regions where SBC has been providing long distance service for the longest periods of time, its in-region long distance presence is even higher. *See Confronting Telecom Industry Consolidation: A Regulatory Agenda for Dealing with the Imposition of Competition*, National Association of State Utility Consumer Advocates, page 23 (April 2005).

[58] *Competition in the Communications Marketplace: How Technology is Changing the Structure of the Industry; Hearings Before the House Energy and Commerce Committee*, (2005) (statement of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America).

[59] The Commission has asked SBC and AT&T to provide definitions of mass market and enterprise customers as well as small, medium, and large business customers in an April 18, 2005 data request.

[60] *See* Description, page v.

before the merger was announced is suspect. As discussed above, AT&T's consumer operations are yielding operating profits at a rate of $2,260,000,000 per year. A decision to conserve resources by not marketing might make business sense, but a decision to tell the world, including AT&T's more than 10,000,000 residential customers, that AT&T has no interest in residential customers, makes no business sense.[61] Applicants have also failed to show that this decision is indeed irreversible. AT&T could easily resume marketing activities because of its recognized brand name, service capabilities, and its Call Vantage VoIP product, especially since SBC and AT&T assert that VoIP will be a "significant competitive challenge" to incumbents.[62] AT&T could also resume marketing to residential customers by partnering with a CLEC to implement a UNE-L approach. If such a claim is true, then AT&T's Call Vantage VoIP product will give a merged entity further market presence. Furthermore, SBC would not necessarily acquire AT&T customers in either the short or long term, absent the merger. After all, AT&T's customers effectively fired SBC when they first became AT&T local customers. Even if the decision were "irreversible," AT&T continues to serve customers[63] and may be adding new customers (including new SBC customers) without actively marketing. Therefore, AT&T's announcement is essentially irrelevant to determining whether the proposed merger would diminish competition. Given that AT&T is a current and potentially future provider of mass market services, the proposed merger ultimately results in SBC acquiring its largest mass market competitor.

---

[61] AT&T to Stop Competing in the Residential Local and Long-Distance Market in Seven States (dated June 23, 2004). *See also,* AT&T to Stop Some Residential Service, Forbes.com (dated June 23, 2004).

[62] Public Interest Statement, pages 60-61.

[63] Declaration of John Polumbo, ¶¶ 36-37.

It is also worth noting that the proposed merger would also result in a significant concentration of the mass market for long distance voice service when viewed from a national perspective. In the national long distance voice market, AT&T and SBC are the top two carriers.[64] According to the most recent market tracking data released by TNS Telecoms, the entity used by the Commission to conduct its Trends in Telephone Service report, SBC has a 17% market share in the national long distance market, while AT&T has a 20% market share.[65] Thus, the SBC and AT&T share for the long distance market, if the proposed merger is consummated, would be 37%. These figures do not take into account potential future market share, but they demonstrate the dramatic increase in concentration that will occur if the merger is approved.[66] In addition, Verizon and MCI control 15% and 8% of the long distance market, respectively.[67] If both mergers are approved, the two newly-created entities would control 60% of the long distance market, a dramatic increase as compared with the present top-two share of 37%.

2. The Merger Would Diminish Competition in the Business Market

Although SBC and AT&T compete in the enterprise (*e.g.* medium and large business customers) market,[68] SBC does not identify its market share, AT&T's share, or any named competitor's share on either a national or in-region basis, and should be required to provide this

---

64 Mark Sullivan, *Merged Telcos Will Sport Different Looks*, at www.lightreading.com/document.asp?doc_id=68343, (Feb. 18, 2005).

65 *See SBC/AT&T Shuffles Wireline Stats*, TNS Telecoms Market Research, February 11, 2005 at www.lightreading.com/document.asp?doc_id=67306.

66 The percentages generated by TNS Telecoms come from bills and promotional material from 32,000 U.S. households. *Id.*

67 *Id.*

68 See Public Interest Statement, page 96.

information.[69] Nevertheless it is clear that combining AT&T and SBC will eliminate an actual competitor from the market and will make the merged company the leading contender to serve enterprise customers in the 35% of the country where SBC is the dominant provider of local services.[70] In-region market shares for SBC in the enterprise market following the merger has been stated to be in "the mid-80 percent range."[71] AT&T's national market share for "corporate telecommunications" is 15%.[72]

Commenters look forward to reviewing Applicants' market share information in response to the Commission's data requests. In the meantime, based on the foregoing available data, it is clear that the merger will cause undue market concentration in the enterprise market.

Applicants have also failed to provide sufficient basis to alleviate concerns about undue concentration in the enterprise market. SBC attempts to justify the proposed undue concentration in the business market on the basis that it needs an integrated long-haul network to compete in the enterprise market. However, as explained below, the merger is totally unnecessary in order to achieve integration. Further, even if it were necessary, there are other less harmful alternatives than a merger that will remove a substantial competitor and reduce

---

69 Please note that the Commission has asked for market share information in an April 18, 2005 data request.

70 Reply Comments of AT&T Corp., WC Docket NO. 43-343, CC Docket NO. 01-338, at 71-72, 77-78 (Oct. 19, 2004). *See also*, Comments of AT&T Corp. WC Docket No. 04-313, CC Docket No. 01-338, at 132-133 (Oct. 4, 2004) (stating that the Bells concede they are thriving in the enterprise market).

71 *Competition in the Communications Marketplace: How Technology is Changing the Structure of the Industry; Hearings Before the House Energy and Commerce Committee*, (2005) (statement of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America) (*citing* Richtel, "Valuing MCI in an Industry Awash in Questions," *New York Times*, February 9, 2004, C-4).

72 Matt Richtel, "Valuing MCI in an Industry Awash in Questions," *New York Times*, February 9, 2004, C-4.

competition exist. For example, SBC already uses the long distance network of an independent stand-alone facilities-based IXC, and therefore, one alternative would be for SBC to purchase that or another independent stand-alone facilities-based IXC. If SBC made such a purchase, the enterprise market would not suffer from nearly as much of an increase in concentration as with an AT&T acquisition. Another possibility would be for SBC to purchase a systems integrator. SBC states that it lags behind system integrators, which have enhanced their capabilities to manage and control the networks over which the service to large business customers is provided.[73] Thus, if SBC purchased a system integrator, it might be able to obtain similar results without removing a facilities-based competitor with a valuable trade name and customer base from the market. SBC could also hire key personnel from a systems integrator in order to enhance its own capabilities to manage and control the networks to become more appealing to large business customers.

Moreover, contrary to Applicants' contention, the sophistication of business customers does not reduce concerns about the proposed increased in-region concentration in the enterprise market. Even sophisticated customers are not able to avoid Applicants' discriminatory practices if alterative providers are not available.

The Commission should reject SBC's claim that it is not able to effectively compete in the enterprise market after only 15 months of having nationwide Section 271 authority. Even if otherwise valid, this is far too soon after receiving Section 271 authority to reach any such sweeping and highly questionable conclusions.

[73] Kahan Declaration at ¶ 25.

SBC's claim that it concentrates on enterprise customers in its "sweet spot," meaning customers with more than 50% of their locations in SBC's footprint is also unpersuasive.[74] This suggests that SBC currently engages in only a limited amount of out-of-region competition in locations where it is not the incumbent monopolist. AT&T and MCI are, however, not so limited, since the entire United States is "out-of-region" for them in the sense that neither AT&T nor MCI is the incumbent monopolist anywhere. Thus, competition between AT&T and MCI for enterprise customers has been vigorous throughout the United States. Following the merger, however, AT&T, as a subsidiary of SBC, will face a much lower access charge to serve customers in the SBC region than MCI, while MCI will face a much lower access charge to serve customers in the Verizon [or Qwest] region than AT&T. The likely outcome of such circumstances will be a tacit geographical allocation of markets, in which AT&T and MCI each follow SBC's lead in concentrating on serving customers in the "sweet spot" sheltered by their ILEC parent's monopoly control over local access. This, in turn, will inevitably lead to a reduction in competition in the national enterprise market.

The proposed merger would also harm the in-region business market because it would eliminate AT&T as a purchaser of wholesale services from CLECs. Post merger, AT&T will have no incentive to obtain access services from, or partner with, CLECs. This will seriously harm the viability of competitive services because CLECs will lose a potential major customer.

3. The Proposed Merger Threatens the Viability of Independent IXCs

Apart from creating an immediate undue concentration of the in-region mass and enterprise markets, the proposed merger is likely to undermine the viability of an independent facilities-based interexchange carriers. SBC uses the long distance network of a third party to

[74] Declaration of James S. Kahan on behalf of SBC, ¶ 27.

provide certain long distance services.[75] It is reasonable to assume that if the merger is approved, SBC will transfer all of its traffic to the AT&T network. As a result, especially in conjunction with the Verizon and MCI merger, independent facilities-based long distance providers may no longer have a viable market in which to participate. As indicated above, the combined long-distance market share of SBC/AT&T and Verizon/MCI will be extremely high, and therefore, no significant, viable market will be able to support independent facilities-based long distance providers. This, in turn will impede competition for local service. Most consumers desire bundled service. If independent facilities-based IXCs are unable to compete with SBC/AT&T and Verizon/MCI, CLECs will have no choice but to purchase long-distance service from SBC or Verizon, both of which will be able to use their control over long distance to impede CLEC competition for customers wanting bundled service.

AT&T has already shown that SBC can discriminate against independent long distance providers by providing lower quality of access, using its market power over the local exchange bottleneck "to undermine long distance competition through discrimination and other anticompetitive conduct," and by forcing these providers to buy special access at grossly excessive prices.[76] If SBC had that much power before the merger, its *ability* to discriminate will increase because provision of better service to its long distance operators will be masked by the "integration" that SBC states it will implement. SBC will have an increased *incentive* to discriminate, because it can favor its own in-house long distance network, that of AT&T. That is the precise reason it was necessary to break up AT&T in the first place.[77]

---

[75] Public Interest Statement at p. 99.

[76] Comments of AT&T Corp, *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, pages 6, 12, 20.

[77] *U.S. v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982).

4. The Proposed Merger Would Unduly Concentrate the IP Backbone Market

Although the Applicants have failed to provide meaningful information concerning the impact of the merger on the IP backbone market, it is clear that the proposed merger raises serious public interest questions because of undue concentration in the IP backbone market.

From a horizontal impact perspective, the merger of SBC-AT&T, combined with the merger of Verizon-MCI, creates the potential for excessive concentration in the provision of Internet backbone services. Based upon the evidence presented by SBC-AT&T, it is likely that the combined mergers will have a detrimental impact on horizontal competition for Internet backbone services. The data submitted by Dr. Schwartz with the SBC-AT&T proposal does not specify which of the unidentified companies in the AS Connection data is Verizon, only identifying SBC, MCI and AT&T. This is an important omission on the part of Dr. Schwartz.[78] Depending on which company's data relates to Verizon, the post-merger HHI for AS Connections could be in excess of 1800.[79] An HHI over 1800 is a sign of a "highly-concentrated" market according to the joint-merger guidelines of the Federal Trade Commission and Department of Justice.[80] In a highly concentrated market, an increase in the HHI of more

---

[78] *See* Declaration of Marius Schwartz, Feb. 18, 2005, Table 2.

[79] The Herfindahl-Hirschman Index ("HHI") is a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in a market, and then summing the resulting numbers. The closer a market is to being a monopoly, the higher the HHI will be. A company with a 100% market share will have an HHI of 10,000 and in a perfectly competitive market with thousands of competitors all having small market shares the HHI will approach 0. The U.S. Department of Justice considers a market with a result of less than 1,000 to be a competitive marketplace; a result of 1,000-1,800 to be a moderately concentrated marketplace; and a result of 1,800 or greater to be a highly concentrated marketplace. As a general rule, mergers that increase the HHI by more than 100 points in concentrated markets raise antitrust concerns.

[80] 1992 Horizontal Merger Guidelines §1.51.

than 50 points raises significant competitive concerns.[81] Dr. Schwartz's evidence shows an HHI increase of 105 points just for the SBC-AT&T merger on its own, and an HHI increase of as much as 677 if the MCI-Verizon merger is also included, depending on which of the unidentified companies is Verizon. Either way, in a highly concentrated market, significant competitive concerns are raised by the SBC-AT&T merger.

In addition, the data submitted by Dr. Schwartz to calculate market shares for Internet backbone providers is outdated. His data on Internet traffic is from the fourth quarter of 2003, while his IDC revenues are from 2003. His most recent data, for AS Connection shares, is eight months old.[82] This outdated data is used despite Dr. Schwartz's own admission that the identity of the top-ranked firm changed twice between January 2003 and May 2004.[83] Use of such data is problematic because there is reason to believe the market for the provision of Internet backbone services has been changing rapidly, with SBC having an increasing market share over this period. Some estimates show an increase in the number of AS Connections served by SBC of 112% between 2002 and 2004.[84] If this is true, than the data submitted by Dr. Schwartz would underestimate the market share of SBC for AS Connections. Therefore, SBC-AT&T should be required to submit more recent data to the Commission in order to properly measure the effect that this merger will have on the Internet backbone market.

Commenters stress here, as elsewhere in these comments, that the Commission should not judge the merger of SBC-AT&T without an evaluation of other mergers occurring in the market, including potential mergers. SBC-AT&T have failed to present any evidence to the

---

81 *Id.*

82 *See* Declaration of Marius Schwartz at ¶ 21 and App. 4.

83 *See* Declaration of Marius Schwartz at ¶ 24.

84 Based on information found in *TeleGeography*.

Commission of the effect that its merger, along with the merger of Verizon and MCI, will have on competition in the market for Internet backbone services. In order to appropriately gauge the effect on competition, the Commission needs to look at all the mergers occurring in the market at this time, including potential mergers that could occur as a result of the competitive imbalances created by the SBC-AT&T and Verizon-MCI mergers. Other decisions involving the lawfulness of mergers have looked at the combined impact of contemporaneous mergers, rather than examining each in isolation.[85] Although Applicants have failed to submit evidence of other merger activity in the same market, the MCI-Verizon merger must not be ignored by the Commission. The Commission would be ignoring its duty to protect the public if it failed to properly review the proposed SBC/AT&T merger without fully taking into account any merger of MCI with a BOC.

The Commission should also consider near term changes in the market. Given the substantial recent growth of the Internet backbone services of SBC and Verizon, the Commission could reasonably project that these carriers will have an even greater market share today and in the near future, providing an additional reason for concluding that the proposed merger is not in the public interest.[86]

In addition, from a vertical integration perspective, the merger of SBC, one of the largest Internet backbone purchasers and AT&T, one of the largest Internet backbone providers, creates

---

[85] *See Memorandum and Opinion*, US District Court for the District of Columbia, Federal Trade Commission v. Cardinal Health, Inc. and Bergen Brunswick Corp., Civ. Act. No. 98-595 and Federal Trade Commission v. McKesson Corp. and Amerisource Health Corp., Civ. Act. No. 98-596 (Jul. 1998).

[86] *See* Public Interest Statement at 48. SBC-AT&T ask the Commission to assess the current market rather than conduct a detailed analysis of the merged company's future competitive strength in the mass market. In the Internet backbone services market, the current market is really not an accurate reflection due to the rapid growth in SBC's and Verizon's market shares.

very serious public interest issues. The potential power of the merged company is critical. SBC itself has previously argued to the Commission about the threat of one company having a much larger backbone than its competitors. SBC wrote, "where one backbone achieves a substantial size advantage over its rivals, it necessarily reduces the value of, and therefore the demand for, the rivals products. At some point, the market may tip with customers abandoning the rivals altogether because the networks are too small to be viable."[87] This threat is apparent here for all Internet backbone providers that will have to compete with the merged SBC-AT&T and Verizon-MCI. As described below, the undue concentration in the IP backbone market that the merger would produce creates a significant potential for harm.

B. The Proposed Merger Would Enhance SBC's Ability to Harm Competitors

1. The Merger Would Enhance SBC's Ability to Engage in Price Squeeze Behavior

Given SBC's and AT&T's market concentration levels and the reduction in competition, competitors as well as the public interest will be harmed by the merger. Very importantly, SBC will have a greater ability to engage in price squeeze behavior. AT&T has previously agreed that ILECs such as SBC have "a powerful incentive to use its bottleneck network facilities and operations to disadvantage competitive entrants and thereby promote its own retail activities."[88] AT&T has also stated that "history provides a powerful example of the RBOCs' ability to

---

87 *See* Opposition of SBC Communications, Inc., *In re Sprint-MCI Worldcom Transfer of Control*, CC Docket No. 99-333, p. 41 (Feb. 18, 2000).

88 Direct Testimony of Joseph Gillan on behalf of AT&T Communications of Ohio, Inc., *In the Matter of the Joint Application of SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation and Ameritech Ohio for Consent and Approval of a Change of Control*, Case No. 98-1082-TP-AMT, filed Dec. 14, 1998, at 54-55.

change overnight its rate structure from one that allows competition to flourish to one that forecloses competition altogether."[89]

So long as SBC continues to exercise market power over special access – a necessary input for competitors in both the local and long distancemarkets – it can subject its competitors to price squeezes. The opportunity to impose a price squeeze exists because Applicants' access services are priced well above actual cost.[90] When Applicants provide long distance or local services, however, they will not pay these inflated access costs. Rather, because they will be vertically integrated – *i.e.,* they will provide access and long distance services together--they will bear only the actual economic cost of providing access when using their own facilities to originate and terminate their long distance traffic. The portion of the access charge above economic cost amounts only to an intra-company transfer payment that will be meaningless to the merged entity. Thus, Applicants will be able to underprice competitors and still earn a profit because inflated access charges will not be a cost of doing business for the combined AT&T-SBC. Given that these access charges to IXCs are a substantial part of the cost of a long distance call, Applicants can significantly underprice their rivals and still earn a profit.

In the *SBC-Ameritech Merger Order,* the Commission recognized that an incumbent LEC's ability to charge supra-competitive access rates could permit it to price squeeze potential competitors.[91] Nonetheless, it permitted the merger to go forward because of SBC's

---

89 Declaration of Lee L. Selwyn on behalf of AT&T, FCC Docket No. 04-313, CC Docket No. 01-338, October 4, 2004, page 71.

90 *See generally Town of Concord v. Boston Edison Co.*, 915 F.2d 17 *(1* Cir. *1990)* (Breyer, J.) (explaining economics of price squeeze); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Hand, J.); *Covad v. BellSouth*, ___ F.3rd ___ (11th Cir. 2005) (holding that *Trinko* does not bar antitrust claim against RBOC).

91 *Id.* ¶ 232.

commitment to provide network elements at rates based on the Commission's forward-looking total element long run incremental cost standard.[92] Since the merger, SBC has walked away from that commitment.[93] In addition, at the time of the Commission's decision, combinations of network elements were still at least theoretically available as a mechanism to obtain exchange access services at economic costs – and that mechanism, as a consequence of the incumbent LECs' litigation efforts, has now been declared unlawful.[94] Finally, the Commission should give no credit to Applicants' suggestion that it address SBC's stranglehold over the special access market in an industrywide proceeding, rather than in this merger proceeding.[95] While Commentors support a resolution of problems caused by ILECs' abuse of their special access monopoly on an industrywide basis, whether and when such a proceeding will cure this problem is a matter of speculation, and Applicants seek to have their merger approved *now*. Commenters suggest that if an industrywide resolution of abuse of special access is to constitute a basis for approving this Application, any new rules that address special access must be final before the Application is approved.

---

92 *Id.*

93 *See Petition for Declaratory Ruling,* CC Docket Nos. 98-141, 98-184 (filed Sep. 9, 2004). SBC has not only walked away from the commitment to compete out-of-region, it has tried to make it impossible for others to hold it that that commitment. In several states, SBC has spent hundreds of millions to sponsor legislation that mandates certain results under a forward-looking pricing methodology for UNEs by requiring state commissions to use certain key cost inputs in the TELRIC formula. AT&T has been the strongest opponent of SBC's initiatives that, if implemented, would raise UNE prices enormously. *See also*, A*T&T Communications of Illinois, Inc. v. Illinois Bell Telephone Company*, 349 F3d 405 (7th Cir. 2003).

94 *See USTA II.*

95 *See* Public Interest Statement, pages 102-105.

2. If Consummated, This Merger Would Make The Maintenance Of The *Status Quo,* In Which No RBOC Competes With Each Other, Much More Likely

Viewed in the context of the proposed Verizon [or Qwest] and MCI merger, the SBC-AT&T merger is particularly problematic. If consummated, these mergers not only would facilitate the unilateral exercise of market power discussed above, but would further make maintenance of the *status quo,* in which no RBOC significantly competes with another in its home markets, much more likely.[96] These mergers would create two vertically integrated super-RBOCs with each controlling about 35 percent of the nation's access lines. Given this market structure, it is highly unlikely that the two remaining "mini"-RBOCs, BellSouth Corp. ("BellSouth") and Qwest Corp. ("Qwest"), would break ranks and invite retaliatory entry by Verizon and SBC.

The possibility of collusive behavior is particularly strong where, as here, conditions are conducive to detecting territorial deviations. The local exchange market is currently characterized by existing territorial divisions, high market concentrations, significant barriers to entry, economies of scale, history of non-competition, and easy detection of violations of the territorial divisions.[97] The mergers would also make retaliation for violation of the existing territorial divisions a greater possibility. While both SBC and Verizon claim they will enter each other's territories post-merger, neither has made a firm commitment to do so or actually invested the necessary resources to make such entry likely in the near future. In light of these facts, and given these RBOCs' historic refusal to compete with each other in core markets, these public

---

96 *See Cf. Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 *(1889)* (holding such territorial divisions per se illegal under the Sherman Act).

97 *See* DOJ/FTC Horizontal Merger Guidelines § 2.12 (discussing in detail why these factors make collusion more probable); Richard Posner, *Antitrust Law: An Economic Perspective* 55-62 (1976) (same).

statements about out-of-region competition are most properly viewed as "shots across the bow" that are intended to maintain the *status quo.*

While approval of the previous wave of RBOC mergers (SBC's roll-up of PacTel and Ameritech and Bell Atlantic's acquisition of NYNEX and GTE, forming what is now called Verizon) were premised on SBC and Verizon's promises to compete out-of-region, SBC makes no such promise here, other than its claim that the acquisition of AT&T will permit it to better compete for enterprise customers. But that claim is a fig leaf.

It is also the case that this collusive behavior is likely to extend beyond just the existing territorial divisions, spilling over into other markets as well, such as innovation markets where there is limited competition between the RBOCs. In the *BA-NYNEX Merger Order,* the Commission observed that "[r]esearch and development . . . is a means through which firms engage in non-price competition, by seeking means to differentiate products either in function or quality" and that "[e]limination of parallel research and development efforts would eliminate this form of non-price competition" and "reduc[e] output."[98] Likewise, the federal antitrust authorities have stated that they will view firms with specialized research and development capabilities as competing in separate "innovation markets" and will block transactions that reduce competition in those market.[99] Any evaluation of these mergers must consider the impact in this market as well.

---

98 *Bell Atlantic-NYNEX Merger Order* ¶ 171.

99 *See, e.g.,* United States Department of Justice/Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property § *3.2.3*, Example 4, *reprinted in* 4 Trade Reg. Rep. ¶ 13,132 (1995) ("DOJ/FTC Intellectual Property Guidelines") (*citing cases*).

3. The Merger Would Increase SBC's Incentive to Exclude Competitors from the Local Market

Given SBC's control of bottleneck facilities, and the high costs of duplicating those facilities, new entrants generally must have access to SBC's network in order to compete effectively. SBC, of course, has substantial incentives to deny such access in order to preserve market power.[100] The Act seeks to prevent such abuses, however, by mandating that incumbent LECs provide such access on "just, reasonable, and nondiscriminatory conditions" and "rate[s] . . . based on the cost" of the access.[101] Nonetheless, detection of discriminatory conduct by incumbent LECs is difficult. Beyond outright refusals to allow access, incumbent LECs can engage in more subtle forms of "non-price" discrimination such as delaying the availability of access, degrading the quality of access and charging more than the economic costs of access.[102] The ability to detect and prevent such discrimination is further made difficult by the significant technological changes that have recently swept the telecommunications industry.

In fact, AT&T has asserted that "BOCs retain significant market power over the provision of special access facilities."[103] If that has been the case in the past, then it will certainly be true following the merger since AT&T will no longer be a prospective or actual bypasser of special access facilities. More importantly, the interrelationship between SBC as a special access monopolist and AT&T as the dominant retailer in the enterprise market will only

---

[100] *See generally Premier Elec. Constr. Co. v. National Elec. Contractors Ass 'n*, 814 F.2d 358, 368 (7th Cir. 1987) (citing T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986)) (explaining the ability to obtain or preserve market power from raising rivals costs).

[101] 47 U.S.C. §§ 251-252.

[102] Comments of AT&T Corp., *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, page 6.

[103] Comments of AT&T Corp., *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, page 34.

increase the likelihood of SBC abusing its power in the special access market. As noted, SBC currently has the ability to discriminate among long distance carriers through price squeezes and discriminatory provisioning. After the merger, SBC will also have an increased incentive to discriminate since its newly acquired long distance affiliate will be one of the competitors. Indeed, an AT&T witness has stated that SBC "systematically favors" its affiliates in the provision of special access based on audits.[104] Thus, the Commission should anticipate that after a merger between them, SBC will favor AT&T.

In addition, the merger between SBC and the largest owner of long distance facilities and removing Section 272 restrictions placed on SBC will have a combined effect of making cost allocation and discrimination virtually undetectable. SBC will be able to conceal any discrimination by its alleged "integration." Plus, in the major markets, SBC and other BOCs have obtained pricing flexibility for special access. As a result, special access is not subject to price caps and SBC and the other BOCs can indiscriminately raise prices. Meanwhile, competitive alternatives to ILEC special access services are already only available at a small number of locations.[105] Thus, the merged SBC and AT&T entity will reduce the competitive alternatives even more, including in MSAs with the largest CLEC presence.[106]

Accordingly, the Commission should consider whether the merged SBC and AT&T entity will have the ability to establish special access arrangements, charge uniformly high prices

---

[104] Declaration of Lee L. Selwyn on behalf of AT&T, FCC WC Docket No. 02-112, CC Docket No. 00-175, page 63 (June 30, 2003). *See also*, *Id.*, page 37 (stating that performance data SBC sought to keep secret showed its affiliates received better performance).

[105] Reply Declaration of Lee Selwyn on behalf of AT&T Corp., *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, FCC RM No. 10593, ¶ 18, filed Jan. 23, 2003.

[106] *Id.* at ¶ 20.

for access that would harm others but not itself, or offer volume discounts that as a practical matter would be unavailable to others.

In addition, a merged SBC and AT&T entity could harm CLECs' participation in the IP-enabled marketplace by imposing additional costs on them or by refusing to provide or discriminating in provision of access to the IP backbone. The Commission must also set conditions that will prevent any anticompetitive behavior for the provision of IP-enabled services.

4. The Merger Would Harm the IP Marketplace

If the SBC and AT&T merger is approved, sellers of Internet backbone services will lose SBC, one of the biggest purchasers in the market, as a customer. As with independent IXCs, this loss of purchasing volume for companies that sell to SBC could force some of them out of the market. It will also have a potential damaging effect of buyers of Internet backbone services, as one of their largest competitors, SBC, will now be one of the primary sellers they have to turn to for these services.

SBC-AT&T will also have the ability to adversely affect competition by discrimination in pricing, access and quality of services. "Interconnection" of IP broadband networks is currently implemented outside the normal telephone company regulatory framework pursuant to "peer-to-peer" relationships. The FCC has to date declined to exercise regulatory oversight over peering. Whatever the validity of that policy in a market in which there were several providers of backbone services and barriers to entry were relatively low, the impending concentration of this market in the hands of local access providers, who can erect new barriers to entry by denying access to their local facilities, calls for an urgent re-examination. Currently, carriers like AT&T and MCI peer on a cost-free basis because they have similar networks. On the other hand, smaller carriers must pay for peering with the larger networks. As a result, CLECs and ILECs

are on an equal footing in terms of getting access to the Internet backbone because neither have large IP networks. With the merging of AT&T with SBC and MCI with Verizon, however, the combined companies will be large enough that they can peer with each other at no charge, but demand peering fees from CLECs.

In fact, in opposing the MCI and Sprint merger several years ago, both AT&T and SBC argued that the size of the combined company's Internet backbone networks would hamper competition.[107] As SBC stated:

> The size of a backbone is critical because a backbone's value to its users lies in its ability to provide connectivity to the entire Internet. . . . [W]here one backbone achieves a substantial size advantage over its rivals, it necessarily "reduces the value of, and therefore the demand for, the rivals' products." At some point, "the market may 'tip,' with customers abandoning the rivals altogether because their networks are too small to be viable."[108]

AT&T likewise stated that:

> IBPs [Internet Backbone Providers] with unbalanced traffic, then, are expected to become customers rather than be peers. They can do so by entering into a "transit arrangement" pursuant to which, for a fee, an Internet Backbone Provider [] agrees to transport the traffic to terminating points on its network or on the networks of other IBPs with whom it has a private peering relationship. Alternatively, a large IBP might agree to a "paid-for" private peering relationship allowing traffic to be terminated on its network, but the IBP paying for such an interconnection cannot represent to its customer that it has a private peering relationship. This significantly hampers its ability to compete with those that do have settlements-free private peering relationships.[109]

---

[107] *Petition of AT&T Corp. to Deny Application*, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T at ¶9 (Feb. 18, 2000) and *Opposition of SBC Communications Inc.*, CC Docket No. 99-333 at 41 (Feb. 18, 2000).

[108] *Opposition of SBC Communications Inc.*, CC Docket No. 99-333 at 41 (Feb. 18, 2000).

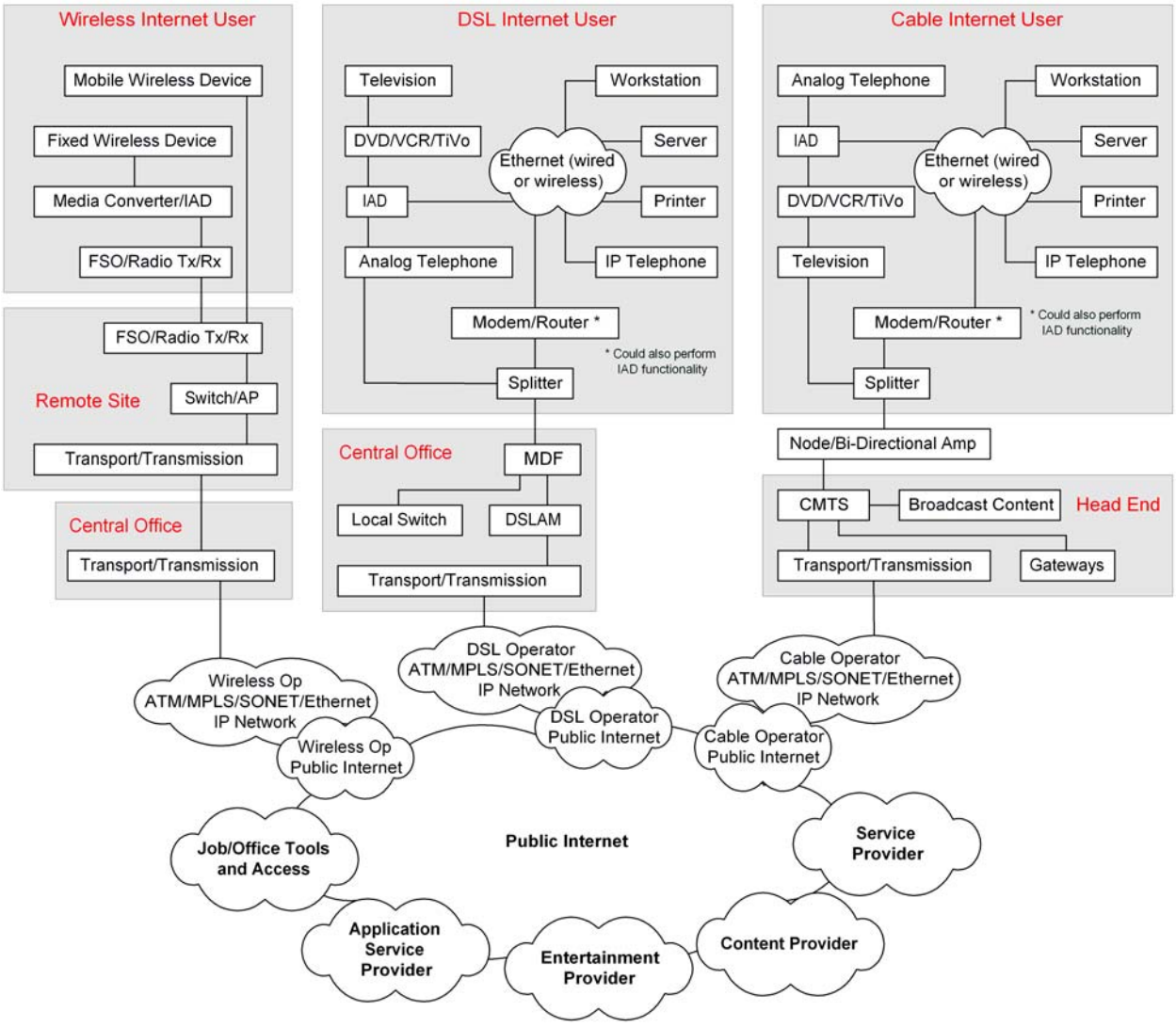
[109] *Petition of AT&T Corp. to Deny Application*, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T at ¶9 (Feb. 18, 2000) (footnotes omitted).

In addition, since SBC and Verizon will likely follow their past patterns of not competing in each other's regions, competitors will be forced to pay whatever peering fees they demand. SBC will be in a position to raise fees for network access while at the same time its costs disappear. Further, unless the Commission changes its hands-off approach, there will be no interconnection regulations like Section 251 that require reasonable and timely peering for all traffic.

Applicants could also engage in myriad forms of non-price discrimination including providing other competitors problematic circuits, and providing priority routing to itself. Electronic data exchange traverses a series of points where data is converted from one medium, format, language, or technology to another. Each of these control points in the IP network would provide the merged company an opportunity to discriminate. For example, at each switch or router control over the end user's data could be exercised via firewalls, IP port forwarding, rate limiting, packet inspection and restriction, or forced caching. ATM cells flowing across any ATM network could be subject to a wide variety of controls for anticompetitive purposes. The diagram following provides a high level view of how end users served by wireless, DSL, or cable modem service connect to the IP backbone and the various control points that could be used by the merged companies to engage in non-price discrimination.

SIMPLIFIED HIGH SPEED INTERMODAL ACCESS TECHNOLOGIES

Darren Sandford, Pac-West
Current Revision 1.0, Apr 6 2005



Indeed, in rejecting the WorldCom/Sprint merger because of concerns about the Internet backbone market, the EU referred to the capacity of the merged entity to "to discipline the market notably through the threat of selective degradation of its competitors' Internet connectivity offering."[110] It is also clear that ILECs are very capable of engaging in port blocking.[111] Accordingly, the proposed merger would enhance Applicants' ability to harm competitors through their control of IP backbone facilities.

VII. THE PROPOSED MERGER WOULD NOT PRODUCE SIGNIFICANT PUBLIC INTEREST BENEFITS

The Commission has clearly articulated the standard for reviewing assertions that a proposed merger benefits the public. In the *SBC-Ameritech Order,* the Commission determined that it would consider only those "redeeming public interest benefits" that were "demonstrable" and "sufficiently likely and verifiable."[112] That standard requires that Applicants demonstrate that the proposed merger "is a reasonably necessary means" to achieve the purported benefits.[113] As the Commission has held: "A mere recitation by the Applicants that they will provide some benefit if and only if their license transfer is approved cannot suffice to show that such a benefit

---

[110] European Commission, Merger Case No COMP/M.1741-MCI WorldCom/Sprint, § 146.

[111] *See, e.g.*, Consent Decree, *In re Madison River Communications, LLC,* DA 05-543 (2005). Madison River was blocking ports used for VoIP applications, thereby affecting customers ability to us VoIP. SBC-AT&T would have the same power here, and as a competitor in the VoIP market with AT&T's VoIP services this potential issue must be addressed by the Commission.

[112] *SBC-Ameritech Merger Order*,14 FCC Rcd at 14712, 14825 ¶ 255.

[113] *SBC-Ameritech Merger Order* 14 FCC Rcd at 14829 ¶ 267.

is merger specific."[114] The Commission has also articulated a "sliding scale" approach, in which more substantial and likely harms require a showing of more substantial and likely benefits:

> As the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest. This sliding scale approach requires that where, as here, potential harms are indeed both substantial and likely, the Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.[115]

AT&T and SBC make numerous but unpersuasive claims that the proposed merger will benefit the public. The Applicants espouse benefits that are unlikely to materialize, are unsupported, or simply represent wild exaggerations regarding minor benefits. In other words, Applicants do not show that the purported benefits are "sufficiently likely or verifiable." Regardless of the merits, or lack thereof, of Applicants' public benefit arguments, SBC and AT&T completely fail to link the purported benefits to the merger in any meaningful manner. Thus, because the claimed benefits are neither likely nor verifiable and not "merger specific," the Commission may not conclude that the Application, as filed, would serve the public interest.

A. The Applicants Fail to Provide Evidence to Support their Bold and Exaggerated Claims that the Merger Benefits the Public

Since passage of the Telecommunications Act of 1996, the RBOCs have perfected the traditional monopolist refrain that that they will provide new services or modernize their networks only if regulators insulate them from competition. SBC and the other RBOCs have successfully employed this tactic to persuade the Commission to ignore the Congressional

---

[114] *SBC-Ameritech Merger Order*, 14 FCC Rcd at 14829 ¶ 267.

[115] *SBC-Ameritech Merger Order* 14 FCC Rcd at 14712, ¶ 256 (1999) (citing *In the Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 157 (1997)).

mandate that the RBOCs and other ILECs make access to their networks available to competitors to promote competition . The RBOCs repeatedly use this tactic to seek Commission approval of mergers that have but one effect: to thwart competition.[116] While the BOCs have sought and received from the Commission insulation from competition in the mass market for broadband and local voice, the RBOCs have failed to fulfill the promises they made in order to gain such regulatory relief.

SBC's anemic effort at out-of-region competition either violated or did no more than the minimumuntil the merger condition expired. SBC dishonored, if not violated, the spirit of that condition. SBC now admits that its National-Local strategy was a failure, acknowledging that the results of its strategy "have fallen short of expectations."[117] In the same breath however, the Applicants expect the Commission to swallow the same claims that it made in connection with the 1998 merger with Ameritech, namely that this merger, finally after all the other mergers, will allow SBC to venture out of its region and actually compete against other RBOCs. But the Commission cannot simply accept these assertions; the Applicants offer no evidence that the results this time will not again "fall[] short of expectations." Indeed, given the successes the BOCs have had a limiting their Section 251 unbundling obligations, it is perversely more likely than not that SBC would not compete out-of-region. The Commission should not approve this anti-competitive merger based on empty promises.

The Applicants make sweeping claims regarding the benefits the merger will bring to the American public. But the Commission cannot simply accept the Applicants' claims at face value. SBC and other RBOCs have a long history of promising regulators a gold plated network

---

116 *See SBC-Ameritech Merger Order, Bell Atlantic GTE Merger Order, Bell Atlantic-NYNEX Merger Order*.

117 Kahan Decl. ¶ 23.

without ever delivering on those promises. Given that the Commission has yet to receive the benefit of the bargain it has struck with SBC and other RBOCs (particularly regarding aggressive out-of-region competition) in previous merger approvals, the Commission should review the Applicants' claims in this application with a heavy dose of skepticism.

B. SBC Has a Record of Broken Promises

While all the BOCs have a history of making unfulfilled promises in exchange for regulatory or legislative promises, SBC is the Napoleon of this strategy. Indeed, SBC's history of broken promises alone should be enough to convince the Commission that SBC's current promises regarding the benefits of the proposed merger are dubious at best.[118] In particular, the Commission should be wary of such promises because commitments made by SBC and other RBOCs in previous merger review and other Commission proceedings were forgotten shortly after the ink was dry on the Commission's orders.

SBC's promise of a National-Local market entry strategy in its merger with Ameritech is a perfect example of why the Commission cannot credit the claims in the current Application. In 1998, when SBC applied for Commission approval of the acquisition of Ameritech, SBC claimed that its "National-Local" entry strategy into 30 out of region markets was the compelling rationale for that proposed transaction. SBC claimed that the "value creation" for the Ameritech merger rested primarily in the National-Local Strategy.[119] SBC further claimed that alone, neither SBC nor Ameritech had the capability to make the investments and compete as it planned to do after the culmination of the National-Local Strategy.[120] The Commission wisely rejected

---

[118] *SBC-Ameritech Order*, 14 FCC Rcd 14712.

[119] *SBC-Ameritech Order* at 14828 ¶ 263.

[120] *SBC-Ameritech Order* at 14828 ¶ 264-65.

SBC's claims that the merger was necessary to conduct SBC's National-Local entry strategy, but approved the merger. Of course, SBC reneged on the spirit of its promises and admits its strategy did not succeed.[121] Nevertheless, the Commission conditioned the merger on such out of region entry by SBC/Ameritech. The Commission now has the benefit of hindsight and can review SBC's five year track record of half-baked effort to comply with the conditions of the SBC-Ameritech Merger Order.

As it did in the *SBC-Ameritech Merger Order*, the Commission should again reject any claim that the benefits of out-of-region competition will flow from this merger. Indeed, the merger may lessen, rather than enhance, the chances that SBC will ever compete against other RBOCs in markets where significant competition has not otherwise developed. The merger of SBC and AT&T, in combination with the merger of Verizon and MCI, will reduce the number of large, national carriers from four to two, and may well lead to further combinations.[122] That, in turn, will enhance the chances of tacit agreement not to compete in each other's region. "[A]s the number of firms increases, collusive agreements are more difficult to police, and the frequency of cheating and non-cooperative behavior increases."[123] By countenancing a progressive reduction in the number of such carriers, the Commission is simply increasing the chances that each will be content, in those segments of the market where competition has not been successful, simply to sit on its own dominant market share and refrain from expensive and risky retaliatory

---

121 *See* Kahan Decl. at ¶ 23.

122 While BellSouth is undoubtedly a large carrier, the Applicants admit that BellSouth does not compete in the market to the same extent as SBC and Verizon, observing that BellSouth operates "nearly exclusively within its own region." Application at p. 82 n. 270..

123 Samuelson and Nordhaus, Economics (16th ed.) at 176.

fights with the other large national carrier(s). AT&T has previously contended that SBC would not compete out-of-region if it merged with SBC.[124]

This is consistent with SBC's failure to faithfully undertake its promises made in the SBC-Ameritech merger to compete in thirty (30) out-of-region markets. There is simply no reason to expect SBC and AT&T will compete out-of-region with any ILEC, including Verizon, except at most for the very largest enterprise customers—the very small fraction of customers that are large enough to have significant operations in more than one RBOC region.[125] Even Qwest, itself an RBOC, has pointed out that "[n]othing in these pending transactions suggests either Verizon or SBC will be encouraged to compete" with each other.[126] As such, these mergers would serve only to increase SBC's and Verizon's market power and to provide additional incentives for them to engage in discriminatory and anti-competitive practices. Indeed, as discussed above, the merger would provide a positive incentive for both AT&T and

---

[124] *Illinois Commerce Commission On Its Own Motion Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996*, ICC Docket No. 01-0662, Initial Phase IA Brief of AT&T Communications of Illinois, Inc., filed July 24, 2002, fn. 132 ("SBC officials recently explained to Wall Street that they would not even consider a potential merger with AT&T unless AT&T's consumer unit was 'assigned no value.' (AMRO Research Notes, November 8, 2001.) This candid statement is an admission by SBC that it expects to win AT&T's customer base in-region (and, in the event of a merger, would fail to defend it out-of-region). As such, it has no value. If local competition were as viable for entrants as incumbents, however, then there would be value to a customer base that AT&T (and others) could compete for on equal terms (an outcome the Act was *supposed* to achieve by assuring that both ILEC and entrant shared access to the same network on equivalent terms.))(emphasis in original).

[125] Experience with the Bell Atlantic merger with GTE shows that that these RBOCs will not compete out-of-region in a meaningful way even when required to do so by merger conditions. *See, e.g., In re Application of GTE Corp. Transferor and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations*, CC Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, at ¶ 319 (June 16, 2000); *see SBC-Ameritech Merger Order* SBC-Ameritech Merger Order at App. C ¶ 59.

[126] Seidenberg Rips Qwest's Proposal to Buy MCI, TR Daily, at 13, March 16, 2005.

MCI to focus their efforts in the enterprise market on those customers with a relatively large portion of their demand within the home territory of its parent RBOC—continuing the SBC practice articulated by Mr. Kahan of focusing on its parent's "sweet spot."[127]

SBC, like the other RBOCs, has a long and tortured history of making promises to enter the video market and then quickly breaking those promises. For instance, before Congress passed the 1996 Act, SBC lobbied for the open video provisions and vigorously participated in the Commission's rulemakings implementing those provisions of the Act but did not build the broadband networks that it claimed it would build if permitted to provide video programming.

In fact, SBC, actually exited the facilities-based video market when given an opportunity. After SBC completed the acquisition of Ameritech, SBC promptly sold Ameritech's competitive facilities-based video operation. Similarly, when SBC purchased SNET it likewise scrapped that company's plans to offer competitive facilities-based service to Connecticut consumers. Based upon this record, it is not possible to credit SBC's claims regarding its commitment to facilities-based competition in the video market.

SBC subsequently utilized the same tactic again, promising to build broadband networks to the home only if the Commission in the *Triennial Review Order* insulated it from intramodal broadband competition. Subsequent to the grant of that request, SBC has touted deployment of "IP-Based Video", "enhanced broadband services," and a "unified IP network" as benefits of the merger.[128] SBC announced plans ("Project Lightspeed") in 2004 to deploy more fiber to support IP-based video in the mass market well before it announced plans to acquire AT&T.[129] Despite

---

127 *See* p. 9, n. 14 and p. 27, n. 75, *supra*; Kahan Dec. at ¶ 27.

128 Application at pp. 29, 36 & 37.

129 SBC Announced this IP network upgrade in June 2004 and dubbed the initiative "Project Lightspeed." *See* SBC Communications to Rapidly Accelerate Fiber Network Deployment

last year's announcement of plans well in advance of this merger, SBC now implies that successful implementation of those plans depends on the Commission's approval of this Application.[130]

It is therefore critical that the Commission view the Applicants' claims regarding this project with skepticism, and consider SBC's failure to follow through on other video plans. And even if Project Lightspeed ever provides video services to the mass market, SBC's plans for Lightspeed are utterly irrelevant to the proposed merger. SBC announced its plans for Project Lightspeed in 2004, and announced related steps in 2003. In that same time period, SBC sought broad relief from unbundling under sections 251 and 271 making the claim that such relief would provide SBC with the proper "incentive" to invest in video competition. At no time did SBC suggest that to make this happen, it also needed to acquire the nation's leading competitive LEC and IXC. It would be absurd for the Commission to determine that SBC's plans for Project Lightspeed are somehow related to the proposed merger announced long after the Commission granted SBC its requested unbundling relief and SBC announced its initial Lightspeed plans.

C. SBC's Claim that it Needs AT&T's Network to Compete is Utter Nonsense

SBC argues that it cannot compete successfully in the market for enterprise customers (those customers that purchase more than $48,000 per year from SBC) unless it is permitted to acquire AT&T and thereby obtain AT&T's network. SBC complains that its current arrangement with WilTel to provide a national network for long distance and enterprise services is insufficient. SBC complains that its arrangement with WilTel "did not give [SBC] enough

---

in Wake of Positive FCC Broadband Rulings, Press Rel, June 22, 2004 available at http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21207.

[130] This is actually a much abbreviated list of broken SBC promises to gain political and regulatory favor. SBC has reneged on commitments to state legislatures and regulators as well.

end-to-end network management control and flexibility" to meet the requirements of the large enterprise market.[131] The Application claims that enterprise customers have been "demanding requirements for system integration and accountability, performance and provisioning and trouble-shooting speed and flexibility."[132] Applicants further complain that SBC's arrangements with other providers likewise "provided insufficient integration and network management control."[133]

But SBC's claim that acquiring AT&T is the solution to this problem is absurd. The Application fails to mention the fact that it can obtain stringent Service Level Agreements ("SLAs") from its suppliers, as do many of its competitors, including other local service providers, cable companies, VoIP providers and others. Further, Applicants do not discuss any efforts to acquire other companies with a national network besides its largest competitor in the local and long distance market. SBC identifies numerous carriers that have extensive national networks that SBC could acquire without having the same negative impact on the competitive landscape.[134]

Remarkably, the Application also claims that systems integrators are among SBC's toughest competitors for enterprise customers. The Applicants suggest that "system integrators (or managed service providers) have become increasingly important competitors for business telecommunications products and services."[135] Applicants further claim that SBC "continues to lag significantly behind" systems integrators "which have continued to enhance and improve

---

131 Application at p. 99.

132 Application at p. 99.

133 Application at p. 99.

134 Application at p. 75-76.

135 Application at p. 83.

their abilities to provide the differentiating managed and systems integration capabilities and sophisticated network applications … that SBC has no track record in providing."[136] Systems integrators, however, do not utilize their own telecommunications facilities; rather, they integrate services provided by contracts with third parties, which is precisely what SBC is already doing with WilTel. As Applicants explain, "system integrators compete not by using their own network assets but by using their unique and valuable experience and skills to make the most efficient uses out of the network assets of others."[137] Obviously, SBC could solve its alleged problem in the enterprise market in a less anticompetitive manner by improving its own performance as a systems integrator, perhaps by hiring key personnel with systems integration expertise, or by purchasing one of the many systems integrators. Notably, SBC has offered no evidence of any attempts to integrate its network with WilTel's in the same manner that systems integrators integrate disparate networks leased under contracts with facilities-based local and long-distance carriers.

Alternatively, if SBC were to establish that, unlike its competitors, it is somehow incapable of serving the enterprise market without owning its own long distance network (something it has utterly failed to show except in the most conclusory way), it could purchase WilTel or another of the independent long distance providers, rather than purchase its largest retail long distance and local competitor. Obviously, if the systems integrators can thrive in the enterprise market without owing any network assets, SBC also can thrive in the same market owning only part of its network. The Commission should not allow SBC to acquire its largest local and long distance competitor based on such absurd and contradictory conclusions.

---

136 CA Application at ¶ 26.

137 Application at p. 84.

SBC also fails to demonstrate that it cannot compete in the long distance market without merging with AT&T. Such a showing is necessary to pass the Commission's vigorous "but for" analysis.[138] When the companies announced the merger, SBC already had Section 271 authority in its entire 13-state region for approximately 15 months. In the period after it received 271 authority, SBC quickly acquired large shares of the long distance market in each state, illustrating that SBC can effectively compete without merging with AT&T. It now appears that SBC's efforts are more directed towards purchasing a customer base and eliminating a competitor than it is trying, as an AT&T witness testified in connection with an earlier SBC merger, "to enter, compete and win customers."[139] Therefore, the Commission should require SBC to prove that absent this merger, it is unable to compete effectively.

D. The Merger Will Not Promote Innovation, Investment, Service Quality, Provision of New Services, or National Security

1. The Applicants' Claims Are Unsupported by Objective Evidence

In the SBC-Ameritech Order, the Commission held that merger applicants have the burden of proof and, that in order to satisfy its burden, any claims regarding the public interest benefits purportedly derived from the merger must be accompanied by evidence supporting those claims.[140] Instead of providing such evidence, all the Applicants can muster is a daisy chain of unsupported assertions that its declarants repeat over and over in the apparent but mistaken belief that the more the same assumption gets repeated the more likely it will come true.

---

138 *See SBC-Ameritech Order* at ¶ 255.

139 Direct Testimony of Joseph Gillan on behalf of AT&T Communications of Ohio, Inc., In the Matter of the Joint Application of SBC Communications Inc., SBC Delaware Inc., Ameritech Corp. and Ameritech Ohio for Consent and Approval of a Change of Control, Case No. 98-1082-TP-AMT, filed Dec. 14, 1998 at p. 6.

140 SBC Ameritech Merger Order at ¶ 255.

For example, SBC trots out its roster of declarants, who instead of providing objective analysis linked to "verifiable" data, largely repeat each other's unsupported conclusions. For example in the declarants Dennis W. Carlton and Hal S. Sider devote five pages to the Applicants' claim that the merger will provide public benefits. In those five pages the declarants cite to 11 sources to support their claims. Of those sources, 10 out of 11 are citations to other declarations filed with the Application. The one source that is not associated with the application is a citation to an investment analyst report repeating claims SBC made to Wall Street regarding the efficiencies the combined entity may realize.[141] Nowhere do Applicants cite to supporting facts from outside sources. Instead, each witness merely repeats the conclusions of another witness and credits them as though they were objective facts. The Commission should not be misled by SBC's conclusory declarations.

2. The Applicants Fail to Show that the "New" Services the Applicants May Provide are "Merger Specific" Benefits

While Applicants provide a list of services that they claim the proposed merged entity will provide, they fail to explain the new services adequately or indicate why these services would result only from the merger of SBC and AT&T. Applicants also contend that the undefined services they will offer post-merger are somehow unique to the marketplace. For example, Applicants contend by combining AT&T's ability to serve big business customers with SBC's ability to deliver service to medium sized business that SBC can now offer services that the medium sized business market does not currently enjoy. This is, of course, nonsense. CLECs are the leaders in providing big business solutions to small and medium sized business customers, and already provide many of these same services. For example, it is well documented that CLECs brought high speed data connections, such as xDSL and T-1 connectivity, to small

[141] Declaration of Dennis W. Carlton and Hal S. Sider, 2/21/05, ¶ 39.

and medium sized business customers by lowering prices for services that previously had been available only to large enterprises.

The Applicants further contend that the "merged carrier will have greater incentive to invest in new services."[142] According to the Application, the combined company will have this supposedly greater incentive because the merged firm will have a broader customer base and a more extensive network. If more customers, however, are all that is needed for this "benefit," then certainly this merger cannot be the only way to achieve it. Licensing or contracting, for example, are alternative ways for SBC to reach many new customers. For that matter, any efforts by SBC to increase sales would qualify as a way to expand its customer base.

More importantly, if one assumes that the combined SBC/AT&T can best be modeled as a regional variation of the pre-divestiture AT&T, the likely outcome of this merger is less investment in new services rather than more. Typical of monopolist behavior, only when finally faced with direct competitors would the pre-divestiture AT&T generally take steps to "catch up" to consumer demand with competitive services or products. The pre-divestiture AT&T, however, did not rush innovation to market and there is no reason to expect that a combined SBC/AT&T would differ appreciably from that model.

3. Fiber Deployment and Development of IP Networks are not Merger Specific Benefits

Applicants further contend that a combined SBC and AT&T is necessary to "complete the transformation of legacy networks to IP."[143] Assuming that the Application is correct that the development of an IP-based network benefits the public, Applicants utterly fail to show that

---

[142] Declaration of Dennis W. Carlton and Hal S. Sider, 2/21/05, ¶ 35.

[143] Application at p. 15.

AT&T and SBC would not have pursued such a migration "but for the merger."[144] SBC and AT&T claim that the merged companies will develop a "unified, advanced telecommunications network" to "offer services over IP."[145] Applicants further claim that other "new" services will flow from this unified network. Among these services the Applicants mention, unified voice mail and e-mail, video teleconferencing, broadband services, Radio Frequency ID ("RFID") services, intelligent optical network services and on line back office systems. Nowhere do Applicants explain why these services would not be offered by SBC, AT&T, or both, absent the merger.

Nothing in the application provides the requisite causal relationship between the merger and the transition to the "unified" IP network, because no such causal relationship exists. Carriers across the globe recognize that the future belongs to IP-based communication. SBC has said as much in its Petition for Forbearance filed with the Commission in 2004, nearly a year before the AT&T merger was announced.[146] In addition, SBC and the other RBOCs filed a Fact Report in the Commission's IP-enabled proceeding claiming that the migration from legacy networks to IP networks is *already* underway.[147] At the time of that filing, none of the RBOCs had announced plans to merge with a major IXC.

Similarly, in the *IP-Enabled Services* NPRM, the Commission observed that "Cable Operators, wireline carriers, and wireless providers have announced that they have begun to

---

144 *See SBC-Ameritech Merger Order* at 14825 ¶ 255.

145 Application at p. 35.

146 Petition of SBC Communications Inc. for a Declaratory Ruling Regarding IP Platform Services, WC Docket 04-36 (filed Feb. 5, 2004); Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, WC Docket No. 04-29 (filed Feb. 5, 2004).

147 SBC Announced this IP network upgrade in June 2004 and dubbed the initiative "Project Lightspeed." *See* SBC Communications to Rapidly Accelerate Fiber Network Deployment in Wake of Positive FCC Broadband Rulings, Press Rel, June 22, 2004 available at http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21207.

deploy, or intend to deploy, IP networks."[148] The RBOC VoIP Report likewise claims that the RBOCs, including SBC, "will provide IP-based services."[149] The same report observes that "IP-based services are also being offered competitively to enterprise customers, as both complements to and substitutes for older packet switched services, such as Frame Relay and ATM."[150] At the time that the RBOCs made these assertions, none of them had announced plans to merge with a major IXC. Certainly, Applicants are not claiming that the deployment of such services would not occur absent the merger.

Applicants have individually undertaken projects that undermine the contention that the carriers' migration to IP-enabled services is contingent on the proposed merger. On June 22, 2004, SBC announced with great fanfare its intent to embark on Project Lightspeed without any mention of needing to acquire AT&T or any other entity in order to provide such service.[151]

Other similar claims in the Application also appear to be fabrications. For example, Applicants claim that by merging with AT&T they can offer "enhanced broadband services," but make no mention of what those services might be or why SBC needs AT&T to offer those services over its local facilities.[152] Similarly the Application touts AT&T's work in the realm of Radio Frequency ID ("RFID") Technology and suggests the possibility of a "network-based RFID solution" but never explains what that solution would entail and precisely how the

---

148 19 FCC Rcd 4863, 4874 ¶ 12 (2004).

149 RBOC VoIP Report, WC Docket No. 04-36, filed May 28, 2004.

150 RBOC VoIP Report at 1.

151 SBC Announced this IP network upgrade in June 2004 and dubbed the initiative "Project Lightspeed." *See* SBC Communications to Rapidly Accelerate Fiber Network Deployment in Wake of Positive FCC Broadband Rulings, Press Rel, June 22, 2004 available at http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21207.

152 *See* Application at p. 37.

combination of AT&T and SBC relates at all to the RFID research that AT&T apparently was handling well all by itself.[153] The same shortcomings are applicable to the claim regarding AT&T's plans to transition to an "Intelligent Optical Network."[154] In each instance, the Application fails to explain the purported benefit in sufficient detail and provides no evidence suggesting the benefit (if any) is "merger-specific."

4. The Applicants Fail to Show that Increased Size Produces Greater Incentive to Invest

Applicants claim that if permitted to combine, they will invest and innovate more for the benefit of consumers. Applicants contend that combining forces rather than competing will promote development of new products and innovation that will benefit AT&T's enterprise customers and SBC's mass market consumers. Traditional economic theory and the experience of the last two decades regarding competition suggests that the Applicants' claims lack merit. Rather, companies that control markets rarely are the innovators. Instead their focus becomes preserving their hegemony and stifling those innovations that threaten their dominant market position.

SBC has articulated these concerns in comments filed opposing the proposed Final Judgment in *United States v. Microsoft*. In that case, SBC complained that the Final Judgment did not go far enough to check Microsoft's market power. With respect to Microsoft's operating systems monopoly, SBC argued that:

> Microsoft's monopoly has created not only the power, but also the incentive, to exclude competition: every technological innovation that emerged to challenge Microsoft's dominance was met with a successful strategy of anticompetitive exclusion. Microsoft was able to "extinguish," perhaps permanently, the two greatest

[153] *See* Application at p. 37.

[154] Application at p. 37.

> innovative threats to its dominance that arose in the 1990's -- Netscape and Java.[155]

Once combined, SBC and AT&T should be expected to operate as Microsoft did, thwarting the adoption of innovative technologies that threaten the core services in which they hold market power.[156] This is no surprise because SBC, like other monopolists in telecommunications, has delayed or stifled innovation to protect its legacy services from possible cannibalization while simultaneously thwarting competitive efforts to deploy similar innovations.

The most recent and appropriate example of such anti-competitive behavior is that of SBC and the other RBOCs keeping xDSL off of the market for years. In the enterprise market, the RBOCs feared that xDSL service would cannibalize their existing T-1 services which, because of their monopoly in the local services market, the RBOCs priced far in excess of their costs to provide the service. In the mass market, xDSL would undercut SBC's market for adding second lines for consumers that wanted to access the Internet. Because xDSL proved more cost-effective than either a second line or a T-1, SBC and other RBOCs kept the technology on the shelf. Or at least it was kept on the shelf until CLECs began offering xDSL service using UNE loops and cable companies began to offer high speed cable modem service as an alternative method of accessing the Internet at high speeds. Only then did the RBOCs begin to roll out xDSL service.

The Commission must not forget the example of the pre-divestiture Bell System that was slow to replace analog with digital transmission facilities. It was not until Sprint and MCI announced digital networks that the post-divestiture AT&T moved to change-out its analog

---

155 *United States v. Microsoft*, No. 98-1232, Comments of SBC, D.C. Cir. (filed January 28, 2002).

156 *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

facilities. It is reasonable to conclude that, absent the divestiture, the Internet would not exist since it relies in part on digital facilities. This merger would return to the conditions that predated the divestiture.

AT&T itself has explored this issue in opposing previous RBOC mergers. For example AT&T argued that the RBOCs, with monopolies in their local service areas, not only lack the incentive to invest but also have the perverse incentive to delay or withhold new technology from the marketplace in order to continue collecting monopoly profits from captive ratepayers.

> As the Commission has also found in the past, they are firms who have powerful incentives to withhold investments in new technologies that will limit the value of their existing monopoly assets, who delayed rolling out DSL- and ISDN-based service for a decade because it would impair their second telephone line services, and who introduced the DSL-based service only in response to cable modem services and the DSL-based offerings of data CLECs.
>
> "ILECs are entrenched monopolists with substantial high-margin second telephone line and other services that are cannibalized by broadband, and ILECs thus did not roll out DSL (or ISDN) technology until cable modem and CLEC services began to cut into their second line revenues. The Commission found that it was "the development of competition, and the threat of losing revenue and customers to carriers offering advanced services," that caused incumbent LECs to invest in facilities for advanced services. *UNE Remand Order* ¶ 138. If that threat is diminished, ILECs will invest less, not more.
>
> "The ILECs have never been a significant source of innovation, and they ultimately invest in improving their networks for only two reasons: (1) to increase revenue by improving network efficiencies or stimulating demand, or (2) to protect revenue by responding to actual or feared competitive threats."[157]

[157] Comments of AT&T Corp., CC Docket Nos. 01-338, 96-98, & 98-147 at 9, 20-21, 43 (April 5, 2002) (internal citations omitted).

5. The Applicants Grossly Exaggerate and Fail to Demonstrate Any Benefit From Network Integration

Applicants further claim that the combining of the two companies' networks will make better use of excess capacity, reduce the number of handoffs, and reduce latency, thus improving service quality.[158] Applicants provide little, if any, evidence that such benefits would be likely and further fail to show that any benefits, to the extent they may accrue, would result from the merger. These same arguments were used by the Bell System prior to the divestiture to justify its anti-competitive behavior. To the extent that any of the network integration "benefits" identified in the Application would be likely to occur, these benefits could just as easily occur if the companies remained separate, or if SBC acquired another facilities-based long-distance carrier that is not one of its largest local and long distance competitors.

The Application suggests that by combining, Applicants can eliminate some peering hand offs so that the combined company traffic is not routed over "convoluted, inefficient routes."[159] Further, the Application claim that eliminating network hand offs reduces latency and risk of packet loss. Such claims, taken to their logical end, would argue for one monopoly network operator controlling the nation's communications – including the Internet. These claims, however, ignore the more important fact that improvements in network capacity and data switching that optical technology provides overwhelm any small diminution in service quality caused by latency and hand-off issues. Such improvements have been driven by competitive pressure, not by "network integration." Further, the Application ignores the probability that consumers balance price and convenience against superior call quality. The explosion in minutes of use for mobile wireless voice services accompanied by the reduction in prices in that still

[158] Application at pp. 39-43.

[159] Application at p. 40.

competitive market, shows that convenience and price are also important to the public as well as hearing a pin drop. Similarly, many consumers are migrating to VoIP services that in many instances lack the clarity of traditional landline based services. Nonetheless, consumers likely choose these services not because of call quality but because of price and convenience. In reality, Applicants' attempt to make issues that are trivial regarding latency and hand-off, even if they had any validity at all, a centerpiece of their public interest showing highlights that there are no genuine or significant public interest benefits from the proposed merger.

Moreover, Applicants make no showing that the purported "benefits" they describe can only be achieved through the proposed merger. First, SBC is currently providing "end-to-end" services by contracting with companies such as WilTel for long distance services. These contractual arrangements certainly qualify as "practical alternatives" to the merger since they are actually in use today. Further, Applicants fail to establish that the "benefits" from vertical integration will actually flow to the consumers in the local and long distance mass market who will be harmed by the anticompetitive effects of the proposed combination. Instead, the described "benefits" seem to benefit Internet customers. Even if these "benefits" are real, they clearly would not accrue to the traditional voice customers who will be most harmed by the anticompetitive effects of this merger. Thus, even if the Commission can credit the Applicants' claims regarding improved network performance, the purported benefit from the network merger cannot offset the anticompetitive harm to mass market customers. The Merger Guidelines underscore this concern, providing that the reviewing agency "considers whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market."[160]

[160] 1992 Horizontal Merger Guidelines, §4.0.

Applicants also assert that combining SBC's and AT&T's network will benefit the public by reducing the combined entity's costs and "making the combined company a more effective competitor."[161] Even if the Commission accepts at face value the claim that the merger would lower costs or provide the opportunity to improve service to customers, there is no clear benefit to the public. The combined company's customers would only receive these "benefits" if there were competitive pressures on SBC/AT&T to provide such benefits. Indeed, "benefits" that lower the merged firm's costs without the company passing on those savings to consumers only serve to increase the profits of the merged firm. These increased profits can hardly be characterized as a benefit to consumers.

The Application merely assumes that reducing the risk of packet loss and latency are "demonstrable and verifiable benefits" that are "achievable only as a result of the merger." Applicants have simply not addressed the relevant standard.

6. The Combination of AT&T's and SBC's Research Capabilities is a Public Interest Harm, Rather than a Benefit

In the Application, SBC and AT&T claim that by combining SBC and AT&T Labs, the merged entity can "lower the cost, increase returns, and increase the efficiency" of research and innovation.[162] These claims contradict prevailing beliefs regarding competitive markets and prior statements made by AT&T.

SBC made an identical argument in touting the benefits of its merger with Ameritech.[163] In opposing that merger, AT&T argued forcefully that:

---

[161] Application at p. 43.

[162] Application at p. 33.

[163] *See SBC-Ameritech Merger Order* at 14850, ¶ 333.

> Applicants' repeated assertions that the public will benefit from the merger because the combination will reduce duplicative research and development and lead to better products … is ironic. … The Commission [has] observed that '[r]esearch and development … is a means through which firms engage in non-price competition, by seeking means to differentiate products either in function or quality' …. Likewise, the federal antitrust authorities have stated that they will view firms with specialized research and development capabilities as competing in separate 'innovation markets' and will block transactions that reduce competition in those markets.[164]

AT&T's warning regarding the harms likely to flow from SBC's merger with Ameritech remain valid today, and is perhaps more serious for this merger because of the history of innovation at AT&T Labs. SBC and AT&T claim that their respective R&D efforts are focused on separate niches and that combining their operations will not harm competition. But other than the labels that Applicants use, they present no justification for these claims. The consolidation will clearly reduce important R&D efforts and undermine U.S. competitiveness in the long-run.

7. The Federal Government and American Taxpayers Will Not Benefit From a Combined SBC and AT&T

The Applicants further claim that a combined SBC and AT&T can achieve "greater security and reliability" for government customers with a "single, integrated end-to-end network than with multiple networks."[165] Under this flawed theory, the government would be better off with a single nationwide supplier of telecommunications services than with multiple competitors for end-to-end services and multiple carriers providing "niche" services. The Application's claim flies in the face of a more than decade of federal government telecommunications procurement policy, as well as the same government's determination to break up the old AT&T

---

[164] Petition of AT&T Corp. to Deny Applications, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp., Transferor to SBC Communications, Inc., Transferee*, CC Dkt. No. 98-141 (filed Oct. 15, 1998) at 49.

[165] Application at p. 20.

in 1983. Since the late 1980's, the government, acting as a purchaser of telecommunications services, has sought lower prices and greater network redundancy in telecommunications procurement (as do many non-governmental customers). Abandoning that policy to obtain more services from fewer providers is not in the interest of American taxpayers, who, under the policy that Applicants propose be abandoned have enjoyed remarkable cost savings in government telecommunications services while government use of telecommunications services has exploded.[166]

In contrast to the pleas for monopoly from Applicants, since 1988 and the first FTS2000 contract, the federal government has wisely sought to obtain the benefits of telecommunications competition for government customers and American taxpayers. Thus the current series of government telecommunications procurements are part of "the overall strategy to foster so-called, 'ruthless competition' for government telecommunications services."[167] Likewise, the government's current plans to address the telecommunications needs of the Federal government call for multiple suppliers providing multiple and overlapping services so Federal agencies always receive the benefits of competition even after procurement is complete.[168] In this instance, the Application fails to show any public benefit.

---

[166] *See* FTS Networx Program, Presentation of Karl Krumbholz, at slide 3, Sep. 30, 2004 available at http://www.gsa.gov/Portal/gsa/ep/programView.do?pageTypeId=8199&ooid=16100&programPage=%2Fep%2Fprogram%2FgsaDocument.jsp&programId=11455&channelId=-16201. reviewed April 19, 2005.

[167] *See* GSA's Metropolitan Area Acquisition Home page at http://www.gsa.gov/Portal/gsa/ep/programView.do?programId=10081&programPage=%2Fep%2Fprogram%2FgsaOverview.jsp&P=TRA4&pageTypeId=8199&ooid=9694&channelId=-13485 reviewed April 19, 2005.

[168] *See* GSA Networx Overview Presentation available at http://www.gsa.gov/Portal/gsa/ep/programView.do?pageTypeId=8199&ooid=16100&programPage=%2Fep%2Fprogram%2FgsaDocument.jsp&programId=11455&channelId=-16201

Applicants further claim that a combined AT&T and SBC can provide greater security and reliability to meet the telecommunications needs of the Department of Defense ("DOD"). This claim is obviously misleading. While Applicants claim they can provide DOD with end-to-end services more securely and reliably than competitors that partner with other carriers, the Applicants fail to acknowledge that the combined SBC/AT&T would still need to have partners with local facilities in the approximately 65% of the United States where SBC is not the incumbent LEC. While the Applicants tout the benefit of a "single, integrated end-to-end network," they will not have such a network that covers all areas in the United States unless they complete the job they have begun of re-assembling the entire Bell system monopoly on a nationwide basis. Again, the Application fails to demonstrate any likely public benefit.

As a result of the reduction in competition brought about by the merger, government telecommunications users will pay more, and have fewer choices and less redundancy.

VIII. CONDITIONS ARE NECESSARY TO PRODUCE A BETTER BALANACING OF COSTS AND BENEFITS

A. The Commission Should Reject the Application as Filed

In light of SBC's pervasive market power in the local, long distance, special access, high capacity facilities, and other markets, and the likely anticompetitive effects of the proposed merger as described in these comments, and the concurrently proposed Verizon/MCI merger, the Commission must deny the Application as filed as contrary to the public interest.

B. Conditions

Alternatively, the Commission should condition any grant of all or a portion of the Application with merger conditions that ameliorate some of the market problems that have

---

reviewed April 19, 2005. (Network contract designed to "Leverage the volume of government requirements" and "Provide the lowest prices in the telecommunications marketplace").

prompted AT&T to give up trying to compete with SBC and other anticompetitive effects described above that are certain to arise from the proposed merger. The Commission has broad authority to approve a merger subject to conditions, such as divestiture of certain assets, based upon, *inter alia*, Section 214 of the Act which authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[169] Pursuant to this authority, if it determines to approve the merger at all, the Commission should impose the following conditions.

1. SBC Should Be Required to Divest In-Region AT&T Local Exchange Assets and Customers

Divestiture of In-Region Assets & Customers: The Commission should require that SBC divest all of the in-region local exchange and exchange access facilities as well as all in-region AT&T residential and business customers.[170] This is the only condition that would prevent further concentration in the local market that is already dominated by SBC in its service territory. SBC should be required to divest all of AT&T's enterprise customers or, at a minimum, those it

---

[169] 47 U.S.C. § 214(c); *See, e.g., In re Application of GTE Corp. Transferor and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations,* CC Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, at ¶¶ 1-4, 248-259, 319 (June 16, 2000) ("*BellAtlantic/GTE Merger Order*") ("we find in this order that, absent conditions, the merger of Bell Atlantic and GTE will harm consumers of telecommunications services;" "spinoff of GTE's Internet backbone and related assets into a separate public company" required.); *In re Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee,* CC Docket No. 98-24, FCC 98-169, 13 FCCR 15,243-15,244, Memorandum Opinion and Order, at ¶ 12 (Rel. July 23, 1998) ("*Teleport/AT&T Merger Order*"); *United States v. FCC,* 652 F.2d 72, 81-81, 88 (D.C. Cir. 1980); *In the Applications of NYNEX Corporation, Transferee, and Bell Atlantic Corporation, Transferor,* FCC 97-286, 12 FCCR 20,0002, Memorandum Opinion and Order, at ¶ 32 (Aug. 14, 1997) ("*BA/NYNEX Merger Order*").

[170] The Commission has ample authority to require divestiture. *See, e.g., BellAtlantic/GTE Merger Order,* at ¶¶ 1-2, 28-29 (Commission required the transfer of the Internet backbone and related assets of GTE Internetworking, Inc. (Genuity) to "an independently owned public corporation" be completed prior to merger closing).

claims it competes for in-region--those with more than 50% of their locations in the SBC region. SBC should be required to divest these in-region assets and customers to a third party identified by SBC and approved by the Commission and the Department of Justice prior to approval of the Application.

Divestiture of in-region assets, while helpful, is not sufficient by itself to ameliorate the anticompetitive effects of the proposed merger. In fact, AT&T's own statements demonstrate that both it and others are heavily dependent upon SBC for special access services and other services.[171] Any purchaser of AT&T's in-region assets would face an even greater reliance on its principal competitor. For these reasons and the reasons provided above, the Commission should impose the additional merger conditions discussed below.

2. The Commission Should Impose Safeguards to Mitigate Discrimination In the Provision of Access to Bottleneck Facilities

Cost-Based Access: In light of SBC's dominance in the market for special access, if SBC is permitted to acquire AT&T, SBC should be required to implement safeguards designed to reduce the opportunities for collusion between RBOCs, discrimination in the provision of access to local bottleneck facilities, and other anticompetitive effects. SBC should be required to first implement, on a temporary basis, incremental cost-based pricing of switched and special access services, until the Commission completes its existing rulemakings regarding ILEC overpricing

[171] *See, e.g., In the Matter of AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates For Interstate Special Access Services*, RM-10593, AT&T Petition For Rulemaking, at ¶¶ 16-18 (filed October 15, 2002) ("the only alternatives available to CLECs are the Bells' special access services … over 98% of AT&T's facilities-based *local* service for business customers using incumbent facilities of DS-1 level or higher is provided over incumbent special access services, not UNEs." "The Bell's ability to engage in discriminatory contract tariffs is equally pernicious, because it allows the Bells surgically to foreclose competition.").

and other anticompetitive conduct in the special access market[172] and its rulemaking to establish a unified intercarrier compensation regime.[173]

Non-Discrimination in Volume Discounts: Further, the Commission should preclude SBC from providing an unfair advantage to its new AT&T affiliate and its other long distance affiliates by ensuring that SBC cannot engage in a price squeeze by offering volume and term discounts and other incentives for which only its affiliates (or those of other RBOCs) can qualify in the market for special access and high capacity wholesale services. To preclude this anticompetitive conduct, the Commission should impose a merger condition that requires SBC to tariff any special access services or wholesale services that it offers to AT&T, its other affiliates, and other RBOCs and make such services available to competitors at the same price without the volume and term commitment that it requires of its affiliates or RBOCs. Finally, all agreements between SBC, AT&T, MCI and either Verizon or Qwest for access to each others' local networks must be made available and subject to opt-in on an pick-and-choose basis.

Performance Measures: In light of the fact that the merger will increase SBC's dominance in the special access and high capacity services markets, the Commission should impose rigorous performance measures and self-effectuating remedies governing SBC's performance in processing orders, provisioning, repairing, and maintaining special access services and UNEs for its competitors. The performance measures should be sufficiently

---

[172] *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* WC Docket No. 05-25, RM-10593, FCC 05-18, Order and Notice of Proposed Rulemaking, at ¶ 3 (rel. Jan. 31, 2005).

[173] *See*, *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, FCC 05-33, at ¶ 15 (rel. March 3, 2005) ("Our current classifications require carriers to treat identical uses of the network differently, even though such disparate treatment usually has no economic or technical basis.").

comprehensive to assure nondiscrimination in provision of special access services.[174] In light of some RBOC's past record of discrimination in the provisioning of UNEs in "no facilities" situations,[175] comprehensive performance measures should be imposed to prevent such discrimination in the more concentrated market that will result from the mergers. These performance measures and other merger conditions must be enforced through self-effectuating remedies that impose liquidated damages that compensate the carriers that were injured by SBC's violations, not the United States Treasury. The liquidated damages and penalties imposed for anticompetitive practices should also escalate with multiple violations so that such damages have a deterrent effect on SBC, rather than being an acceptable cost of doing business.

Affiliation for Purposes of UNE Rules: In addition, the proposed mergers of SBC/AT&T and Verizon/MCI or Qwest/MCI would make AT&T and MCI collocations affiliated. For purposes of implementation of the rules governing unbundled access to network elements established in the *Triennial Review Remand Order*,[176] the Commission should require as a condition of any approval of the merger that SBC treat AT&T collocations as affiliated under those rules. This should include a retroactive application insofar as SBC has treated these collocations as unaffiliated prior to the merger.

---

[174] At a minimum, the required performance measures should include metrics, standards, and damages for the following parameters: mechanized provisioning accuracy, mean installation interval, order completion due date met, percent of due missed because of lack of facilities, percent of trouble reports within 30 days, percent of missed repair commitments, receipt to clear duration, percent or repeat trouble, percent or repeat trouble reports, percent of billing accuracy.

[175] Triennial Review Order, at ¶¶ 630, 637 (The Commission rejected the RBOCs' no facilities policy and held that "with the exception of constructing an altogether new local loop, we find that requiring an [ILEC] to modify an existing transmission facility in the same manner that it does so for its own customers provides competitors access to only a functionality equivalent network.").

[176] 47 C.F.R. §§ 51.319(a)(4)-(5) and (e); *Triennial Review Remand Order*, at ¶¶ 66, 126, 129, 146, 174-180,

Rooftop Collocation: In light of the fact that the availability of wholesale high capacity loops will be substantially reduced by removal of AT&T and MCI as sources of supply and by the FCC's determination to reduce the availability of UNEs, the Commission should impose a merger condition that requires SBC to permit collocation of fixed wireless equipment on the rooftops of its premises. Section 251(c)(6) of the Act requires RBOCs to provide for physical collocation of equipment needed for interconnection or to access UNEs "at the premises" of the RBOC. These "premises" included the provision of collocation space on rooftops for equipment needed for interconnection and to access customers.[177] In order to preclude SBC from evading the collocation requirement, the Commission should require SBC to offer rooftop collocation under standard terms and conditions, at cost based rates and within a provisioning interval determined by the Commission.

OSS Enhancements: Finally, the Commission should require SBC to implement an enhanced OSS by the merger closing date to provide real-time access to SBC's databases for remote terminal location and vacant facility information for purposes of obtaining UNE loops.

3. The Commission Must Impose Safeguards to Ensure an Open IP-Enabled Marketplace

Safeguards for IP-Enabled Marketplace: As demonstrated above, the proposed merger will unduly concentrate the IP backbone market. Further, the mergers will enable SBC and other RBOCs to undermine competitive providers in the market for IP-enabled services by imposing higher costs on critical inputs, and by refusing to provide, or discriminating in the provision of, access to the IP backbone. In light of these anticompetitive effects, the Commission should require SBC to divest the AT&T backbone. Alternatively, the Commission should require (1) SBC to allow any IP network to peer with the merged SBC and AT&T if that network

[177] 47 U.S.C. § 251(c)(6).

interconnects at a specified number of peering points, and (2) SBC to provision interconnection to the IP backbone and transit service to non-peering ISPs and CLECs at LRIC rates. The Commission should impose net neutrality requirements to preclude ILECs from blocking or providing inferior quality access to non-ILEC IP-enabled services. Further, the Commission should prohibit the merged company from imposing any restrictions or limitations on use of Session Initiation Protocol ("SIP") by its customers or services obtained from third parties by the customer. SIP is a signaling protocol used for establishing sessions in an IP network. Absent appropriate conditions, SIP could be a useful tool for discrimination by the merged company.

Structural Separation: The Commission should impose structural separation requirements that are similar to those imposed under Section 272 of the Act to minimize opportunities for cross-subsidies and discriminatory conduct, and ensure that SBC operates its AT&T and SBC long distance affiliates on an arm's length basis. Among other structural separation requirements, the Commission should require that SBC and AT&T provide interexchange services through a separate subsidiary.

4. The Commission Should Require SBC to Negotiate Section 271 Network Elements Under the Section 252 Process

Negotiation of 271 Terms: The Commission should order SBC to negotiate and arbitrate, if necessary, the rates, terms and conditions for "271 network elements" (*i.e.*, 47 U.S.C. §§ 271(c)(2)(B)(iv) (local loop transmission), (v) (local transport), (vi) (local switching), & (x)(signaling/call related databases)) pursuant to the § 252 process. SBC currently refuses to do so on the grounds that *Coserv Ltd Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003) relieves it of this obligation.[178] SBC's position is wrong because the law specifies that

[178] SBC's position is that § 252 only requires it to negotiate and, if necessary, arbitrate § 251(b) and (c) issues and that the independent duties imposed on it by § 271 or elsewhere cannot be subject to the § 252 arbitration process so long as it refuses to negotiate such provisions.

– (1) SBC is obligated to offer 271 network elements;[179] (2) § 271 requires that interconnection agreements approved by a state commission, pursuant to § 252, contain both § 251(c)(3) and § 271 network elements;[180] (3) the *TRO* and *TRRO*, among other things, established new standards pertaining to SBC's obligation to offer 251(c)(3) and 271 network elements that must be negotiated and implemented pursuant to the § 252 process;[181] and (4) a state commission is legally obligated to resolve related open issues and establish the appropriate terms for offering such facilities in a § 252 arbitration.[182] Although Commenters and other CLECs believe the law is unequivocal, SBC is forcing them to devote precious resources litigating this issue. As discussed, the merger of SBC and AT&T would have a harmful impact on local wireline competition and to mitigate those harms, the FCC should put an end to this senseless litigation and require SBC to negotiate and, if necessary, arbitrate its § 271 obligations pursuant to § 252.

---

[179] 47 U.S.C. §§ 271(c)(2)(B)(iv),(v), (vi), & (x) (expressly stating that BOCs are obligated to offer access to local loop transmission, local transport, local switching, and signaling/call related databases); *TRO*, ¶¶ 652-53 (emphasizing that "BOCS have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251").

[180] 47 U.S.C. § 271(c)(1) (requiring that agreements be "approved under Section 252").

[181] *TRO*, ¶¶ 656-664 (prescribing the standard that needs to be applied when establishing rates, terms and conditions for 271 network elements and recognizing that although the FCC may have relieved BOCs from offering certain UNEs in the *TRO* (and later in the *TRRO*) pursuant to § 251(c)(3), BOCs still have an independent obligation pursuant to § 271 to provide access to them at just, reasonable, and not unreasonably discriminatory rates, terms and conditions consistent with § 201 and § 202 of the Act); ¶¶ 703-704, 706 (holding that the § 252 process be followed in implementing the *TRO* and stating that "Parties may not refuse to negotiate any subset of the rules we adopt herein [which includes the FCC's 271 determinations]"); *see generally* 5 U.S.C. Sec. 551 (a "'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.…").

[182] 47 U.S.C. § 252(b)(4)(C) (requiring a state commission to resolve all open issues in a § 252 arbitration); *TRO*, ¶¶ 701-705 (holding that the § 252 process should be used to conform interconnection agreements to reflect the *TRO*).

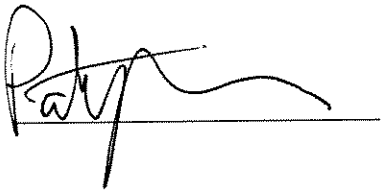
C. If the Commission Approves the Merger, it Should Impose Transition Safeguards to Mitigate the Anticompetitive Impacts

In addition to the permanent conditions set forth above, the Commission should impose transition safeguards to ensure the proposed merger does not unduly disrupt the marketplace. Specifically, the Commission should require SBC to provide DS1 loops and EELs in every wire center regardless of the impact of the FCC's existing UNE rules for a period of at least five years. Further, the Commission should require promotional discounts of 25%-30% on all loops and subloops for a period of at least three years. The Commission should also require SBC to offer unbundled access to FTTC, FTTP, and hybrid loops for all customers at commercially negotiated rates for five years. The Commission should require SBC to commit to pay CLEC intrastate access charges for three years at the rates extant on January 1, 2005. Finally, in order to mitigate market disruptions resulting from the proposed merger, SBC should be required to continue to maintain its existing level of interexchange traffic with unaffiliated, non-RBOC carriers for a period of five years, at the election of the third party IXC.

Both the permanent and transitional merger conditions should be self-enforcing to the extent feasible. In particular, the performance measures should be self-enforcing. Moreover, in light of the Commission's limited enforcement capability, the Commission should authorize the state commissions to enforce these merger conditions in their particular state.

IX. CONCLUSION

For the reasons discussed herein, the Commission may not conclude that grant of the Application as filed would serve the public interest. The Commission should impose significant conditions on any approval of the proposed merger.



Andrew D. Lipman
Eric J. Branfman
Patrick J. Donovan
SWIDLER BERLIN LLP
3000 K Street, NW
Washington, DC 20007
(202) 424-7500

Counsel for

ACN Communications Services, Inc.
ATX Communications, Inc.,
Bullseye Telecom, Inc.,
Cavalier Telephone Mid-Atlantic, LLC,
Cimco Communications, Inc.,
CTC Communications Corp.,
Gillette Global Network, Inc. D/B/A Eureka Networks,
Granite Telecommunications, LLC,
Lightship Communications, LLC,
Lightyear Network Solutions, LLC,
Pac-West Telecomm, Inc.,
RCN Telecom Services Inc.,
US LEC Corp., and
U.S. TelePacific Corp. D/B/A TelePacific Communications

APPENDIX

Additional Suggested Questions to Applicants

1. Dr. Marius Schwartz submitted information concerning IP backbone issues based on 2003 and 2004 data. Please submit the same information using March 2005 data; if such data is not available, please use the most recent data that is available.

   Explanation. The information submitted by Dr. Schwartz is outdated.

2. Provide copies of all media advertising and direct mail advertising used by SBC for the purpose of marketing local or long distance, mass market or enterprise services in each of the thirty (30) out-of-region markets that SBC was obligated to enter in fulfillment of the requirements of its merger with Ameritech.

   Separately for each of these thirty out-of-region markets, separately for each year commencing with the year in which SBC first began offering service in each market, provide total SBC revenues, total SBC expenditures on switched and special access services purchased from LECs, and SBC market shares separately for mass market and enterprise segments.

   Explanation. This information will permit the Commission to verify the nature and extent of SBC's out-of-region competition in compliance with the conditions of its Ameritech merger and otherwise.

3. Provide the share of the wireless market held by Cingular Wireless nationally, in-region, and out-of-region.

   Explanation. This information would permit the Commission to evaluate Applicants' claims that they will be subject to intermodal competition from wireless competitors after the proposed merger.

4. In an August 18, 2004 ex parte submission in CC Docket 01-338, SBC provided a series of maps of approximately twenty Metropolitan Statistical Areas (MSAs) including maps of central business districts ("CBDs") within the SBC region. These maps identified locations at which, according to SBC, CLECs were serving enterprise customers via special access or via CLEC-owned fiber. The CBD maps also included the routes of CLEC-owned fiber optic facilities.

   Please provide a new, and corresponding, set of maps in which the following additional information is identified:

(1) Indicate the AT&T special access and on-net fiber-served locations that are identified only as "CLEC" locations on the August 18, 2004 maps.

(2) Indicate the locations of SBC enterprise customers, which are not included on any of the August 18, 2004 maps.

(3) For each MSA and CBD, provide a count of enterprise customer locations, broken down as follows: (a) Locations at which SBC provides service at retail to end-user enterprise customers; (b) Locations at which AT&T provides service at retail to end-user enterprise customers using special access services obtained from SBC; (c) Locations at which AT&T provides service at retail to end-user enterprise customers using AT&T-owned fiber optic facilities ("on-net" AT&T locations); (d) Locations at which AT&T provides service at retail to end-user enterprise customers using facilities being leased from or otherwise provided by other CLECs not affiliated with SBC or AT&T; (e) Locations at which AT&T provides service at retail to end-user enterprise customers using special access services obtained from SBC where the customer location is passed by fiber optic facilities owned by AT&T; (f) Locations at which SBC provides service at retail to end-user enterprise customers where the customer location is also served by fiber optic facilities owned by AT&T; (g) Locations at which SBC provides service at retail to end-user enterprise customers where the customer location is passed by fiber optic facilities owned by AT&T

(4) Provide maps in the same format as those requested in (3) for any MSA or CBD outside of the SBC region where SBC or an SBC affiliate has deployed fiber optic facilities. For each such location, provide the same information as is requested in (3)(a) through (3)(g) above.

Explanation. This information is the minimum necessary to permit the Commission to evaluate the increase in concentration in local markets that would be caused by SBC's acquisition of AT&T's local facilities.

5. Using the methodology of the DOJ/FTC Horizontal Merger Guidelines,[1] define all relevant product and geographic markets in which SBC and

[1] In this and the following questions that refer to the methodology of the DOJ/FTC Horizontal Merger Guidelines, the reference is primarily to "§1.1 Product Market Definition." This section of the Guidelines explains the concept of the "hypothetical monopolist" and the "smallest market principle":

> Specifically, the Agency will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed at lease a "small but significant and nontransitory" increase in price, but the terms of sale of all

AT&T compete. For each relevant product and geographic market, provide the market shares of SBC, AT&T, and all other competitors measured alternatively by subscribers and by revenue.

Explanation. The initial questions promulgated by the FCC Staff did not ask the parties to define relevant product markets.

6. State the number and current monthly dollar volume of revenues generated by new residential customers AT&T that has added subsequent to its announcement that it would no longer market to residential customers.

Explanation. Applicants have argued that AT&T is not competing in the residential market as the result of its cessation of marketing. The number of new customers acquired (and the dollar volume of revenue produced) is one test of the extent to which AT&T's cessation of market truly reflects the removal of AT&T as a competitive force in the market.

7. For each type of Internet service and Internet-related product (excluding Internet backbone services) – e.g., broadband Internet access services, narrowband Internet access services, voice over IP services (VOIP) – provided by AT&T and SBC, use the DOJ/FTC Horizontal Merger Guidelines' methodology to define the relevant product market in which it is sold.

For each product market identified above, use the Merger Guidelines methodology to define the relevant geographic market. For each product and geographic market, identify the competitors and calculate SBC's, AT&T's and each competitor's market shares measured alternatively by subscribers and by revenue. Also provide the "universe" number of

---

other products remained constant. If, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Agency will add to the product group the product that is the next-best substitute for the merging firm's product. …The price increase question is then asked for a hypothetical monopolist controlling the expanded product group. In performing successive iterations of the price increase test, the hypothetical monopolist will be assumed to pursue maximum profits in deciding whether to raise the prices of any or all of the additional products under its control. This process will continue until a group of products is identified such that a hypothetical monopolist over that group of products would profitably impose at least a "small but significant and nontransitory" increase, including the price of a product of one of the merging firms. The Agency generally will consider the relevant product market to be the smallest group of products that satisfies this test. [emphasis added]

subscribers, and the total revenue, used as the denominator when calculating these shares.

Explanation. The initial questions promulgated by the FCC concerning VOIP and Internet products did not ask the parties to define relevant product markets

8. State whether AT&T and SBC compete with each other in longhaul services. If so, using the DOJ/FTC Horizontal Merger Guidelines methodology, please define the relevant product markets for longhaul services for this merger.

For each product market identified above, use the Merger Guidelines methodology to define the relevant geographic market. For each product and geographic market identify the competitors and calculate SBC's, AT&T's and each competitor's market shares measured alternatively by subscribers and by revenue. Also provide the "universe" number of subscribers, and the total revenue, used as the denominator when calculating these shares.

Please provide a map of all longhaul interexchange fiber optic network facilities owned by SBC or any affiliate of SBC, separately for in-region areas and for out-of-region areas. In responding to this request, include all interLATA administrative network facilities constructed pursuant to the administrative facilities exception to the interLATA line-of-business restriction in the MFJ, as well as any interLATA facilities constructed specifically for the purpose of providing interLATA services to SBC customers. Separately for each network link, specify the link's capacity (expressed in OC-n units).

Explanation. The FCC did not ask for information concerning longhaul services based on product markets.

9. In addition to providing for each SBC franchise area, the number of residential resold lines, residential UNE-P lines, residential UNE-L lines, competitively deployed access lines, residential wireless only customers, and residential VOIP customers, please additionally provide for each SBC franchise area the number of SBC's retail residential customers and the number of customers served by UNE-P equivalent services, such as LWC, being provided by SBC to CLECs pursuant to negotiated commercial agreements.

Explanation. The FCC Staff questions concerning residential customers omitted SBC's retail residential customers and customers served via UNE-P equivalent services, such as Local Wholesale Complete.

10. For each benefit or efficiency that you assert, explain whether it will reduce variable or marginal costs. If so, describe how variable .or marginal costs will be reduced and quantify the savings. Identify the product and geographic market(s) in which each benefit or efficiency will have an effect.

Explanation. Providing this additional information will permit a complete assessment of efficiencies asserted by the Applicants.

11. At page 99 of the Public Interest Statement, Applicants state:

"Because SBC does not own its own dense national long-haul network, SBC attempted to serve those needs through an arrangement with WilTel, using WilTel's network. SBC found, however, that its particular arrangement with WilTel did not give it enough end-to-end network management control and flexibility to meet these customers demanding requirements for system integration and accountability, performance and provisioning and trouble-shooting speed and flexibility."

Please identify all enterprise customers that decided not to use SBC's services because SBC's arrangement with WilTel did not give SBC enough end-to-end network management control and flexibility to meet the customer's requirements for system integration and accountability, performance and provisioning and trouble-shooting speed and flexibility and provide all documents relating to SBC's attempts to sell service to the customer and the customer's response. Please provide all materials prepared by SBC for potential use by its sales representatives that describe or discuss SBC's use of WilTel's network.

Explanation. SBC's principal justification for its need to purchase AT&T appears to be that unless it owned its own long haul network, it would not be able to satisfy the demands of enterprise customers for network integration. This question tests the veracity of that claim in the actual business world.

12. When did SBC first begin providing services to national enterprise customers? How long did it take, from first contact to closure of the deal, to negotiate your first contract with a national enterprise customer?
For what length of time does this contract cover?
Provide a copy of that contract and all documents that indicate when the negotiations were taking place.

How long does it typically take, from first contact to closure of the deal, to negotiate contracts with national enterprise customers?

What is the shortest length of time, from first contact to closure of the deal, that it has taken SBC to sign a contract with a national enterprise customer?
What is the longest length of time, from first contact to closure of the deal, that it has taken SBC to sign a contract with a national enterprise customer?
Provide all documents that indicate how long it took to negotiate each of your national enterprise customer contracts.

Explanation. SBC was first permitted to begin selling to nationwide enterprise customers in late 2003. Because it has been in the market such a short time, its current market share might not reflect its potential in a few years. These questions will permit the Commission to better assess likely SBC future market shares.

13. Please provide the number of potential enterprise customers and amount of potential revenues currently "in the pipeline" for SBC – i.e., between initial contact and signed contract.

What is the typical contract length for national enterprise customers?
What is the shortest contract length for any AT&T or SBC national enterprise customer?
What is the longest contract length for any AT&T or SBC national enterprise customer?
Provide copies of all SBC contracts that cover sales to national enterprise customers.

Is SBC currently trying to gain additional national enterprise customers?
What rate of growth does expect in its sales to national enterprise customers?
What is SBC's current share of all new sales to national enterprise customers?
Absent this merger, what do you predict will be SBC's share of all sales to national enterprise customers in two years? three years? four years? five years?
Provide documents that show SBC's current share of all sales to national enterprise customers and your forecasted sales growth to national enterprise customers.

Explanation. This would provide a better indication of "potential competition" than the data on customers currently receiving service.

14. Describe and quantify the major types of cost savings, benefits, or efficiencies that SBC achieved through its acquisition of Ameritech. For each of these types of cost savings, benefits, or efficiencies, explain whether it will be achieved in the SBC/AT&T merger, and compare the

amount of each cost saving, benefit, or efficiency with its counterpart from the earlier merger. Do you expect to achieve any types of cost savings, benefits, or efficiencies with the AT&T acquisition that you did not achieve in the Ameritech acquisition? If so, describe each one, explain the amount expected, and explain why you expect to achieve it with this merger but not the Ameritech merger.

Explanation. This will provide some concrete details to evaluate Applicants' claims of cost savings.

15. Separately for AT&T and SBC, provide the net price (or average revenue per minute) for each of the following types of calls: wireline local, wireline long-distance, wireless within MSA, and wireless outside MSA. If there is no single net price for each type of call, indicate the range of net prices from the minimum to the maximum.

Explanation. Questions 15 and 16 are designed to provide evidence concerning contribution margin for wireless and wireline calls, which is one of the indicia as to whether such services are in the same product market.

16. Separately for AT&T and SBC, provide your best estimate of the short-run variable costs per minute for each of the following types of calls: wireline local, wireline long-distance, wireless within MSA, and wireless outside MSA. Consider short-run variable costs to be those that vary with quantity in a time frame of less than one year, or use your own definition and describe what it is. Explain which cost components or categories you include in your definition of short-run variable costs.

Explanation. Questions 15 and 16 are designed to provide evidence concerning contribution margin for wireless and wireline calls, which is one of the indicia as to whether such services are in the same product market.

CERTIFICATE OF SERVICE

I, Danielle Burt, herby certify that I have caused copies of the foregoing comments in WC Docket 05-65 to be hand delivered, unless otherwise indicated, on this 25th day of April 2005 to the following:

Best Copy and Printing, Inc.
Portal II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554
www.bcpiweb.com

Gary Remondino
Competition Policy Division
Wireline Competition Bureau
445 12th Street, S.W.
Room 5-C143
Washington, D.C. 20554
Gary.Redmondino@fcc.gov

Marcus Maher
Competition Policy Division
Wireline Competition Bureau
445 12th Street, S.W.
Room 5-C360
Washington, D.C. 20554
Marcus.Maher@fcc.gov

Bill Dever
Competition Policy Division
Wireline Competition Bureau
445 12th Street, S.W.
Room 5-C266
Washington, D.C. 20554
William.Dever@fcc.gov

Mary Shultz (via overnight delivery)
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, PA 17325
Mary.Shultz@fcc.gov

Jeff Tobias
Wireless Telecommunications Bureau
445 12th Street, S.W.
Room 3-A432
Washington, D.C. 20554
Jeff.Tobias@fcc.gov

David Krech
Policy Division
International Bureau
445 12th Street, S.W.
Room 7-A664
Washington, D.C. 20554
David.Krech@fcc.gov

JoAnn Lucanik
International Bureau
445 12th Street, S.W.
Room 6-A660
Washington, D.C. 20554
JoAnn.Lucanik@fcc.gov

Charles Iseman
Office of Engineering and Technology
445 12th Street, S.W.
Room 7-A363
Washington, D.C. 20554
Charles.Iseman@fcc.gov

James Bird
Office of General Counsel
445 12th Street, S.W.
Room 8-C824
Washington, D.C. 20554
James.Bird@fcc.gov

Jonathan Levy
Office of Strategic Planning and Policy Analysis
445 12th Street, S.W.
Room 7-C362
Washington, D.C. 20554
Jonathan.Levy@fcc.gov

Danielle Burt