

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

In the Matter of

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

OPPOSITION OF VONAGE HOLDINGS CORP.

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EXECUTIVE SUMMARY

Vonage Holdings Corp. (“Vonage”) opposes the application of SBC Communications Inc. (“SBC”) and AT&T Corp. (“AT&T”) for a transfer of control of AT&T to SBC (“the Merger”). SBC and AT&T have failed in most respects to meet their burden of proof that the Merger is in the public interest. The proposed combination will result in a combined company with increased incentives and additional ability to act anticompetitively in several different areas of the U.S. telecommunications marketplace to the detriment of all other competitors, and will frustrate any remaining attempts of the FCC to ensure a competitive U.S. local and long distance marketplace. Vonage is particularly concerned with the effects of the Merger on the emerging IP-enabled services market in which Vonage competes.

The Merger will provide increased incentives for the combined companies to restrict the availability to competitors of many key elements necessary by VoIP providers to provide voice services. In particular, standalone VoIP providers need nondiscriminatory and reasonable access to the following key elements: 1) direct tandem access necessary for interconnection to the PSTN and provision of 911 services; 2) number porting; 3) Internet backbone facilities; and 4) white pages directories. Without competitive safeguards, however, these key elements will be under the control of a combined SBC and AT&T throughout SBC’s region. In addition, competitive VoIP providers need assurance that there will be net neutrality with regard to access to their services over SBC’s broadband network. Further, VoIP providers need access to a wireless platform in order to offer new

innovative VoIP offerings to the wireless space and thus compete with a dominant wireline and wireless provider like SBC.

Finally, as detailed below, the Merger may impact the ability of VoIP providers to receive interconnection to the PSTN. CLECs now provide the bulk of Vonage's necessary elements such as interconnection and numbering resources. The merger of SBC and AT&T, coupled with the potential merger of MCI with another ILEC, will remove two of the largest CLECs with a national footprint. Therefore, the FCC must take steps to ensure that VoIP providers will not be impaired in their ability to interconnect with the PSTN.

Accordingly, in order to remove the above anticompetitive threats, and preserve and promote competition in the U.S. telecommunications marketplace, the FCC must either deny this transfer of control application, or in the alternative act in a more targeted way to remedy some of the harms the Merger will present. We respectfully submit that this could be achieved by imposing the following conditions on this transaction:

- 1) SBC must offer to all VoIP providers nondiscriminatory and reasonable access to the facilities that comprise the public telephone network, as well as ensure a right of interconnection with the E911/911 infrastructure;

- 2) SBC must establish separate subsidiaries for the provision of VoIP services;

3) SBC must provide peering or IP interconnection to competitors, and do so on a reasonable basis with non-discriminatory terms, rates and conditions regardless of the volume of traffic;

4) SBC must provide IP transit services at nondiscriminatory rates, terms and conditions;

5) SBC must make its White Page listings and directories available to VoIP service providers without requiring them to take service pursuant to SBC's TIPToP tariff;

6) SBC must make its wireless spectrum available for resale;

7) SBC must enter into enforceable commitments that prevent packet-discrimination in favor of its VoIP provider affiliates. In particular, SBC must adopt net neutrality requirements that guarantee that it will not discriminate, block or provide inferior access to VoIP or other IP-enabled services its competitors might provide to SBC's broadband customers;

8) SBC must not be able to give preferences in timing and process of porting requests to its affiliates;

9) SBC must be forbidden from abusing the porting process by classifying port requests as erroneous even if the "errors" are caused by their own internal databases. Once a customer has provided a Letter of Authorization, the acquiring carrier (or VoIP provider) should be able to work directly with SBC to remove any non-existent features that are causing the port to be rejected; and

10) SBC must allow DSL customers to port their number away from SBC while still maintaining their standalone DSL service.

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OPPOSITION OF VONAGE HOLDINGS CORP.

I. INTRODUCTION

Vonage Holdings Corp. (“Vonage”), by its undersigned counsel, hereby opposes the application of SBC Communications Inc. (“SBC”) and AT&T Corp. (“AT&T”) for a transfer of control of AT&T to SBC (“the Merger”).¹ As demonstrated below, the Merger will result in a combined company with the resources and motivation to act anticompetitively in several different areas of the U.S. telecommunications marketplace to the detriment of all other competitors. Vonage is particularly concerned with the effects of the Merger on the emerging IP-enabled services market in which Vonage competes. Accordingly, Vonage respectfully requests that the Federal Communications Commission (“FCC”) deny the above-captioned application for a transfer of control. In the alternative, Vonage requests that the FCC condition grant of the application on compliance with the conditions described in this opposition.

¹ See *Commission Seeks Comment on Application for Consent to Transfer of Control Filed by SBC Communications Inc. and AT&T Corp.*, DA 05-656, WC Docket No. 05-65, rel. Mar. 11, 2005.

II. LEGAL STANDARD FOR 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 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.³

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.”⁴ The burden of proof is upon SBC and AT&T to demonstrate through a preponderance of the evidence that the Merger serves the public interest.⁵ There are four overriding factors the FCC examines: “(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

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*”).

³ 47 U.S.C. §§ 34-39.

⁴ *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*”).

⁵ *Ameritech/SBC Order*, 14 FCC Rcd 14737 at ¶48.

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.”⁶ 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.⁷

SBC and AT&T have failed in most respects to meet their burden of proof that the Merger is in the public interest. In fact, the preponderance of the evidence points to a different conclusion—that the Merger is anticompetitive and will 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. THE MERGER'S IMPACT ON THE NEW VOICE SERVICES MARKET

As the FCC is well aware, Vonage is a leading provider of consumer and small business Voice over Internet Protocol service, or “VoIP” as it is referred to in the industry, in the United States, with over 550,000 subscriber lines. Vonage's innovative VoIP service offers consumers a choice in the retail market for communications services. However, like many other innovative services delivered by means of telecommunications, Vonage's service relies upon reasonable and non-discriminatory access to the network infrastructure owned and controlled by telephone companies. Vonage is concerned that the proposed merger would

⁶ *Id.*

⁷ *Id.* at ¶ 49.

diminish existing competition by further consolidating ownership and control over the communications infrastructure on which Vonage and other competitors, including cable providers, rely to provide service to end users. In this opposition, Vonage will explain the basis for this concern and outline what safeguards it believes are necessary to preserve competition both in the wholesale and retail communications marketplaces.

Vonage has experienced explosive subscriber growth due to the innovative features and the competitive price of the service. Simply stated, Vonage enables customers to use their broadband Internet connection to place and receive telephone calls. By leveraging the power of the Internet, Vonage offers its customers a panoply of new features simply not available from the incumbent providers of telephone service. These include the ability to obtain online real-time information concerning their account, call detail and billing status, the ability to receive voicemails as an attachment to an e-mail directed to their desktop, laptop, PDA, or Blackberry as well as other features that traditional carriers can't offer.

In terms of price, consumers are experiencing widespread residential local and national competition for the first time. Vonage offers customers the ability to replace their existing telephone service with its service for as little as \$14.99 per month. This includes 500 minutes of calling throughout the U.S. and Canada, with popular features like caller ID, call waiting, voicemail, and many others all included for free. Moreover, for just \$24.99 a month, our customers can make unlimited local and long distance calls throughout the United States and Canada.

Because of Vonage's low price, most customers can subscribe to a broadband Internet connection – via cable or telephone companies – and receive telephone service at a price lower than what many consumers pay for traditional telephone service. In this way, Vonage's services are driving broadband adoption which in turn increases broadband deployment, especially in rural and other underserved markets.

In the face of the threat of competition that Vonage poses, the incumbent providers of telephone service have the incentive and the power to undermine it. In fact, SBC has already used that power to put Vonage at a competitive disadvantage, by denying and impeding its access to the E911/911 network that they control,⁸ and by preventing SBC's DSL customers from porting their numbers away from SBC without canceling their DSL service. The merger with AT&T will increase exponentially the ways in which SBC can use market power to exclude VoIP providers from competing effectively in the retail market. Ironically, SBC incorrectly relies on the existence of standalone VoIP providers like Vonage as a source of competition to support its claim that the Merger will not reduce competition in any market. Yet, by allowing the Merger to go forward without proper safeguards, the Merger will in fact impair competition in several areas of the telecommunications market, including not only the retail marketplace from

⁸ Vonage notes that SBC recently sent a letter to Vonage stating that it has now agreed to do a technical, economic and regulatory assessment of options to help address Vonage's 911 issues. SBC, however, has not given Vonage any timeframe for such assessment, or potential prices, terms, conditions or other information about what they may or may not provide. *See* Letter from Christopher T. Rice, SBC, to Jeffrey A. Citron, Vonage, dated April 18, 2005.

standalone VoIP providers, but also the wholesale marketplace that provides key elements necessary for VoIP providers to compete.

In summary, in order to compete successfully against an incumbent dominant carrier like a combined SBC and AT&T, standalone VoIP providers will need nondiscriminatory and reasonable access to the following key elements: 1) direct tandem access necessary for interconnection to the PSTN and provision of 911 services; 2) number porting; 3) Internet backbone facilities; and 4) white pages directories. Without competitive safeguards, however, these key elements will be locked up by a combined SBC and AT&T in SBC's region, and a combined Verizon Communications Inc. ("Verizon") and MCI, Inc. ("MCI") in Verizon's region.⁹ In addition, competitive VoIP providers need assurance that there will be net neutrality with regard to access to their services over SBC's broadband network. Further, VoIP providers need access to a wireless platform in order to offer new innovative VoIP offerings to the wireless space and thus compete with a dominant wireline and wireless provider like SBC. Finally, as detailed below, CLECs now provide the bulk of Vonage's necessary elements such as interconnection and numbering resources. The merger of SBC and AT&T, coupled with the merger of Verizon and MCI, will remove two of the largest CLECs with a national footprint. Therefore, the FCC must ensure that VoIP providers are not impaired in their ability to directly interconnect with the PSTN. Accordingly, the FCC must either

⁹ Vonage recognizes that there is a continuing question as to whether Verizon or Qwest Communications Corporation will be the successful bidder for MCI. For purposes of this Opposition, Vonage assumes that Verizon will be the successful bidder.

deny this transfer of control application, or condition its grant so as to remove the above anticompetitive threats, in order to preserve and promote competition in the U.S. telecommunications marketplace.

IV. ACCESS TO ESSENTIAL NETWORK FACILITIES

SBC and AT&T point to the increasing number of VoIP providers and the existence of VoIP services as evidence that there is sufficient competition in the communications marketplace such that the merger will not have an anticompetitive effect on consumers. Their argument, however, ignores SBC's market power over essential facilities that make competition possible. VoIP providers like Vonage offer competition in the retail marketplace for communication services. The greater threat is that the Merger will reduce competition in the wholesale marketplace, which could allow carriers controlling bottleneck facilities to restrain competition in the retail market. While end users today may be able to choose from an increasing number of VoIP providers, both this Merger and the Verizon/MCI merger represent further consolidation of the facilities necessary to deliver innovative new IP services such as VoIP. These bottleneck facilities include the access tandems – the access ramps to and from the PSTN – and, to an increasing extent, the backbone facilities that represent the Internet itself.

A. Access to Tandem Switches and E911 Facilities

In order to deliver calls to the PSTN, VoIP providers must gain tandem access. Currently access to the public telephone network is provided through a dwindling number of competitive local exchange carriers. This Merger, combined with the Verizon/MCI merger, will result in the acquisition by the two largest local

exchange companies of the two largest entities currently purchasing wholesale access to the local exchange networks. The remaining competitors lack the geographic diversity and the financial stability to compete effectively with the merged entities.

For example, Vonage has already experienced the difficulties that arise in obtaining access to facilities used to deliver E911/911 services when they are controlled by just a handful of companies. While Vonage is technically able to provide E911 call-back and location information, it has been stymied in its efforts by the RBOCs who control essential facilities. In large part, SBC has denied Vonage access to the same 911 infrastructure that they make directly available to others.

Even though the 911 infrastructure was paid for by end-user 911 surcharges and other subsidies, the RBOCs own and control it and will not willingly make it available to VoIP providers. RBOCs, in particular SBC, have no incentive to offer access to this critical infrastructure to competitive VoIP providers and have increasing incentive to discriminate in favor of their affiliated VoIP providers - such as SBC Internet Services, Inc. ("SBCIS"). For instance, SBC rebuffed initially Vonage's request for a 911 trial, yet at the same time its affiliate SBCIS enjoys the benefits of interconnection not offered to Vonage and other VoIP providers. As a result, SBCIS can offer a higher level of 911 service to its subscribers than other unaffiliated VoIP providers. Vonage is grateful that SBC has very recently begun discussing with it E-911 deployment for all Vonage customers in their territory, but

nothing has yet been achieved, and Vonage needs to ensure that this cooperation will remain beyond the pendency of this transaction.

After the Merger, AT&T's CallVantage IP-enabled voice service may also enjoy this unfair discriminatory access unless the FCC takes action to halt it. Accordingly, the FCC must condition grant of the Merger on SBC offering to all VoIP providers nondiscriminatory and reasonable access to the facilities that comprise the public telephone network, as well as ensure a right of interconnection with the E911/911 infrastructure. In addition, to ensure nondiscrimination in provision of essential facilities, SBC should be required to establish separate subsidiaries for the provision of VoIP services.

B. Access to Internet Backbone Facilities

Another of the key elements necessary for a healthy VoIP market is a competitive Internet backbone market. VoIP providers must have reasonable access to the packet-switched network that comprises the Internet. The FCC has already found that the Internet backbone market is a separate relevant product market for examination in the case of mergers.¹⁰ The FCC's duty to protect the public interest requires it to ensure that nothing happens to hurt competition in this market.

Vonage is alarmed because the Merger threatens the state of competition in this key sector by combining SBC's dominant position in the access market with

¹⁰ See *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025, 18107 at ¶148 (1998) ("MCI/WorldCom Order").

AT&T's strength in the Internet backbone market, thus configuring additional incentives and ability for discrimination. As noted above, VoIP users in SBC's region have few options for broadband access and therefore are in effect forced to use SBC to access the broadband facilities necessary to utilize VoIP services. In turn, VoIP providers rely on high quality Internet backbone providers with diverse and multiple pathways like AT&T's for delivering Internet traffic. AT&T, together with UUNET (owned by MCI), control a significant segment of the market for such services. The result of an AT&T/SBC merger and a Verizon/MCI merger would be both combined companies having a dominant position in both the access and backbone markets in the areas they serve. This dominant position, coupled with the lack of regulation in the area of peering, would set up a situation where SBC could drive away any competitors in the Internet backbone and access markets in its region. As a result, SBC would have the ability to act as a gatekeeper of broadband application providers like Vonage throughout its region.

For example, it is Vonage's experience that not all Internet backbone services are created equal, and certain standards are necessary to offer VoIP services. Vonage requires access to a high quality Internet backbone with diverse and multiple peering points and robust network facilities in order to offer its high quality VoIP product. While access to the Internet via one peering relationship may be fine for offering a basic web browsing service, in order to offer a voice service, a VoIP provider needs access at multiple peering points with a guaranteed amount of speed, quality and bandwidth. However, there are very few Internet backbone

providers that can offer such arrangements, with UUNET and AT&T being the premier providers controlling a significant segment of the market.

To date, Vonage has not had an issue getting the Internet backbone access it needs from companies like UUNET and AT&T. Despite the lack of regulation mandating access to the Internet backbone on fair and reasonable terms, the market dynamics have been such that competition has flourished with its attendant checks on terms and price offered. The merger of SBC and AT&T, coupled with the Verizon and MCI merger, however, will change the equation greatly, resulting in a market ripe for abuse, with essentially no regulatory oversight.

In a circuit-switched environment, where ILECs control access to the essential facilities necessary to reach end-users, their power is checked by a series of regulations governing interconnection. In contrast, the “interconnection” of IP broadband networks is done outside this regulatory framework pursuant to “peer-to-peer” relationships. The FCC has 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 for free, but demand peering fees from everyone else. In fact, in opposing the MCI and Sprint merger several years ago, both AT&T and SBC argued against the merger because, among other reasons, the size of the combined company's Internet backbone networks would hamper competition.¹¹ 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."¹²

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

¹¹ *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).

¹² *Opposition of SBC Communications Inc.*, CC Docket No. 99-333 at 41 (Feb. 18, 2000).

ability to compete with those that do have settlements-free private peering relationships.¹³

In addition, the European Union, in opposing the MCI/Sprint merger found that the merger would create an Internet backbone provider of such a large size as to be in a position to control the prices of its competitors and customers, control technical developments, and inflict harm on the market through the selective degradation of its competitors' Internet connectivity offerings.¹⁴

Finally, because 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, there will be no interconnection regulations like Section 251 that require reasonable and timely peering for all traffic. Therefore, if the FCC approves this merger, it must do so only on condition that SBC is required to provide peering or IP interconnection to competitors, and that it do so on a reasonable basis with non-discriminatory terms, rates and conditions regardless of the volume of traffic. The FCC should also require that IP transit services be offered at non-discriminatory rates, terms and conditions.

C. Access to White Page Listings

SBC's "White Page" directory listings are also a bottleneck facility. Because SBC is the dominant provider of local exchange services within its region, virtually

¹³ *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).

¹⁴ European Commission, Merger Case No. COMP/M.1741-MCI WorldCom/Sprint, § 146.

all consumers rely upon the SBC White Pages as the authoritative source of telephone listing information. If SBC were able to provide favored White Page listing access to its own IP-enabled services, such as AT&T CallVantage, and deny such listings to competitors such as Vonage, it could give an uneconomic advantage to the service it acquires.

In order for VoIP services to truly be a viable alternative to SBC's traditional voice offerings, and a source of competition, VoIP providers and their customers should have access to White Page directories and listings. SBC has made only a half-hearted attempt to give VoIP providers such access. SBC said it was willing to discuss making available White Page Listings only to those "IP enabled Voice Information Service providers" that took service pursuant to SBC's controversial TIPToP tariff.¹⁵ SBC's TIPToP tariff was introduced last November 2004 and was immediately condemned by both VoIP providers and the Chairman of the FCC because it attempts to replace the reasonable interconnection charges VoIP providers now pay with higher per-minute fees based on access charges.¹⁶ Therefore, for a truly competitive environment, SBC should be required to make its White Page listings and directories available to VoIP service providers without requiring them to take service pursuant to SBC's TIPToP tariff.

¹⁵ See *SBC CEI Plans-Agreements, TIPToP Additional Contract Services*, at <http://www.sbc.com/gen/public-affairs?pid=2976>.

¹⁶ See *Chairman Powell Issues Statement on SBC's TIPToP Service*, FCC News Release issued Nov. 26, 2005.

D. Access to Wireless Internet Services

Increasingly, VoIP and other Internet applications will be delivered through a wireless platform. Verizon and SBC (through Cingular) dominate the wireless market in addition to dominating the local and interexchange market. Therefore, for many subscribers, wireless is not a competitive alternative to wireline; it is a compliment to it. Further, Vonage foresees that VoIP will increasingly be delivered via a wireless platform. Yet neither SBC's wireless affiliate nor Verizon Wireless will actively engage in discussions to resell wireless spectrum or enter into Mobile Virtual Network Operator ("MVNO") type arrangements. As the wireless market becomes increasingly consolidated due to the lifting of spectrum caps and these firms gain more market share in related industries due to mergers, third party providers will face tremendous hurdles in delivering new innovative VoIP offerings to the wireless space. In order to be competitive, VoIP providers will need to be able to offer a combined WiFi and cellular product, which can only be offered if they have access to a resold wireless product. Otherwise affiliates of SBC such as CallVantage will have favorable access to arrangements for spectrum and the broadband platforms not available to competitors. In addition, SBC's VoIP provider affiliates will also be able to get discriminatory bundling which will make its product unfairly more attractive.

Finally, the lack of access to MVNOs eliminates SBC's arguments that wireless services offer sufficient intermodal competition to check anticompetitive behavior. It is hard to argue that there is true competition from wireless service providers when the largest wireline companies also control the wireless market. As

long as wireless services remain closed to a limited number of competitors, and those competitors dominate the wireline market, there will not be true competition. Accordingly, in order for VoIP providers to be competitive, the FCC must ensure that wireless spectrum is not concentrated in the hands of a few providers like SBC, and mandate that they be open to MVNOs.

V. NETWORK NEUTRALITY MUST BE ENSURED

The market dominance of the combined SBC and AT&T also presents concerns about their ability to discriminate in the quality of the broadband connection they offer end-users. Broadband is widely viewed as an open pipe over which any end user can access competitive applications such as Vonage's, thus increasing competition in retail markets. Unfortunately, this is not always true. The Merger increases broadband discrimination concerns. Broadband discrimination is the ability of providers of high-speed Internet access connections to both discriminate and block certain communications.

Broadband discrimination could take three different forms. First, an entity like SBC that either owns or controls a broadband Internet connection could prioritize packets associated with the application it provides to its end users over the packet generated by a third-party provider like Vonage. In this instance, Vonage would be placed at a significant disadvantage as compared to the network provider because the network provider would provide superior quality service by allowing its packets to supersede those transmitted by third-party Internet application providers. Second, an entity that either owns or controls a high-speed Internet connection could inject latency or otherwise degrade the packets sent by a

third-party Internet application provider. In this way, the network provider would discourage their users from taking advantage of a service like Vonage's because of performance related concerns that are caused entirely by the actions of the network provider.

Another form of broadband discrimination occurs when entities that either own or control broadband Internet access facilities block certain transmissions. The industry has established certain standards that define what pathways a certain Internet application will use when it is provided to an end user. VoIP services are assigned to a specific route or port. By blocking the port associated with VoIP services, a broadband Internet access provider can prevent VoIP providers from providing their service.

The concern about broadband discrimination is not theoretical. The Madison River Companies ("Madison River") recently entered into a Consent Decree to settle an investigation arising out of a complaint by Vonage concerning the company's practice of preventing its customers from using Vonage's VoIP service.¹⁷ Madison River engaged in port blocking whereby all of the communications generated by Vonage's users were blocked. While admitting no wrong doing, Madison River agreed to pay \$15,000 to the United States Treasury.

The *Madison River Order* clearly shows that broadband access providers have the means and the motive to engage in packet-discrimination, blocking certain communications. The merger of SBC and AT&T gives them both the motive and

¹⁷ *Madison River Communications, LLC and Affiliated Companies*, File No. EB-05-IH-0110, DA 05-543, (rel. Mar. 3, 2005) ("*Madison River Order*").

ability to engage in this type of anticompetitive behavior. Vonage has already been victimized by this practice and even in the face of FCC action against Madison River, some other providers are continuing the practice. While cable providers have committed to not block customer access to new innovative IP applications, SBC and Verizon have waffled on their commitments in this area. To ensure a competitive VoIP market, the FCC must require SBC to enter into enforceable commitments that prevent packet-discrimination in favor of its VoIP provider affiliates. SBC has not made any commitments (and in fact opposes any conditions) that would preclude it from discriminating in price, terms, conditions or quality of service to customers that chose to purchase a competitive IP application not offered by itself or an affiliated company. In order to address this concern, the FCC should require SBC to adopt net neutrality requirements that guarantee that it will not discriminate, block or provide inferior access to VoIP or other IP-enabled services its competitors might provide to SBC's broadband customers.

VI. NUMBER PORTABILITY CONDITIONS REQUIRED

The Merger presents dangerous risks of anticompetitive behavior in the area of number portability. As detailed below, SBC has already shown a proclivity for abusing its position as a dominant LEC in delaying the porting of numbers from former SBC customers to new service providers, including VoIP providers. The combination of SBC with AT&T will only serve to exacerbate the problem unless the Commission imposes conditions on the Merger that address these issues.

As VoIP service providers seek to gain a toehold in the huge voice services market, one obstacle they increasingly face is the reluctance of consumers to switch

service providers unless they can keep their existing telephone numbers. Although number portability is by law available to these potential VoIP customers, in reality the ILECs often make portability so difficult and time consuming that customers are discouraged from switching service providers. In other FCC proceedings Vonage has raised these concerns, and proposed solutions.¹⁸ Rather than rehash all of these concerns in this proceeding, Vonage would like to focus on how the merger of AT&T and SBC will elevate some of these concerns to an even higher level that will adversely impact competition. Therefore, it is imperative that the Commission reject this merger unless SBC can assure reasonable and timely number portability, rather than wait until it completes its broader review of number portability in the aforementioned proceedings.

Currently VoIP providers are not able to directly acquire telephone numbers from the North American Numbering Plan Administrator (“NANPA”) or the Pooling Administrator (“PA”) according to the Commission’s existing rules,¹⁹ although a waiver was recently granted to SBC’s affiliate, SBCIS.²⁰ Therefore, VoIP providers must obtain access to telephone numbers through competitive local exchange

¹⁸ See generally *Telephone Number Portability*, Reply Comments of Vonage Holdings Corp., CC Docket No. 95-116 (filed Dec. 17, 2004).

¹⁹ Section 52.15(g)(2)(i) requires that an applicant requesting North American Numbering Plan numbering resources must be “authorized to provide service in the area for which the numbering resources are being requested.” The Commission has interpreted this rule as requiring “carriers [to] provide, as part of their applications for initial numbering resources, evidence (e.g., state commission order or state certificate to operate as a carrier) demonstrating that they are licensed and/or certified to provide service in the area in which they seek numbering resource[s].”

²⁰ See *Administration of the North American Numbering Plan*, CC Docket 99-200, Order, FCC 05-20 (rel. Feb. 1, 2005).

carriers (“CLEC”) by purchasing Primary Rate Interface (“PRI”) or Direct Inward Dialing (“DID”) services. These telephone numbers are necessary for VoIP customers utilizing a broadband IP network to receive calls from parties served by a carrier operating a time division multiplexed (“TDM”) network within the PSTN. According to the arrangements with CLECs, the carrier terminates a VoIP customer’s communications on the PSTN or delivers the traffic to another carrier for termination on the PSTN.

Other than VoIP providers needing to work with CLECs to obtain telephone numbers, the overall issues associated with number portability are no different for VoIP providers than they are for any other competitive carrier. VoIP providers must be able to offer new customers the ability to keep their existing phone numbers if they are going to succeed in offering true competition to the ILECs. As recently as Friday, March 25, 2005, the Commission reaffirmed that the Telecommunications Act of 1996 requires ILECs to port telephone numbers in a non-discriminatory manner and that “carriers may not impose non-porting related restrictions on the porting out process.”²¹ Specifically, certain parties had highlighted to the Commission that ILECs will delay porting when a competing voice provider wins a customer that also subscribes to an ILEC data service. Not only has Vonage experienced similar discriminatory treatment in the same

²¹ See *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring Bell-South to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of Inquiry, WC Docket No. 03-251, at ¶ 36.

circumstances, it has been Vonage's experience that ILECs' information management practices also are producing unwarranted costs and delays. Vonage explained in detail this form of porting abuse engaged by ILECs in its recent filing with the Commission.²² By delaying porting through poor information management practices, these incumbent carriers are frustrating federal law, damaging the reputation of requesting CLECs and companies that rely on the services of such carriers like Vonage, and increasing the costs associated with finalizing number ports for CLECs and VoIP providers.

While Vonage hopes the Commission will take firm action to address these porting abuses on a general level in its open *Telephone Number Portability* docket²³, it is critical that the Commission impose conditions now in this proceeding to preclude SBC from further engaging in such abuse. If SBC is allowed to take over AT&T, the opportunities for continued abuse will increase greatly. First, SBC starts with a firm advantage in the VoIP services market because it already has an established subsidiary, SBCIS, that not only operates in its region providing VoIP services, but has the only FCC waiver to allow it direct access to numbers from NANPA or the PA. With the addition of AT&T's CallVantage customer base, SBCIS will take an increasingly larger share of the market. SBCIS' ability to acquire

²² See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from William B. Wilhelm, Jr. and Ronald W. Del Sesto, Jr., Attorneys for Vonage Holdings Corp., filed March 28, 2005, in CC Docket Nos. 95-116, 99-200 and WC Docket Nos. 04-36 and 03-251.

²³ See *Telephone Number Portability*, CC Docket No. 95-116, *Second Further Notice of Proposed Rulemaking*, FCC 04-217 at ¶4 (rel. Sept. 16, 2004) ("*Telephone Number Portability*").

numbers directly then gives it a competitive advantage over independent VoIP providers because SBCIS is able to interconnect with the PSTN in a more efficient manner by interconnecting with the PSTN on a trunk-side basis, at a centralized switching location; *e.g.*, a tandem switch. This type of interconnection allows SBCIS to use softswitch and media gateways more efficiently to overcome the availability and scalability limitations inherent in retail interconnections with the PSTN.

Because SBCIS operates primarily in SBC's region, to the extent it needs to port the numbers of existing SBC customers, it is not likely to encounter the same delays in porting experienced by other VoIP providers. The addition of AT&T's CallVantage customers to the SBC portfolio increases significantly the number of potential customers that could receive this preferential treatment. In addition, SBCIS will be in a position to continue to quickly grow its customer base to the detriment of other VoIP providers by potentially offering faster and easier porting of numbers. Therefore, to level the playing field, the Commission must reject the merger; or, in the alternative, impose the following safeguards to ensure that number portability remains an option for VoIP providers. First, SBC must not be able to give preferences in timing and process of porting requests to its affiliates such as SBCIS and CallVantage. And second, SBC must be forbidden from abusing the porting process by classifying port requests as erroneous even if the "errors" are caused by their own internal databases. Once a customer has provided a Letter of Authorization, the acquiring carrier (or VoIP provider) should be able to work

directly with SBC to remove any non-existent features that are causing the port to be rejected. This would greatly streamline the porting process from the customer perspective and allow further automation to be developed to handle these cases in order to serve and give effect to the customers' intent.

VII. "NAKED DSL" SHOULD BE MADE AVAILABLE TO CONSUMERS

SBC must be prevented from tying DSL services to other services. The practice of tying broadband Internet access services to basic voice offerings is widespread throughout the telecommunications marketplace. The most immediate result of this anticompetitive tying practice is to prevent DSL customers from porting their numbers to VoIP providers. SBC routinely denies number porting requests when a customer has subscribed to a DSL service despite the fact that the Act requires non-discriminatory number porting and the Commission's specific finding that "carriers may not impose non-porting related restrictions on the porting out process."²⁴ Because of these requirements, an RBOC like SBC cannot avoid its obligations by pleading non-porting related complications or requirements such as the presence of DSL service on a customer's line yet, as a matter of practice, this is exactly what SBC does. And even when RBOC customers have given up their DSL service, and tried to port their number to Vonage or other VoIP providers, their

²⁴ *Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order, 18 FCC Rcd 20971, 20975, para. 11 (2003); *see also id.* at 20975-78, paras. 14-18, 21; *Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697, 23705, 23711-12, paras. 21, 34-37 (2003).

porting requests are still often rejected because the RBOC has not updated its records.

As discussed at the beginning of this pleading, as part of the FCC's review of the Merger, the FCC also is required to look at the effects of the merger pursuant to antitrust principles. In that context, DSL tying requirements by SBC are certainly anticompetitive if allowed to continue after the Merger. If SBC is allowed to continue requiring DSL customers to keep their local service, and not port numbers, customers will be greatly dissuaded from using competing local voice services offered by VoIP providers, allowing SBC to leverage its market power in the local services marketplace to gain an unfair competitive advantage in the market for broadband and VoIP services.

DSL tying represents a classic violation of the antitrust laws, and consumers might until recently have been expected to turn to private enforcement actions in the courts to vindicate their right to purchase their desired broadband and voice services from separate providers. However, the Supreme Court's decision in *Verizon v. Trinko* places foremost responsibility for enforcement of antitrust principles on the FCC. In justifying its recusal from at least certain areas of antitrust enforcement in telecommunications, the Supreme Court held as a "factor of particular importance ... the existence of a regulatory structure designed to deter and remedy anti-competitive harm." Thus, the FCC's first line of defense against anticompetitive conduct is the regulatory structure of Title II of the Act. The Commission has previously found that a tying practice can violate Section 201 without making

findings with respect to market power that are necessary to establish a violation of the antitrust laws.²⁵

The practice of DSL tying is clearly anticompetitive because it prevents customers from porting their numbers, and essentially forces them to purchase local services they do not want – either because they have a wireless option or because they prefer to use VoIP alternatives. The net effect is to make services like those offered by Vonage economically unattractive because there is no cost savings to the retail consumer. DSL tying ultimately acts as a drag on the adoption of broadband new IP technologies.

DSL tying not only eliminates consumer choice in the voice market, but it also undermines the potential of broadband to integrate digital voice and data with home appliances, other services and applications, and with each other. Broadband therefore remains more expensive and less attractive to American consumers, who as a result are falling further and further behind other countries that increasingly are leading the broadband revolution. The cost efficiencies of VoIP and broadband can reverse this course by fueling demand for each other – but only if consumers have the freedom to choose their preferred broadband and voice service providers based upon the strength of the service offerings, unfettered by limitations imposed

²⁵ *AT&T's Private Payphone Commission Plan*, Docket ENF-87-19, Memorandum Opinion and Order, FCC 92-453 (rel. November 4, 1992) at ¶ 16 (“We also conclude that, without regard to whether it may violate the antitrust laws, AT & T's practice of bundling its ‘0 +’ and ‘1 +’ services constitutes an unreasonable practice in violation of Section 201(b) of the Communications Act.”)

via the strength of a provider's market power. The elimination of DSL tying is an essential step in putting this power of choice into the hands of consumers.

As demonstrated above, DSL tying is clearly anticompetitive. It imposes unreasonable and discriminatory consequences on consumers not only where the tying carrier possess market power, but also where it does not. It is critical that the FCC put a stop to anticompetitive practices such as tying if competition is to ever flourish from standalone VoIP providers. Therefore, in reviewing this Merger, the FCC must act to prevent DSL tying by SBC in order to fulfill its antitrust responsibility. The FCC should condition any grant of this transaction on SBC being required to allow DSL customers to port their number away from SBC while maintaining a standalone DSL service.

VIII. THE COMMISSION SHOULD ENSURE THE VIABILITY OF INTERCONNECTION WITH THE PSTN

Vonage is concerned that the merger of SBC and AT&T will have a detrimental effect on the ability of VoIP providers to interconnect with the PSTN. As noted above, CLECs currently play an integral role in the deployment of VoIP services. For instance, Vonage relies on CLECs for both interconnection to the PSTN and for numbering resources. The acquisition of AT&T, however, will result in the removal from the marketplace of the single largest CLEC. When one adds to this the potential acquisition of MCI by Verizon, the result is a huge blow to the ability to get interconnection or number resources from CLECs. In particular, the remaining CLECs lack the geographic diversity and financial stability offered by AT&T and MCI. If the local market becomes even more concentrated, it is

foreseeable that other CLECs will fail, further reducing options for numbering and PSTN access. This will have a detrimental impact on VoIP providers' ability to originate calls on the PSTN unless the FCC takes steps to ensure that VoIP providers can get interconnection rights to the PSTN directly from ILECs.

As a result, it is even more important that the FCC take what steps are necessary to ensure that the remaining local exchange carriers such as SBC and Verizon do not have the ability to hamper competition by denying interconnection with VoIP providers, and other forms of discrimination such as poor provisioning, inferior connections, and unreasonable pricing for existing bottleneck circuit-switched facilities and packet-switched networks. As pointed out above, SBC will have every incentive to engage in such anticompetitive behavior after taking over AT&T because its ownership of major new interexchange facilities could truly benefit from favorable access to ILEC bottleneck facilities.

IX. ENFORCEMENT AND CONDITIONS

Should the FCC grant authority to SBC to merge with AT&T, the FCC should do so pursuant to conditions that are self-enforcing to the extent possible, especially with respect to performance metrics. Experience has shown in the context of the Section 271 proceedings and conditions imposed there, that SBC will take every step possible to avoid compliance with other types of conditions. The FCC should also enlist the help of the states in monitoring compliance by authorizing them to enforce merger conditions that affect their state.

The following is a summary of the conditions detailed previously that must be imposed to ensure that the public interest benefits of the Merger will outweigh all of the public harms that may result:

1) SBC must offer to all VoIP providers nondiscriminatory and reasonable access to the facilities that comprise the public telephone network, as well as ensure a right of interconnection with the E911/911 infrastructure;

2) SBC must establish separate subsidiaries for the provision of VoIP services;

3) SBC must provide peering or IP interconnection to competitors, and do so on a reasonable basis with non-discriminatory terms, rates and conditions regardless of the volume of traffic;

4) SBC must provide IP transit services at nondiscriminatory rates, terms and conditions;

5) SBC must make its White Page listings and directories available to VoIP service providers without requiring them to take service pursuant to SBC's TIPToP tariff;

6) SBC must make its wireless spectrum available for resale;

7) SBC must enter into enforceable commitments that prevent packet-discrimination in favor of its VoIP provider affiliates. In particular, SBC must adopt net neutrality requirements that guarantee that it will not discriminate, block or provide inferior access to VoIP or other IP-enabled services its competitors might provide to SBC's broadband customers;

8) SBC must not be able to give preferences in timing and process of porting requests to its affiliates;

9) SBC must be forbidden from abusing the porting process by classifying port requests as erroneous even if the “errors” are caused by their own internal databases. Once a customer has provided a Letter of Authorization, the acquiring carrier (or VoIP provider) should be able to work directly with SBC to remove any non-existent features that are causing the port to be rejected; and

10) SBC must allow DSL customers to port their number away from SBC while still maintaining their standalone DSL.

X. CONCLUSION

As demonstrated above, the FCC must deny the application of SBC and AT&T for a transfer of control of AT&T to SBC because it will not serve the public interest. The combined company will have both the resources and motivation to act anticompetitively in several different areas of the U.S. telecommunications marketplace to the detriment of all other competitors. In the alternative, to combat the competitive harms of the Merger, the FCC must condition grant on compliance with the conditions described above.

Respectfully submitted,

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