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

In the Matter of	)	
	)	
Transfer of Control Filed by SBC	)	WC Docket No. 05-65
Communications Inc. and AT&T Corp.	)	

REPLY COMMENTS ON BEHALF OF THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

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Table of Contents

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I. INTRODUCTION

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") submits these reply comments in response to the pleading cycle established by the Federal Communications Commission ("FCC") on March 11, 2005, regarding the proposed transaction.[1]

A. The Ratepayer Advocate reiterates the concerns and recommendations set forth in its initial comments.

Industry participants, consumer advocates, and regulators express several major common themes opposing the proposed merger between SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") (collectively "Applicants"), as it is presently structured. Those favoring the merger are few, and provide little other than generalities in support of their positions. In these reply comments, the Ratepayer Advocate identifies and briefly discusses the major points that the FCC should heed. Based on the Ratepayer

[1]/ Federal Communications Commission, "Commission Seeks Comment on Application for Consent to Transfer of Control filed by SBC Communications Inc. and AT&T Corp.," Public Notice released March 11, 2005.

Advocate's review of the initial comments filed in this proceeding, its review of the Applicants' testimony filed recently with the New Jersey Board of Public Utilities ("New Jersey Board"),[2] and its analysis of the proposed merger between Verizon Communications Inc. ("Verizon") and MCI, Inc. ("MCI"),[3] the Ratepayer Advocate reiterates the concerns and recommendations set forth in the initial comments that the Ratepayer Advocate submitted on April 25, 2005 in this proceeding. The Ratepayer Advocate continues to recommend that the FCC condition any approval of the proposed transaction on enforceable conditions that minimize the risk of harm to consumers and maximize the probability of benefits for consumers. The Applicants have thus far failed to demonstrate that the proposed merger is in the public interest.

Also, many of the analysis and recommendations included in the Ratepayer Advocate's Initial Comments and attached Declaration of Susan M. Baldwin and Sarah M. Bosley, submitted in WC Docket No. 05-75, yesterday, regarding Verizon's proposed acquisition of MCI, apply also to SBC's proposed acquisition of AT&T.

B. The Ratepayer Advocate supports the FCC in its quest for additional information, and urges the FCC to allow sufficient time in the procedural schedule to permit comprehensive examination of the new information.

The Ratepayer Advocate fully supports the FCC in its effort to obtain detailed, comprehensive information from the Applicants.[4] The Applicants' response to the FCC's Information Request was due

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[2]/ On May 4, 2005, the Applicants submitted testimony in BPU Docket No. TM05020168, Joint Petition of SBC Communications Inc. and AT&T Corp., Together with its Certificated Subsidiaries, for Approval of Merger.

[3]/ On May 9, 2005, the Ratepayer Advocate submitted initial comments and the Declaration of Susan M. Baldwin and Sarah M. Bosley in WC Docket No. 05-75.

[4]/ Letter to Applicants from Michelle M. Carey, Deputy Chief, Wireline Competition Bureau, April 18, 2005, Initial Information and Document Request.

yesterday, and, therefore, the Ratepayer Advocate has not had the opportunity to review the new information. The Ratepayer Advocate urges the FCC to permit adequate time in the procedural schedule for interested commenters to submit *ex parte* filings based on their review of the Applicants' response. The stakes of this multi-billion dollar transaction for consumers are substantial, and the FCC's consideration of the merger should be deliberate and unrushed.

II. THEMES OF THE INITIAL COMMENTS

A. Introduction

The initial comments submitted in this proceeding raise concerns about the impact of the merger on the mass market, business, special access market, and Internet markets.[5] In these reply comments, the Ratepayer Advocate focuses primarily on the implications of the merger for the mass market although many of the concerns raised apply to the special access, Internet, and other telecommunications markets.

Several themes emerge from the initial comments submitted in this proceeding:

- The FCC should consider SBC's proposed acquisition of AT&T, not in isolation, but rather in concert with its analysis of Verizon's proposed acquisition of MCI.
- The monopolization and re-monopolization of local, long distance, data, and bundled markets by the Bell operating companies ("BOCs") represent a troubling trend that will limit competitive choice by consumers and expose consumers to the risks of high prices, service quality deterioration, and lack of innovation.
- Head-to-head competition among rival BOCs would benefit mass market consumers, but based on past and present BOC practices, is unlikely absent strong, enforceable regulatory conditions.

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[5]/ *See, e.g.,* Opposition of Broadwing Communications, LLC, and Savvis Communications, Corporation, at 2, asserting that the merger "does not provide adequate protections to preserve competition in two key markets – special access and Internet backbones."

- The imminent expiration of unbundled network element platforms ("UNE-P") eliminates the precarious foundation upon which BOCs obtained regulatory relief, and should trigger the FCC's and state public utility commissions' re-imposition of regulatory safeguards to protect consumers from BOCs' exertion of their market power.

- The consumers most vulnerable to fall-out from the merger are residential and small business consumers, including both those who subscribe to bundled services and those who choose not to subscribe to bundled services.

- Intermodal alternatives, although they offer consumers *supplemental* choices, do not provide economic substitutes for basic local exchange service.

- The loss of AT&T as a BOC-rival would diminish the depth and breadth of regulatory proceedings.

- The Applicants have failed to demonstrate that, on balance, their proposed merger is in the public interest.

- The Applicants should provide detailed market-specific data to the FCC.

- The FCC should require strict adherence to conditions as a prerequisite to approving the merger.

The Ratepayer Advocate discusses these concerns below, which supplement those described in the Ratepayer Advocate's Initial Comments.

B. The FCC should consider SBC's proposed acquisition of AT&T, not in isolation, but rather in concert with its analysis of Verizon's proposed acquisition of MCI.

The post-*TRRO*[6] proposals by the two largest BOCs to acquire their two largest rivals raise unique and serious concerns. One concern, discussed in Section II.C, below, is that the BOCs are re-

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[6]/ Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, FCC WC Docket No. 04-313; CC Docket No. 01-338, *Order on Remand*, rel. February 4, 2005 ("Triennial Review Remand Order" or "TRRO").

monopolizing the telecommunications industry. Another concern, discussed in Section II.E, below, is that the white flags of surrender being raised by AT&T and MCI underscore the FCC's misplaced optimism in the purportedly beneficial impact on competition of terminating competitive local exchange carriers' ("CLECs") access to UNE-P.

Several commenters have expressed the need for the Commission to consider both proposed mergers together and the cumulative impact they will have on the local exchange market. *See, e.g.*, Comments of the National Association of State Consumer Utility Consumer Advocates ("Comments of NASUCA"), at 5. As stated in initial comments jointly filed by several national consumer advocate organizations, the FCC "simply cannot ignore the combined impact of the mergers, which involve the four largest firms in the industry." *See* Petition to Deny of Consumer Federation of America, Consumers Union, and U.S. Public Interest Group ("CFA/CU/PIRG Petition to Deny"), at 2. *See, also* Comments of the Antitrust Institute, at 5.

Qwest Communications International, Inc. ("Qwest") contends that the "merger would permit SBC to foreclose current competition by acquiring its principal rival," that "SBC would threaten emerging competition from wireless VoIP and other broadband technologies, and that "[t]hese effects would be magnified by any concurrent Verizon-MCI combination." Petition to Deny of Qwest Communications International, Inc. ("Qwest Petition to Deny") , at 1.[7] Qwest further observes from the sidelines that this " proceeding, and the related application of Verizon to acquire MCI, are perhaps the most significant

[7]/ Qwest has filed a motion to intervene in the New Jersey Board's investigation of the SBC/AT&T merger. New Jersey BPU Docket No. TM05020168, Qwest Communications Motion to Intervent and Request for Leave to Provide Motion After Due Date, May 4, 2005. Among other things, its statement to the Board, Qwest states that the proposed merger "presents serious issues and questions for telecommunications competition and consumers in the state of New Jersey." New Jersey BPU Docket No. TM05020168, Initial Statement of Qwest Communications Corporation, May 4, 2005.

dockets the Commission has faced since Divestiture." Qwest Petition to Deny, at 2.

C. The BOCs' monopolization and re-monopolization of local, long distance, data, and bundled markets represent a troubling trend that will limit competitive choice by consumers and expose consumers to the risks of high prices, service quality deterioration, and lack of innovation.

The BOCs' incumbent position in the local market combined with (and fostering) its phenomenal successes in the long distance, data, and bundled markets has transformed the Baby Bells into unbeatable Goliaths. In its initial comments , the Ratepayer Advocate discussed, among other concerns, the implications of SBC's bundled offerings for consumers and competitors, and highlighted data from SBC's last quarter in 2004.[8] Since then, the BOCs have released their investor reports for the first quarter of 2005. These data show that the steeply rising demand for BOCs' packages continues:

- SBC's long distance revenues were up 20.3% from the first quarter of 2004 to the first quarter of 2005; Verizon's long distance revenues increased 8.3 percent between the first quarters of 2004 and 2005.
- SBC's long distance revenues were $901 million in the first quarter of 2005; Verizon's long distance revenues, in the first quarter of 2005, were $1.1 billion.
- As of the end of the first quarter 2005, SBC has 22 million long distance lines in service and Verizon served over 8 million long distance lines, an increase from first quarter 2004 of 29.6% and 11.6% respectively.
- SBC reported that 64% of its consumer retail lines bundle their local wireline with at least one other service (*e.g.*, long distance, digital subscriber line ("DSL"), Cingular wireless,

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[8]/ Initial Comments of the Division of the Ratepayer Advocate, at 11.

> video), a substantial increase from the fourth quarter of 2003, when 50% of SBC's retail consumers purchased bundled services and double the rate of penetration two years ago; fifty-eight percent of Verizon's residential customers subscribe to local and long distance and/or Verizon's DSL service (an increase from 51 percent the previous year); Qwest reported that bundle penetration increased to 47% in the first quarter of 2005.[9]

In a similar vein, the Texas Office of Public Utility Counsel ("Texas OPC") observes that "[a]fter the merger, SBC's regional market share of the long distance market may approach 70% and its share of local service will rise to 90%."[10] The Texas OPC further states that:

> In Texas, for instance, the potential for increases in UNE-P prices at market based rates could have a chilling effect on competition. Over 75% of Texas CLEC customers are served via UNE-P. Substantial price increases for UNE-P network elements will cause formerly viable local exchange and other telephone service competitors to cease providing service to residential customers, close sales offices, and liquidate their capital investments. SBC promised more investment, more jobs and a more competitive telephone market in its previous merger applications with Pacific Telephone and Ameritech. Instead, the result has been less competition, higher prices, and less availability of affordable advanced telephone services to mass market customers.

Comments of Texas OPC, at 4.

Initial comments also raise the concern that the merger would heighten risks of excessive prices and anti-competitive behavior. CFA/CU/PIRG Petition to Deny, at 25. A CLEC coalition observes that "SBC will have a greater ability to engage in price squeeze behavior." Comments of ACN *et al*, at 34; *See also*, CompTel/ALTS Petition to Deny, at 6, 27. ACN further explains that "the merger between SBC

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[9]/ SBC Communications, Inc. Investor Briefing No. 247, April 25, 2005, at 2-3, 5-6; Verizon Communications Investor Quarterly, VZ first quarter 2005, April 27, 2005, at 3-4; Qwest Press Release, "Qwest Sees Significant Margin Expansion and Growth in Key Areas in First Quarter 2005, May 3, 2005 available at http://media.corporate-ir.net/media_files/irol/11/119535/q_q105er.pdf.

[10]/ Texas OPC, at 5.

and the largest owner of long distance facilities and removing Section 272 restrictions placed on SBC will have a combined effect of making cost allocation and discrimination virtually undetectable. SBC will be able to conceal any discrimination by its alleged 'integration.'" Comments of ACN *et al*, at 40.

SBC's bundled offerings also raise concerns about possibly anticompetitive tying arrangements. The FCC has previously investigated complaints about tying arrangements, such as when it concluded that the pay phone commissions offered by AT&T on its "0+" services were "an added inducement, when coupled with [AT&T's] dominance in the "0+" market, which AT&T [was] using as leverage in the "1+" market." The FCC's Common Carrier Bureau concluded that "AT&T's conduct ha[d] significant enough anticompetitive consequences to find an unreasonable practice." In its explanation of its finding, the FCC stated, among other things, the "unbundling policy also prevents a carrier from configuring the basic service elements in a way which would be anticompetitive."[11] In a subsequent order the FCC explained the Bureau's order as finding "that AT&T's tying of its "0+" service to its "1+" service violates the underlying policy goals of the antitrust laws, and is, therefore, unreasonable under Section 201(b),"[12] concluded that AT&T's bundling practices "constitute[d] an unreasonable practice in violation of Section 201(b) of the Communications Act,"[13] and declined to vacate the Bureau's order.[14] SBC's and other Bell's bundling practices merit further regulatory scrutiny, similar to that afforded more than ten years ago to AT&T's pay

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[11]/ *In the Matter of AT&T's Private Payphone Commission Plan*, File No. ENF-87-19, *Memorandum Opinion and Order*, October 3, 1998, 3 Rcd (1988), at paras. 26-27.

[12]/ *In the Matter of AT&T's Private Payphone Commission Plan*, File No. ENF-87-19, *Memorandum Opinion and Order*, October 3, 1998, 7 Rcd (1992), at para. 11.

[13]/ *Id*., at para. 16.

[14]/ *Id.*, at para. 17.

phone practices, to ensure that the BOCs do not engage in anticompetitive, discriminatory practices.

Furthermore, because: (1) mass market competition is absent, (2) SBC is offering integrated bundles of non-competitive and competitive services (which complicate the detection of cross-subsidization) and (3) the merger would yield substantial synergies, the Applicants should commit to using the merger synergies to support the offering of broadband services throughout its region to all consumers at basic voice grade prices.

D. Head-to-head competition among rival BOCs would benefit mass market consumers, but based on past and present BOC practices, is unlikely absent strong, enforceable regulatory conditions.

Vigorous, all-out competition among the BOCs would provide compelling evidence that the local mass market could support effective competition. Indeed, with the two largest CLECs "crying uncle" in the wake of the *TRRO*, intense sibling rivalry among the Bells holds out the only hope of creating competitive choice for consumers. This possibility provided some of the rationale for the earlier wave of mergers but the vision of head-to-head inter-BOC competition has yet to be realized.

As did the Ratepayer Advocate in its Initial Comments, the Texas OPC urges the Commission to recognize that "the 30-market entry strategy that was developed as a condition of the SBC/Ameritech merger has not brought the expected benefits to consumers. SBC has not been an active CLEC in the required 30 markets, nor has there been the retaliatory entry into SBC territory." Comments of Texas OPC, at 6; *See also*, Comments of NASUCA, at 26. ACN, *et al* similarly observe that "[t]here is simply no reason to expect SBC and AT&T will compete out-of-region with any ILEC, including Verizon, except at most for the very largest enterprise customers—the very small fraction of customers that are large enough to have significant operations in more than one RBOC region." Comments of ACN *et al*, at 50.

As explained in the declaration accompanying the Ratepayer Advocate's Initial Comments filed in the Verizon/MCI merger proceeding, WC Docket No. 05-75, the lack of inter-BOC competition raises serious concerns about opportunities for collusion, which the pending merger would exacerbate:

> Furthermore, the pending mergers heighten concerns about the absence of sibling rivalry among the Bells and the growing potential for tacit collusion. As one economist observed, "[t]he variety of collusive pricing arrangements in industry is limited only by the bounds of human ingenuity." The pending mergers facilitate collusion because they shrink the number of "players" in the industry, which has anti-competitive consequences. The following excerpts from an economics textbook explains the beneficial impact of *increasing* the number of players:
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> > First, as the number of sellers increases and the share of industry output supplied by a representative firm decreases, individual producers are increasingly apt to ignore the effect of their price and output decisions on rival actions and the overal level of prices.
> >
> > . . .
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> > Second, as the number of sellers increases, so also does the probability that at least one will be a maverick, pursuing an independent, aggressive pricing policy.
> >
> > . . .
> >
> > Finally, different sellers are likely to have at least slightly divergent notions about the most advantageous price. ... The coordination problem clearly increases with the number of firms.

The Declaration continues: "If the FCC approves Verizon's acquisition of MCI, the FCC and state public utility commissions will need to devote substantially greater resources for regulatory scrutiny and oversight."[15] These concerns apply equally to the instant proceeding.

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[15]/ Declaration of Susan M. Baldwin and Sarah M. Bosley, at para. 112, citing, F. M. Scherer, *Industrial Market Structure and Economic Performance*, Rand McNally & Company, (1970), at 158, 183.

E. The imminent expiration of UNE-P eliminates the precarious foundation upon which BOCs obtained regulatory relief, and should trigger the FCC's and state public utility commissions' re-imposition of regulatory safeguards to protect consumers from BOCs' exertion of their market power.

The federal and state regulatory frameworks that govern BOCs today correspond with a fleeting era in which some hope of local competition existed. Based in large part on the competitive inroads made possible by UNE-P, state public utility commissions (often despite consumer advocates' concerns[16]) have relaxed their regulatory oversight of incumbent local exchange carriers ("ILECs").[17] The minimal competition that existed is evaporating. Compounding decreases in the fourth quarter,[18] SBC's UNE-P lines declined an additional 364,000 in the first quarter of 2005 and decreased 10% (from 6.8 million to 6.1 million) from the first quarter 2004.[19] In its most recent Investor Briefing, SBC assigns part of its

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[16]/ *See, e.g.*, Qwest Petition for Competitive Classification of Business Services, Washington Utilities and Transportation Commission ("WUTC") Docket No. 030614. Direct and Rebuttal Testimony of Susan M. Baldwin on behalf of the Public Counsel, August 13, 2003 and August 29, 2003. In its order, the WUTC observed that "Public Counsel and WeBTEC argue that it is paradoxical that UNE-P is under attack by Qwest in the TRO proceeding at the same time that Qwest relies on UNE-P to support its petition here." WUTC Docket No. UT-030614, Order No. 17, Order Granting Competitive Classification, December 23, 2003, at 42.

[17]/ *E.g.*, the WUTC's decision to grant competitive classification for Qwest's basic business local exchange services, which the Public Counsel opposed, was based on data regarding CLECs' presence during the relative "heyday" of local competition, *i.e.*, before the FCC issued the *TRRO* order. In the Matter of the Petition of Qwest Corporation For Competitive Classification of Basic Business Exchange Telecommunications Services, Docket No. UT-030614, Order No. 17, Order Granting Competitive Classification, December 23, 2003. Among other things, the WUTC stated: "CLECs using UNE-P are present in 61 of 68 Qwest exchanges, where over 99% of Qwest's analog business customers reside. *Id.*, at 37. The WUTC also determined that "[a]n important feature of this structure is the availability to competitors of UNE-P, which is the entire platform (loop, transport and switch included) used by Qwest to serve a customer." *Id*., at 49.

[18]/ The Ratepayer Advocate previously included comparable data for the UNE-P decline based on investor reports for the fourth quarter of 2004. Initial Comments of the Division of the Ratepayer Advocate, at 8.

[19]/ SBC Communications, Inc. Investor Briefing No. 247, April 25, 2005, at 3.

"improved retail access line trends" to "a shift in UNE-P lines to resale and retail."[20] Verizon reported providing 186,000 fewer UNE-P lines in the first quarter of 2005 compared to the fourth quarter 2004.[21] BellSouth and Qwest report similar results.[22] The FCC and state public utility commissions should revoke the regulatory freeedoms that they prematurely granted unless and until effective competition materializes. The pending mergers highlight the harmful mismatch between the lax level of regulation and the emerging telco/cable duopoly.

In discussing the myriad deregulation decisions that the FCC has adopted recently, Comptel/ALTS states that "[i]n each case the FCC has relied upon a *perception* of competition, or worse—the promise of future competition—that does not match *reality*." See Comments of Comptel/ALTS, at 4 (emphasis in original). NASUCA similarly observes that "the competitive environment that was anticipated and nourished in the SBC/Ameritech and Bell Atlantic/GTE mergers has been choked almost out of existence. This has occurred at a time when SBC's operating companies have been deregulated – either through state legislative or regulatory action – based on the presumption of a level of competition that was never really reached, and is unlikely to be reached in the future absent major action by the Commission." *See* Comments of NASUCA, at 7.

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[20]/ *Id.*, at 5.

[21]/ Verizon Investor Quarterly, VZ First Quarter 2005, released April 27, 2005, at 4.

[22]/ "UNE-P access lines resold by BellSouth competitors were down 95,000 compared to year-end 2004." BellSouth Corporation Press Release, "BellSouth Reports First Quarter Earnings," April 21, 2005, available at: http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=49407. Qwest recently noted that "More than 90 percent of the company's UNE-P revenue now comes from customers on commercial QPP contracts." Qwest Press Release, "Qwest Sees Significant Margin Expansion and Growth in Key Areas in First Quarter 2005, May 3, 2005 available at http://media.corporate-ir.net/media_files/irol/11/119535/q_q105er.pdf.

F. Intermodal alternatives, although they offer consumers *supplemental* choices, do not provide economic substitutes for basic local exchange service.

The FCC should dismiss ILECs' frequent and persistent incantations about intermodal alternatives. The ILECs' arguments lack an empirical foundation. Consumers' actual purchasing decisions provide the best evidence of their preferences. At most, five to seven percent of consumers have "cut the cord" to migrate to wireless service."[23] That teenagers, college students and households rely on wireless service to meet *new* supplemental demand and to replace *additional* lines does not prove that wireline and wireless services are economic substitutes. VoIP similarly competes for bundles and not basic service.

The Ratepayer Advocate is not persuaded by the comments of the Progress & Freedom Foundation that "claims that wireless services are not 'substitutable' for wireline services, or that potential new-technology competitors like independent VoIP, broadband powerline, or WI-MAX providers, are not relevant to assessing the market power of existing leading market participants also should be viewed with considerable skepticism by those government authorities charged with considering the competitive effects proposed mergers." *See* Comments of Progress & Freedom Foundation at 1-2. The purported reliance on alternative technologies is not substantiated in these comments.

As stated by consumer coalitions in initial comments filed in this proceeding, "VoIP is not yet an effective competitor to the traditional wired phone service." *See* CFA/CU/PIRG Petition to Deny, at 16. Price, service quality, and limited access to the 911 system prevent wireless from competing with basic service. CFA/CU/PIRG Petition to Deny, at 18. The Texas OPC similarly states that VoIP is not a substitute for local exchange service, noting that over 70% of households do not have the requisite

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[23]/ FCC Ninth Annual CMRS Competition Report, at fn. 575.

broadband connection and that VoIP subscribers do not have reliable access to 911 services. Additionally, the Texas OPC observes that if one needs broadband access through cable TV package, the total monthly bill may end up totaling $80-$100. *See* Comments of Texas OPC, at 6-7. Others similarly demonstrate that intermodal alternatives do not provide economic substitutes. *See, e.g.*,Comments of ACN *et al*, at 15-20; Comments of NASUCA, at 11-12.

G. The loss of AT&T as a BOC-rival would diminish the depth and breadth of regulatory proceedings.

The Ratepayer Advocate reiterates its concern that AT&T's merger with a former archrival will lessen dialogue in federal and state regulatory proceedings, and diminish the depth and breadth of policy making**.**

Like many commenters, the Texas OPC believes that the merger will create a regulatory vacuum: "AT&T was also a vigorous proponent of competitive public policy positions. The proposed merger will eliminate AT&T both as a competitor and public policy advocate of open competition." Comments of Texas OPC, at 7. Comptel/ALTS also has expressed persuasively concerns regarding the loss of AT&T as a regulatory rival to the RBOCs, stating that:

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

> 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.[24]
>
> ...
>
> In addition to doing violence to the intended goal of the Act (a competitive local and long distance market), the proposed acquisition of AT&T by SBC violates a fundamental assumption underlying the Act itself – that is, that a reasonable resource balance would exist between entrant and incumbent so that the creative tensions of negotiation and arbitration could produce just and reasonable wholesale arrangements.[25]

Raising concerns both about the loss of AT&T as a regulatory activist and about SBC's opposition to local competition, a CLEC coalition raises significant concerns that merit the FCC's close attention:

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

See Comments of ACN *et al*, at 36, fn. 93.

Furthermore, as NASUCA aptly observes, the Commission expressed concern about maintaining a number of policy competitors when it approved the SBC/Ameritech merger. AT&T is one of the few policy competitors with the resources to compete in the policy arena.[26]

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[24]/ Comments of Comptel/ALTs, at 28.

[25]/ *Id*. at 41.

[26]/ NASUCA, at 16, citing SBC/Ameritech Merger Order, at para. 149.

H. The Applicants should provide detailed market-specific data to the FCC.

SBC's and AT&T's request for approval of a merger of unprecedented implications for the telecommunications industry is remarkably lacking in data and detail. The FCC's request for detailed information from the Applicants is an important first step in obtaining the information necessary to analyze the competitive implications of the proposed transaction.

Many raise concerns about the paucity of information that the Applicants have provided. According to the Antitrust Institute, the FCC cannot analyze the competitive implications of the proposed transaction because the "application is devoid of any geographic market definition for any product line, or any meaningful market share data." and the Applicants "have chosen not to be forthcoming with even the most rudimentary market data." *See* Comments of the Antitrust Institute, at 4-6. Similarly, another commenter observes that a "remarkable feature of the Application is that it fails to provide sufficient information concerning, among other things, market share and market definitions for the services provided by the Applicants." See Comments of ACN *et al*., at 2; *see also*, Comments of NASUCA, at 17-18. As did the Ratepayer Advocate (at 10, 18-20), ACN *et al* includes a list of suggested additional questions that the FCC should pose to the Applicants. See Comments of ACN *et al*, Appendix.

WilTel also expresses the concern that the Applicants have not provided adequate data to permit an informed decision regarding the merger. Although WilTel indicates that it is encouraged by the Commission's additional information request, it notes that commenters do not have time to review the material before reply comments are due. WilTel notes that these merger reviews are perhaps the most important decision for the telecommunications market since divestiture. Comments of WilTel, at 2-3.

Comptel/ALTS urges the Commission to seek additional information from the Applicants on

several issues in its Petition to Deny and concludes that "SBC and AT&T have failed thus far to come forward with even the minimum relevant and probative information that the Commission needs to assess the potential anticompetitive effects of the merger." Comments of Comptel/ALTS, at 40.

Even the Alliance for Public Technology, which "applauds SBC's current investments in advanced networks, and believes that the prospect that the merged entity will increase its capital spending on such advancements would be a very significant positive impact of the merger" recommends that the FCC seek additional information from the Applicants. *See* Comments of Alliance for Public Technology at 3. The Alliance for Public Technology states that "the Commission should seek more specific information from the Applicants" and "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." *Id.*

I. The FCC should impose appropriate conditions to foster the competitive market place and to protect consumers from potential harm.

The Ratepayer Advocate reiterates its previous position that if the FCC approves the SBC/AT&T merger, it should only do so conditioned on enforceable commitments. The Ratepayer Advocate recommended several conditions to mitigate consumer harm and provide consumer benefit.[27] The FCC should consider these conditions and those described in other parties' comments. According to NASUCA, the proposed merger is "both qualitatively and quantitatively different – more likely prejudicial

[27]/ Initial Comments of the Division of the Ratepayer Advocate, at 28-30.

to consumers – from mergers previously considered by the Commission, the conditions need to be more substantial and more effectively enforceable than the conditions previously adopted." *See* Comments of NASUCA, at 4; *see also* Comments of Texas OPC, at 9; Comments of WilTel, at 1. Qwest contends that if the FCC approves the merger, it "at least must condition it on substantial divestiture of AT&T facilities, customer contracts, and related operations in the SBC territory." Qwest Petition to Deny, at 2.

If SBC fails to commit to competing out-of-region in mass markets, the Ratepayer Advocate supports the recommendation that the Commission require SBC to divest all of the in-region local exchange and exchange access facilities as well as all in-region AT&T residential and small business customers. Comments of ACN *et al*, at 69.

Also, the Applicants should commit to using the merger synergies to support the offering of broadband services throughout its region to all consumers at POTS prices.

The Ratepayer Advocate also supports the condition that the "Commission ... impose structural separation requirements that are similar to those imposed under Section 272 of the Act to minimize opportunities for cross-subsidies and discriminatory conduct, and ensure that SBC operates its AT&T and SBC long distance affiliates on an arm's length basis," and further the condition that "the Commission should require that SBC and AT&T provide interexchange services through a separate subsidiary." Comments of ACN *et al*, at 74. As described in the Ratepayer Advocate's initial comments in this proceeding (at page 11), and in more detail in the comments filed by the Ratepayer Advocate on May 9, 2005, in FCC WC Docket No. 05-75, the Bells' bundling of telecommunications packages poses numerous risks to consumers and competitors.

Numerous conditions in addition to those that the Ratepayer Advocate describes in its initial

comments (at pages 28-30) were identified in the various initial comments, including several specific conditions recommended by NASUCA. Based on the Ratepayer Advocate's review of the Applicants' submission of detailed information, further consideration of these diverse proposed conditions, and its participation in federal and state investigations of the proposed Verizon/MCI merger, the Ratepayer Advocate may supplement its discussion of conditions in a future filing with the FCC. Also, the Ratepayer Advocate incorporates by reference the recommendations set forth in the Initial Comments and accompanying declaration submitted on May 9, 2005 in WC Docket No. 05-75, regarding Verizon's proposed acquisition of MCI.

III. CONCLUSION

WHEREFORE the reasons set forth above and in the Ratepayer Advocate's Initial Comments, the Ratepayer Advocate reiterates its previous recommendations to the Commission:

- The FCC should impose enforceable conditions to protect consumers from harm and that increase the likelihood of benefits flowing to mass market consumers.
- Absent such conditions, the Applicants have failed to demonstrate that, on balance, the proposed merger is in the public interest.
- The FCC should seek detailed data and information from the Applicants and allow adequate time for the industry, consumer advocates, and state regulators to examine the information.

Respectfully submitted,

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