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

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

Janine Migden-Ostrander
Consumers' Counsel
David C. Bergmann
Chair, NASUCA Telecommunications Committee
Terry L. Etter
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Telephone: 614-466-8574
Facsimile: 614-466-9475

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

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I. SUMMARY

SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") (collectively, "Joint Applicants") seek approval from the Federal Communications Commission ("Commission") of SBC's takeover of AT&T and its subsidiaries. The comments submitted by the National Association of State Utility Consumer Advocates ("NASUCA")[1] demonstrated that this merger, as currently structured, does not serve the public interest, convenience and necessity, as required

[1]NASUCA is a voluntary association of 44 advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

by the governing statutes and this Commission's rules. NASUCA's comments also demonstrated that, as with prior mergers considered by this Commission, the proposed SBC/AT&T merger will not serve the public interest, convenience and necessity unless definitive and enforceable conditions are adopted that will promote competition in the local, broadband and long distance markets for residential and small business consumers; protect residential and small business customers from negative impacts of the merger, such as declines in SBC's or AT&T's service quality; and provide additional benefits to residential and small business customers. NASUCA's comments showed conclusively that this merger is both qualitatively and quantitatively different -- more likely prejudicial to consumers -- from mergers previously considered by the Commission. Thus the conditions need to be more substantial and more effectively enforceable than the conditions previously adopted.

The comments filed in support of the merger -- few of which contain any substance -- do not refute the anti-competitive aspects of the merger identified by NASUCA. The comments filed in opposition to the merger reinforce and add to NASUCA's concerns.

In its totality, this merger -- as currently structured -- fails to pass the public interest test. The concerns raised by this merger are substantially heightened by the other major merger currently under consideration, that between MCI – the second-largest interexchange carrier ("IXC") and competitive local exchange carrier ("CLEC") in the United States -- and Verizon, another Regional Bell Operating Company ("RBOC"). Taken together, these two mergers would result in the elimination of competition far greater than for each merger taken individually. In assessing both mergers, the Commission must consider the interrelationship and cumulative effect of the mergers, rather than looking at them in isolation.

These reply comments are structured, like NASUCA's initial comments, to respond first

to others' views of the current competitive landscape and the impact of the merger on that landscape. The reply comments then address the benefits claimed by the Joint Applicants and their supporters. Finally, the reply comments address the conditions that would be necessary to bring this merger within the public interest, including conditions proposed by other commenters.

II. INTRODUCTION

A wide and numerous range of industry stakeholders either oppose the SBC/AT&T merger, look to numerous conditions on the merger to enhance the public interest, or have serious questions about the merger. This includes a state,[2] state commissions,[3] consumer advocates,[4] and all stripes of the industry: an RBOC;[5] CLECs;[6] cable telephony providers;[7] payphone service providers;[8] Internet service providers;[9] rural incumbent local exchange carriers

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[2] State of Alaska.

[3] Missouri Public Service Commission; New Jersey Board of Public Utilities.

[4] Consumer Federation of America, Consumers Union and U.S. Public Interest Research Group ("CFA, et al."); NASUCA; Nevada Department of Justice, Office of the Attorney General, Bureau of Consumer Protection ("NvBCP"); New Jersey Ratepayer Advocate ("NJRPA"); Texas Office of Public Utility Counsel ("TxOPC").

[5] Qwest Communications International Inc. ("Qwest").

[6] CompTel/ALTS; a group of fourteen CLECs ("ACN, et al."); a group of seven CLECs ("Cbeyond, et al."); a group of two CLECs ("Broadwing, et al"); and Telscape Communications, Inc. ("Telscape").

[7] Cox Communications, Inc. ("Cox").

[8] American Public Communications Council ("APCC").

[9] EarthLink, Inc. ("EarthLink").

("ILECs");[10] VoIP providers;[11] wireless providers;[12] and others.[13] Their reasons for opposing this merger cover the waterfront, as discussed here.

Those who support the merger are a somewhat diverse but shallow coalition. There is a doctrinaire anti-regulator;[14] a labor union that favors SBC's labor-management policies to AT&T's;[15] a group of telecom equipment manufacturers who believe that the merger will enhance investment;[16] non-profit organizations largely funded by SBC and/or other RBOCs;[17] and a variety of other interest groups that provide brief totally supportive comments.[18] One common feature of the comments that support the merger is that they accept the Joint Applicants' assertions of lack of competitive harm and substantial public interest benefits as nothing short of gospel.

As before, these reply comments are presented in the context of the Commission's

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[10] Independent Alliance.

[11] Vonage.

[12] United States Cellular Corporation.

[13] American Antitrust Institute ("AAI"); Global Crossing North America, Inc.; Telecommunications Consultants Coalition; WilTel Communications, LLC.

[14] Randolph J. May, Progress & Freedom Foundation ("May").

[15] Communications Workers of America ("CWA").

[16] Ad Hoc Telecom Manufacturer Coalition.

[17] Alliance for Public Technology ("APT"), see www.apt.org/about/sponsafflt.html ; Women Impacting Public Policy, http://www.wipp.org/index.asp .

[18] There are some thirty of these.

definitive statements regarding the last round of mergers.[19] This merger deserves even greater scrutiny because SBC and AT&T customers deserve more than the unfulfilled promises that arose from the SBC/Ameritech and Bell Atlantic/GTE mergers.

III. THE LAW PLACES THE BURDEN ON SBC AND AT&T TO DEMONSTRATE THAT THEIR MERGER WILL SERVE THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

There is little dispute about the law involved here, or on the burden of proof under the law that is imposed upon the Joint Applicants. One commenter, however, says that despite the Commission's duties under the law, the Commission should defer to the expertise of the Department of Justice ("DoJ") regarding competitive concerns regarding the merger.[20] The Commission should reject this constricted view of its responsibilities.

It is true that the DoJ -- and the Federal Trade Commission ("FTC") -- also have duties to review this and other mergers.[21] May says that "[t]he difference between deciding whether a merger will substantially lessen competition [the focus of the DoJ/FTC review] or fail to enhance competition [the task of the Commission] is related more to semantics than anything else."[22] It is **not** mere semantics to say, as the Commission does, that in ensuring that a merger will promote the public interest it must **promote** competition.[23] In that analysis, a neutral result -- neither

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[19] *In re Applications of Ameritech Corp. and SBC Communications Inc., for Consent to Transfer Control*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("*SBC/Ameritech Order*"); *In re Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000) ("*BA/GTE Order*").

[20] May Comments at 2.

[21] *Id*.

[22] *Id*.

[23] See CompTel/ALTS Comments at 47, 49.

promoting nor harming competition -- is inadequate. A merger that does not substantially lessen competition -- thus meeting the DoJ's test -- *may not* promote competition, and would thus fail the Commission's test.

In addition, the Commission must apply its competitive test based on its expertise in this industry, rather than the generalistic competition review undertaken by the DoJ and FTC. The Commission's competitive review must also take place in the context of its public interest responsibility, a broader context than competition taken in isolation. The Commission should not defer to other agencies in this review.

In any event, it is clear that under traditional analysis, the merger will diminish the current level of competition. As CFA, et al. demonstrate, the current Hirschman-Herfindahl Index ("HHI") for residential local service in California is over 6900, indicating a very concentrated market. Post-merger, the HHI would be 8100.[24] The 1200-point increase is well in excess of the degree required to make a merger suspect.[25] The situation in the large business segment is not much different.[26]

Tellingly, Cbeyond, et al. point out that "the word 'competition' is never once mentioned in the Standard of Review section of the SBC/AT&T Application."[27] Such a fundamental omission cannot be inadvertent.

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[24] CFA, et al. Comments at 20-21.

[25] *Id*.

[26] *Id*. at 22.

[27] Cbeyond, et al. Comments at 9.

IV. THE CURRENT COMPETITIVE LANDSCAPE IS BLEAK.

On the wireline side, TxOPC provides a stark example of the impact of the RBOCs' war of litigation that ended in *USTA II* and the *Triennial Review Remand Order*.[28] In Texas, over 75% of CLEC customers are served via the unbundled network element platform ("UNE-P"), which will soon be disappearing.[29] Likewise, in Ohio more than 90% of residential customers served by CLECs were served via UNE-P.[30]

Telscape points out that SBC's "commercial alternative" to the UNE-P can exceed SBC's retail price,[31] making it not much of an alternative and not very commercial. CompTel/ALTS discuss at length SBC's proposed commercial substitute for unbundled local switching and transport.[32] Particularly discriminatory are the mammoth volume discounts allowed: Carriers purchasing 750,000 or more ports will pay less than half per port and one-tenth per minute than carriers purchasing "only" 450,000 ports.[33] CompTel/ALTS note that only AT&T and possibly one other carrier currently have volumes sufficient for the maximum discount.[34]

Many of the comments present compelling evidence that the "intermodal" competition

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[28] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"); *In the Matter of Unbundled Access to Network Elements,* WC Docket No. 04-313*, Review of the Section 271 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Order on Remand, FCC 04-290 (rel. February 4, 2005) ("*Triennial Review Remand Order*").

[29] TxOPC Comments at 4-5.

[30] NASUCA ex parte (February 13, 2003).

[31] Telscape Comments at 5, n.4.

[32] *Id*. at 53-55.

[33] *Id*. at 53.

[34] *Id*. at 54. Indeed, CompTel/ALTS cite SBC information that appears to show that the maximum discount may result in rates below cost. *Id*. at 56-58.

touted by the Joint Applicants is not real competition.[35] CFA, et al. identify the flaw with VoIP quite succinctly: "Both telephone companies and cable operators force consumers to buy bundles of services -- to pay twice -- if they want to purchase VoIP service from a competitor."[36] And Vonage, for its part, asserts that the merger will have substantial negative impacts on VoIP.[37]

CFA, et al. discuss at length how the Commission's actions have resulted in a "cozy duopoly" for broadband service.[38] The many negative effects of this duopoly are also discussed.[39]

CFA, et al. also colorfully summarize the dilemma that SBC and AT&T -- along with Verizon and MCI -- pose for the Commission:

> These two mergers represent a double dose of anticompetitive chutzpah that spells disaster for consumers.
>
> - Within their regional market, first the Bells made life so miserable for competitors that they go into bankruptcy or throw their hands up in despair. Then the Bells say they should be able to buy up their largest local competitors, because they really aren't very good current or potential competitors.
>
> - When competing head-to-head with other companies outside their region, the Bells flip the argument around, with the same unfortunate result for consumers. In order to secure approval of their previous mergers, which eliminated potential out of region competitors, the Bells promised to compete out of their home region markets, but they did not try very hard and have not done very well. So the Bells say, since we cannot be considered really good competitors now or in the future, we should be able to buy up the companies

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[35] NvBCP Comments at 6-7; TxOPC Comments at 6-7.

[36] CFA et al. Comments at 17.

[37] Vonage Comments at 3-6.

[38] *Id*. at 3-9.

[39] *Id*.

we were supposed to compete with.

> The failure of competition becomes an excuse for further re-consolidation and re-integration of the market, which eliminates the vestiges of competition and makes new entry into the market more difficult.[40]

Qwest describes at length how the mergers will increase the incentives for SBC and Verizon not to compete against each other.[41] The Commission must resist SBC's (and Verizon's) unconditional urge to merge.

CompTel/ALTS provide a graphic numerical demonstration of the impact of the various market changes on carriers. When the Act was passed, the RBOCs and GTE had revenues of over $109 billion, and the three main competitors (AT&T, MCI and WorldCom) had revenues of almost $99 billion.[42] As of 2004, the RBOCs had revenues of almost $158 billion, and the competition had under $61 billion in revenues.[43] *After* the SBC/AT&T merger and the Verizon/MCI merger, the RBOCs will have $209 billion in revenues, while the remaining competitors will have less than $10 billion in revenues.[44] Thus we will have gone from a situation of near-parity to one where the RBOCs out-earn the competitors by twenty to one.

V. THE IMPACT OF THE MERGER ON THE COMPETITIVE LANDSCAPE WILL BE SUBSTANTIAL HARM TO THE PUBLIC INTEREST.

In the initial comments, NASUCA asserted that "[i]n order to accurately assess the application, SBC and AT&T should provide the Commission substantive data on their

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[40] CFA, et al. Comments at 14.

[41] Qwest Comments at 39-44.

[42] CompTel/ALTS Comments at 44.

[43] *Id*. at 45.

[44] *Id*. at 46.

competitive positions -- at least on a state by state basis, if not wire center by wire center -- for local service, long distance service and broadband."[45] AAI agrees:

> The Application and its supporting materials is insufficient to permit a competitive analysis. It is impossible to isolate products with the granularity needed to determine which products are substitutes of which other products. The application is devoid of any geographic market definition for any product line, or any meaningful market share data.[46]

AAI faults the applicants for presenting, despite knowledge of the Commission's duties in its analysis, "a self-serving and conclusory statement repeatedly expressing their unsupported opinion that no adverse competitive effects could result from the Commission's approval of this transaction."[47] And CFA, et al. sum it up nicely: "[T]he merging parties have provided the Commission with a mountain of rhetoric, but not even a molehill of specific product and geographic market data…."[48]

The NvBCP gives an example of the granularity that is needed for this analysis: In Northern Nevada, SBC has market dominance in the local market, and SBC and AT&T together would have dominance in the long distance market.[49] In addition, SBC enjoys pricing flexibility in Nevada for its business services.[50] This is a perfect combination for the exercise of market power.

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[45] NASUCA Comments at 17-18.

[46] AAI Comments at 5; see also ACN, et al. Comments at 2.

[47] AAI Comments at 5. AAI notes that much of this needed information is covered by the April 18th letter from the Commission to the applicants, and that, once filed, it should be considered an amendment to the application such that stakeholders have an opportunity to comment. *Id*. at 6. On the other hand, CompTel/ALTS point out some inadequacies in the Commission's information requests. CompTel/ALTS Comments at 20-21, 26, 39-40.

[48] CFA, et al. Comments at 1; see also Qwest Comments at 7.

[49] NvBCP Comments at 6.

[50] *Id*.

As another example of the needed granularity, CompTel/ALTS dwell at length on the merger's impact on the *wholesale* market, stressing the extent of AT&T's local fiber network that is available at wholesale, in competition with SBC.[51] This aspect of AT&T's service is largely ignored in the Joint Application.[52] Broadwing, et al explicate in detail the negative impacts on the on the Internet backbone market.[53]

Qwest recognizes the contradiction in the claim (for one purpose) that SBC and AT&T provide only complementary services, and for another purpose, the assertion of the wide range of services offered by SBC and AT&T.[54] A big part of that "complementarity" is AT&T's supposedly "irreversible" decision to exit the consumer market.[55] As to whether AT&T's decision to exit the consumer market was really irreversible, CWA (like NASUCA) recognizes the previous decisions where AT&T management did an about-face.[56] But more importantly, as TxOPC points out, AT&T had in fact planned to continue serving the residential market using VoIP.[57]

As to the residential market, ACN, et al. note that, in acquiring AT&T and its remaining millions of residential customers, SBC will get those customers without "having to fight for them

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[51] CompTel/ALTS Comments at 13-15; see also Qwest Comments at 15-16.

[52] CompTel/ALTS Comments at 13.

[53] Broadwing, et al Comments at 6-9, 35-55; see also CompTel/ALTS Comments at 32-36;

[54] Qwest Comments at 14-15.

[55] Qwest points up another contradiction in the Application: If AT&T, with its resources, had to exit the residential market, how is it that other CLECs (see Application at 62) will be able to provide competition in that market? Qwest Comments at 33; see also Cbeyond, et al. Comments at 38. And Cbeyond, et al. note that the Commission discounts market-exit announcements when that would limit scrutiny of an application. *Id*. at 37.

[56] CWA Comments at 3.

[57] TxOPC at 7, n. 7; ACN, et al. also point out other competitive strategies that AT&T could have taken. ACN, et al. Comments at 25; see also Cox Comments at 12.

in the competitive marketplace, and SBC's market share … will become even larger."[58] That should be a significant consideration in finding this merger not to be in the public interest.[59]

NASUCA had noted the importance of the presence of AT&T as a "policy competitor" to SBC and the RBOCs.[60] CompTel/ALTS includes that loss in its pessimistic view of a market without AT&T: "AT&T's facilities, retail presence, and ability to aggressively prosecute violations by SBC -- acting as the only security guard in a neighborhood where no police are present -- were the only factors that had even limited effect in constraining SBC's market power."[61]

CompTel/ALTS also point out that, at the time of the SBC/Ameritech merger, the merged entity's incentives to discriminate against competitors were somewhat muted by the need to show open networks in order to meet Section 271 requirements for interLATA and interstate entry.[62] Now, of course, such restraint will no longer be in evidence, because SBC will no longer need it.

USCC shows in detail the range of impacts of this merger on a single carrier -- this one a mid-sized wireless carrier.[63] The Independent Alliance tells a similar tale for rural ILECs.[64] APCC shows the impact on payphone operators.[65] These patterns probably hold true for most of

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[58] ACN, et al. Comments at 10.

[59] See Cbeyond, et al. Comments at 30-31.

[60] NASUCA Comments at 16.

[61] CompTel/ALTS Comments at 28; see also *id*. at 41-43; see also Cox Comments at 9, Qwest Comments at 37.

[62] CompTel/ALTS Comments at 51.

[63] USCC Comments at 2-5.

[64] Independent Alliance Comments at 2-6.

[65] APCC Comments at 2-5.

the carriers that have to deal with SBC.

On the intermodal side, Qwest correctly points out that

> SBC and Verizon are not merely trying to acquire their largest current competitors. They are also trying to eliminate -- right here, right now, before it is too late -- the threat that the assets of AT&T and MCI could be used against them in a converged world. SBC and Verizon are protecting themselves against the risk that developing intermodal threats would morph into meaningful, fully-integrated competitors in part through the use of AT&T and MCI facilities, customers, technical and marketing expertise, systems and brands. If these mergers are approved, SBC and Verizon will not need to worry that AT&T and MCI may partner with smaller wireline companies, or wireless companies, or media companies, or Internet companies, or computer companies, or power companies -- or more likely some combination of the foregoing.[66]

Tellingly, Qwest quotes AT&T's own words, from the Bell Atlantic/GTE merger, that underscore the competitive issues here. AT&T stated, "It is virtually always more profitable for rivals to merge than compete. Where such profitability comes at the expense of competition, however, consumers are harmed."[67] NASUCA agrees with Qwest's position now -- and with AT&T's position back then.

And Qwest demonstrates in detail how this merger displays the traditional symptoms of concentration that antitrust policies -- including those enforced by this Commission -- were designed to cure.[68] ACN, et al. state that "the merger between the largest provider of local exchange services in its region, SBC … with its largest and most financially stable competitor, constitutes a competitive injury *per se* that should preclude this Application as a matter of law."[69]

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[66] Qwest Comments at 4.

[67] *Id*. at 10, quoting *Affidavit of John W. Mayo and David L. Kaserman on Behalf of AT&T Corp.,* ¶ 60; see also ACN, et al. comments at 6-8.

[68] Qwest Comments at 21-22.

[69] ACN, et al. Comments at 3.

Vonage explains how the market power of the combined SBC/AT&T would include "their ability to discriminate in the quality of the broadband connection they offer end-users."[70] This discrimination could take three different forms in a packet-switched world: prioritizing SBC's end-users' packets; degrading other providers' packets; and actually blocking transmissions.[71] EarthLink points out that

> [e]ither [the Applicants'] description of a new, seamless network from the disparate components of the current network are pure hyperbole, and therefore the purported public interest benefits do not exist, or the Applicants truly are poised to create a network that is qualitatively different in terms of vertical integration than anything that has existed since the break-up of AT&T.[72]

VI. THE BENEFITS THAT SBC AND AT&T ASSERT THE MERGER WILL PRODUCE ARE NOT MERGER-SPECIFIC, NOT LIKELY AND NOT CREDIBLE.

APT recites the Joint Application's statements that the merger will provide benefits from increased research, development and innovation.[73] Yet APT characterizes this as a "commitment,"[74] when in reality it is nothing of the sort. Under the merger as currently structured, if the combined SBC should decide next year to decrease its research and development spending, neither the Commission, APT nor SBC's customers will have any ability to challenge that decision. Therefore, if the Commission is going to treat increased spending as a benefit of this merger, the increased spending should be made an enforceable condition before

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[70] Vonage Comments at 16.

[71] *Id.* at 16-17.

[72] EarthLink Comments at 10.

[73] APT Comments at 4.

[74] *Id*.

the merger can be approved. Yet ACN, et al. point out that the focus of "companies that control markets … becomes preserving their hegemony and stifling those innovations that threaten their dominant market position."[75]

ACN, et al. state:

> [T]he Commission cannot simply accept the Applicant's claims at face value. SBC and other RBOCs have a long history of promising regulators a gold-plated network without 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.[76]

Further, ACN, et al. also point out that in the declarations discussing benefits, "[n]owhere do Applicants cite to supporting facts from outside sources. Instead, each witness merely repeats the conclusions of another witness and credits them as if they were objective facts."[77] And Cbeyond, et al. note that "half of the potential savings claimed are attributable to AT&T cost-cutting measures already underway, and are not resultant of the merger."[78] This is not nearly enough to meet the Applicants' burden.

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[75] ACN, et al. Comments at 60. ACN, et al. give examples, including suppressing xDSL and delaying the replacement of analog facilities with digital. *Id*. at 61-62.; see also Cbeyond, et al. Comments at 68-72.

[76] ACN, et al. Comments at 47-48; see *id*. at 50-52 for details.

[77] *Id*. at 56; see also Cbeyond, et al. Comments at 59-60.

[78] *Id*. at 73.

VII. THE PUBLIC INTEREST HARMS THAT WOULD RESULT FROM THIS MERGER ARE SO SUBSTANTIAL THAT A MULTITUDE OF CONDITIONS WOULD BE REQUIRED TO MAKE IT IN THE PUBLIC INTEREST.

A. The context of commitments

Commenter May objects to "the extraction of conditions [from merging firms] unrelated to competitive concerns or to compliance with existing clearly-defined regulatory mandates…."[79] Mr. May says that the acceptance of these conditions -- as in the SBC/Ameritech merger -- cannot really be called "voluntary."[80]

The Commission found that the SBC/Ameritech merger, as originally proposed, did not meet the public interest test and could not be approved. With the conditions added, however, the Commission found that the merger was, **on balance**, in the public interest, and the Commission was able to approve it. Without the conditions, the merger could not have been approved. The stress on whether the conditions were "voluntary" is misplaced. At bottom the choice was SBC's and Ameritech's: either accept the conditions or accept the fact that the Commission would not otherwise approve the merger.

That also addresses Mr. May's concern about conditions "unrelated to competitive concerns."[81] Admittedly there were, among the SBC/Ameritech conditions those whose primary focus was consumer benefit rather than competitive concerns. Yet the public interest test is not a simple seesaw having only anti-competitive issues on one side and pro-competitive issues on the other; rather, in terms of the net public interest a positive condition like Lifeline or the roll-out of

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[79] May Comments at 4.

[80] *Id*.

[81] *Id*.

advanced services to low-income households[82] -- along with the other conditions -- can balance out the negatives.

It should also be noted that a merger condition that requires "compliance with existing clearly-defined regulatory mandates"[83] imposes nothing new on the merged company, and thus cannot in itself enhance the public interest.[84] It is precisely conditions that add to current requirements that can make up for a merger's shortcomings.

It appears that Mr. May's main concern is with "the Communications Act's indeterminate public interest standard."[85] Yet that is the law. Mr. May's constricted view of the public interest -- which would not allow the sorts of conditions that were imposed in the SBC/Ameritech merger and should be imposed here -- would result in the disapproval of more mergers, not fewer.

CFA, et al. correctly characterize the result of the previous round of mergers: The Bells "never competed in one another's regions as envisioned by Congress, and they never fulfilled the promises they made during their previous mergers."[86] Thus if the Commission approves this merger with conditions (and the Commission cannot possibly approve this merger without conditions), there must be adequate assurances that the latest set of conditions will in fact be met.

CompTel/ALTS have doubts whether any conditions on this merger are workable:

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[82] *Id*.

[83] *Id*.

[84] That is, unless it is assumed, somehow, that absent the condition in the merger order the merged firm will be able at will to disobey the clearly-defined regulatory mandate.

[85] *Id*.

[86] CFA, et al. Comments at 15.

> It would be a mistake, and simply another exercise in futility, for the Commission to attempt to mitigate the many public interest harms of this merger through toothless merger conditions. Today, SBC is completely incapable of operating within the Commission's regulatory structure, and the Commission today is completely incapable of regulating SBC.[87]

NASUCA is not so pessimistic. Yet merger conditions need not be "toothless"; NASUCA urged the Commission to ensure that any conditions it imposes on this merger are in fact enforceable.

The comments submitted by other parties have not disturbed NASUCA's proposed list of conditions. Therefore, except where other commenters have raised points pertinent to those conditions, NASUCA will merely reiterate those conditions here.

B. Federal conditions should be a floor, not a ceiling.

As in the SBC/Ameritech Order, the Commission should adopt a condition that allows states to impose their own conditions on the merger.[88] Given the greater importance of this merger, allowing such state flexibility is even more necessary.

C. The conditions should remain in place for five years and survive changes in law.

SBC, AT&T, the rest of the industry and the public in general would likely benefit from the certainty of knowing that the conditions will persist for an extended time, even in the face of legislative action. Thus the conditions should remain in place for five years and survive changes in the law, unless they are forbidden by the new statutes.

D. The conditions

NASUCA placed the conditions that the Commission should adopt into four broad categories: 1) conditions to encourage and enable the prospects for competition for residential

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[87] CompTel/ALTS Comments at 9-10.

[88] Condition XXX (see Attachment C to NASUCA Comments); see, e.g., *SBC/Ameritech Order*, ¶ 34 (Ohio conditions).

and small business customers; 2) conditions aimed at limiting the harm to competition and consumers from the merger; 3) conditions to ensure that residential and small business customers benefit from the merger; and 4) conditions to realign the regulatory regime to recognize the new market conditions arising from the merger.[89] The comments do not cause NASUCA to retreat from any of those proposals.

1. Conditions to promote competition

NASUCA proposed that a condition of this merger should be that SBC makes the UNE-P and the HFPL available to competitors at TELRIC rates.[90] NASUCA agrees with Vonage that this should include a requirement to sell customers so-called "naked" DSL.[91] SBC should also be required to open its network to other carriers' VoIP traffic, especially E9-1-1 traffic.

APT states that it "supports open, interoperable advanced networks. Such openness principles, however, should apply to *all* providers of advanced network facilities (including cable), not merely to these Applicants."[92] NASUCA agrees that all providers of advanced network facilities, including cable providers, should be subject to open access requirements. Yet NASUCA also believes, in apparent distinction from APT, that one open network -- such as could be accomplished through a merger condition here -- is preferable to **no** open networks (which is the likely result of APT's position).

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[89] The conditions are proposed here specifically for the SBC/AT&T merger. As *Confronting Consolidation*, the White Paper attached to NASUCA's Comments makes clear, similar conditions will have to be imposed for an MCI/Verizon or Qwest merger.

[90] NASUCA Comments at 24; see also ACN, et al. at 70, 76; Vonage at 6. HFPL refers to the high frequency portion of the loop. It appears that this condition would satisfy Telscape's need for reasonable loop rates. Telscape Comments at 6.

[91] Vonage Comments at 23-26.

[92] APT Comments at 6 (footnote omitted; emphasis in original).

On the other main competitive front, many of the comments note the lack of success of the National-Local Strategy condition of the SBC/Ameritech and Bell Atlantic/GTE mergers.[93] It is fair to say that SBC and Verizon never gave their conditions any real effort. Cbeyond, et al. discuss how the pending SBC and Verizon mergers will create powerful incentives for tacit collusions between the firms.[94] NASUCA repeats its recommendation that the merged company should be required to repeat the National Local Strategy on today's terms.

As noted by NASUCA, a standard anti-trust and regulatory response to anti-competitive combinations like this one is to open duplicative facilities to competition.[95] NASUCA proposed that as a condition of merger, SBC and AT&T should be required to divest themselves of duplicative long-distance and Internet backbone capacity.[96] Qwest proposes such a condition, stressing that a little more than a year ago, the DoJ required it to divest Allegiance facilities prior to the proposed merger with Allegiance.[97] As Qwest describes it, the SBC/AT&T merger is like the Qwest/Allegiance merger, only "super-super-sized."[98] As Qwest states, "The merger here involves two much larger companies, and far more service overlap across the entire SBC region, with added competitive issues arising from SBC's ownership of Cingular…."[99]

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[93] Cbeyond, et al. Comments at 48-54; Qwest Comments at 11.

[94] Cbeyond, et al. Comments at 41-46.

[95] NASUCA Comments at 26.

[96] *Id*.; see also ACN, et al. Comments at 69, 73-74; Telscape Comments at 7.

[97] Qwest Comments at 45-47.

[98] *Id*. at 47.

[99] *Id*. at 2.

2. Conditions to limit harm to competition and consumers

As a condition of the approval of the SBC/AT&T merger, the merged firm should be subject to the terms of the originally-adopted CBOR, for all of its operations -- wireline, wireless and broadband. If the regulatory commission or other body within a state is unable to enforce such a condition, the Commission should retain enforcement jurisdiction.

Condition VII of the SBC/Ameritech merger should be reinvigorated as a condition of the SBC/AT&T merger.[100] In addition to divesting duplicative facilities,[101] SBC should be required to allow efficient peering.[102]

NASUCA proposed that as a condition of their merger, the Applicants should be required to commit not to participate in efforts to restrict municipalities and other governmental entities from investing in broadband networks that will be made available to consumers.[103] CFA, et al. show how such networks can provide low-cost, high-quality services.[104]

3. Conditions to ensure consumer benefits

As one condition for the merger, NASUCA proposed that the Commission should require as a condition of approval of this merger that the combined company provide broadband capabilities ubiquitously throughout the SBC territory within five years.[105] Even APT, which

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[100] See also ACN, et al. Comments at 71; Cox Comments at 13-16.

[101] NASUCA Comments at 26.

[102] Broadwing, et al Comments at 55-56.

[103] NASUCA Comments at 28.

[104] CFA, et al. Comments at 18-19.

[105] NASUCA Comments at 30-31.

supports the merger,[106] recognizes that "it is not clear from the Application whether all of the customers in SBC territory are likely to enjoy these benefits."[107] Therefore, APT states that

> the Commission should seek more specific information from the Applicants. …[T]he Commission should examine how this merger will affect SBC's deployment of advanced services in rural areas, in lower-income neighborhoods, to Native American populations, and to the other demographic segments of our society that often do not experience the deployment of succeeding generations of telecommunications technologies at the same pace as customer segments that are more attractive from a marketing standpoint.[108]

Flowing the benefits of merger synergies and cost-savings back to consumers should be a condition for the merger. Further, SBC should be required to show, at the end of 2008, that the merger produced $2 billion in savings per year. SBC should also be required to show how much of these savings flowed back to consumers and in what form (e.g., rate reductions). Finally, the continuation throughout SBC territory of Lifeline plans that provided benefits comparable to the Lifeline plan adopted as part of alternative regulation in Ohio should be ensured.[109]

4. Conditions to realign the regulatory regime

As explained in detail in *Confronting Consolidation*, reinstatement of many regulations to control market dominance must be considered. This would include de novo reviews of deregulation/detariffing/flexible pricing of "competitive" services; restoration of incentive regulation safeguards such as productivity offset factors and earnings sharing/capping; reinitialization of rates at "authorized" rates of return; and imputation of earnings that benefit from joint BOC/affiliate activities (e.g., local/long distance).

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[106] APT Comments at 7.

[107] *Id*. at 3.

[108] *Id*.

[109] Condition XXIII (see Attachment C to NASUCA Comments).

5. Enforcement

The Commission determined that it would "utilize every available enforcement mechanism" to ensure that the benefits of the SBC/Ameritech merger conditions were realized.[110] The Commission will have to make that determination again.

NASUCA stated that SBC's track record on the conditions dictated in that merger is not encouraging, and cited examples of violations.[111] Cbeyond, et al. provide an extensive review of these and other violations.[112]

This past behavior dictates that the Commission must adopt specific and effective enforcement mechanisms here. As NASUCA stated,

> The enforcement mechanisms must be substantial enough that SBC will not make the calculation that it is cheaper -- or more desirable -- to pay the fine than comply with the condition. In the SBC/Ameritech merger, the Commission hinted that enforcement would include, "if necessary, revocation of the merged firms section 214 authority." The Commission must make clear here that such a penalty is a real possibility, in order to give the merged company a real disincentive to not complying with the conditions.[113]

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[110] *SBC/Ameritech Order*, ¶ 360.

[111] See Attachment B to NASUCA Comments.

[112] Cbeyond, et al. Comments at 12-19; see also CompTel/ALTS Comments at 63-68.

[113] NASUCA Comments at 30.

VIII. CONCLUSION

Cbeyond's warning deserves attention:

> The proposed SBC-AT&T merger is truly an industry-transforming event, and the Commission must disregard Applicants' pleas to rubber-stamp their … plan to reinforce SBC's dominance. A misstep on this Applicant would unravel overnight a decade of progress in opening telecommunications markets to competition pursuant to the 1996 Act.[114]

The SBC/AT&T merger as currently structured is not in the public interest. The comments submitted to the Commission demonstrate the extent of the harm to the public interest that would be caused by the merger. Therefore, the Commission should not approve the merger.

If the Commission wishes to approve the merger, it will have to impose a wide range of conditions that will constrain the harms and add public interest benefits to balance out the remaining harms. These conditions must be easily and effectively enforceable in order to ensure that they are met by SBC.

Respectfully submitted,

/s/ David C. Bergmann
Janine Migden-Ostrander
Consumers' Counsel
David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications Committee
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Telephone: 614-466-8574
Facsimile: 614-466-9475

[114] Cbeyond, et al. Comments at 7.

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380