BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from	)	
AT&T CORP., **Transferor**	)	WC Docket No. 05-65
to	)	
SBC COMMUNICATIONS INC., **Transferee**	)	

JOINT OPPOSITION OF SBC COMMUNICATIONS INC. AND AT&T CORP. TO PETITIONS TO DENY AND REPLY TO COMMENTS

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In connection with the proposed transaction, SBC intends to file a registration statement, including a proxy statement of AT&T Corp., and other materials with the Securities and Exchange Commission (the "SEC"). Investors are urged to read the registration statement and other materials when they are available because they contain important information. Investors will be able to obtain free copies of the registration statement and proxy statement, when they become available, as well as other filings containing information about SBC and AT&T Corp., without charge, at the SEC's Internet site (www.sec.gov). These documents may also be obtained for free from SBC's Investor Relations web site (www.sbc.com/investor_relations) or by directing a request to SBC Communications Inc., Stockholder Services, 175 E. Houston, San Antonio, Texas 78205. Free copies of AT&T Corp.'s filings may be accessed and downloaded for free at the AT&T Relations Web Site (www.att.com/ir/sec) or by directing a request to AT&T Corp., Investor Relations, One AT&T Way, Bedminster, New Jersey 07921.

SBC, AT&T Corp. and their respective directors and executive officers and other members of management and employees may be deemed to be participants in the solicitation of proxies from AT&T shareholders in respect of the proposed transaction. Information regarding SBC's directors and executive officers is available in SBC's proxy statement for its 2004 annual meeting of stockholders, dated March 11, 2004, and information regarding AT&T Corp.'s directors and executive officers is available in AT&T Corp.'s proxy statement for its 2004 annual meeting of shareholders, dated March 25, 2004. Additional information regarding the interests of such potential participants will be included in the registration and proxy statement and the other relevant documents filed with the SEC when they become available.

Certain matters discussed in this statement, including the appendices attached, are forward-looking statements that involve risks and uncertainties. Forward-looking statements include, without limitation, the information concerning possible or assumed future revenues and results of operations of SBC and AT&T, projected benefits of the proposed SBC/AT&T merger and possible or assumed developments in the telecommunications industry. Readers are cautioned that the following important factors, in addition to those discussed in this statement and elsewhere in the proxy statement/prospectus to be filed by SBC with the Securities and Exchange Commission, and in the documents incorporated by reference in such proxy statement/prospectus, could affect the future results of SBC and AT&T or the prospects for the merger: (1) the ability to obtain governmental approvals of the merger on the proposed terms and schedule; (2) the failure of AT&T shareholders to approve the merger; (3) the risks that the businesses of SBC and AT&T will not be integrated successfully; (4) the risks that the cost savings and any other synergies from the merger may not be fully realized or may take longer to realize than expected; (5) disruption from the merger making it more difficult to maintain relationships with customers, employees or suppliers; (6) competition and its effect on pricing, costs, spending, third-party relationships and revenues; (7) the risk that Cingular Wireless LLC could fail to achieve, in the amount and within the timeframe expected, the synergies and other benefits expected from its acquisition of AT&T Wireless; (8) final outcomes of various state and federal regulatory

proceedings and changes in existing state, federal or foreign laws and regulations and/or enactment of additional regulatory laws and regulations; (9) risks inherent in international operations, including exposure to fluctuations in foreign currency exchange rates and political risk; (10) the impact of new technologies; (11) changes in general economic and market conditions; and (12) changes in the regulatory environment in which SBC and AT&T operate.

The cites to webpages in this document are for information only and are not intended to be active links or to incorporate herein any information on the websites, except the specific information for which the webpages have been cited.

EXECUTIVE SUMMARY

The merger of SBC and AT&T should be approved, it should be approved promptly, and it should be approved without conditions. By any measure, the merger meets the Commission's public interest test. It will bring a broad array of public benefits: improved products and services for business and residential customers, a strong U.S. competitor in the global telecommunications industry, enhanced national security services and a boost to the national economy. All of these benefits will arise without any harm to competition or to any other public policy objectives.

The merits of the merger are underscored by the identity of its opponents and the nature of their opposition. Many of those opponents are competitors who do not want to compete against the combined company and who are looking to the Commission to shield them from having to do so. Their arguments – such as groundless fears that SBC and AT&T are "putting the Bell system back together" – are based on a world that has long gone and will not return. This merger looks forward, not backward as its opponents suggest; it looks to the future and to the kind of company that will be needed to compete effectively in a globalized, IP-enhanced world.

The benefits of this transaction are manifold, and many of them are directly related to changes in domestic and global telecommunications markets. Traditional wireline networks are in decline, as customers rely increasingly on wireless services, cable telephony, VoIP and various other broadband services. Foreign companies are challenging U.S.-based carriers, and, increasingly, customers look to have a single company serve their needs.

Although both SBC and AT&T have made strides in competing in this new marketplace, each, standing alone, faces limitations. AT&T can no longer rely on – and indeed, is exiting – its former core business as a mass-market long distance company. Notwithstanding its national and global network, it is limited in its ability to serve individuals and small businesses. SBC, on the other hand, serves those customers well in its region, but lacks the network to compete effectively for national and globally based enterprise customers. By combining their complementary assets, the new company will be able to achieve public interest benefits that neither could achieve alone:

- It will have the financial strength and facilities to be a world leader in telecommunications, ensuring the rapid build-out of IP-enabled broadband networks – an area where the U.S. clearly lags behind many other nations.

- It will enhance its national security capabilities – a crucial objective in today's world – by strengthening its ability to upgrade and enhance the networks on which the government already relies heavily and by keeping them under U.S. ownership and control.

- It will benefit customers through increased research and innovation, while improving efficiencies through the realization of cost savings, the sharing of best practices and other synergies.

- It will be better able to serve the needs of the full spectrum of telecommunications customers. For example, business customers will benefit from the creation of an expanded IP network that will allow them to compete more efficiently, while consumers will benefit from the ability of the combined company to provide a full range of broadband services.

- All of the foregoing benefits can only have a positive long-term effect on employment. SBC and AT&T have had to make sizeable job reductions, but there can be no question that employees will benefit from a strong, more viable combined company.

The Commission's test for assessing mergers requires it to balance the benefits that a merger will bring against any harms that may result. No such calculus is necessary here, however, because there are no such harms. In the face of these overwhelming

public benefits, none of the opposition provides a basis to deny, delay, or condition this proposed transaction. Several parties – principally ***competitors*** of both SBC and AT&T's, not their ***customers*** – have challenged the merger on a variety of grounds. But virtually all of their arguments have nothing to do with the merger. Rather than show that this transaction will substantially *reduce* competition and result in harms that cannot be addressed by industry-wide rules, they merely repeat positions taken – some of which the FCC has already rejected – in other industry-wide Commission proceedings and demand that the Commission reject the merger or establish onerous merger conditions. It is well settled, however, that such claims are properly resolved in the industry-wide proceedings in which they have been raised, so that the Commission's rules can be consistent and coherent in their application across the entire industry.

The challengers to the merger also are decidedly wrong on the facts and misconstrue basic economic principles. In each of the four main areas that have drawn the most comment – special access, Internet backbone, enterprise market, and mass market – the critics are simply misguided:

1. Special Access. Most of the arguments that merger opponents raise about special access have been raised in numerous Commission proceedings and are best addressed in ongoing industry-wide proceedings – *not* here. Some opponents do argue that the merger will materially increase concentration in the special access market by eliminating AT&T as a competitive supplier of special access services. But AT&T has only limited local facilities in the SBC region, whereas there are many other CLECs with extensive local networks and greater wholesale capabilities than AT&T. Indeed, all but a handful of the buildings served by AT&T in SBC territory are either served already by

another CLEC or readily could be based on the Commission's non-impairment criteria for high capacity loops. Similarly untenable is the claim that the merger will harm the market for *resold* special access services. AT&T receives no unique volume discounts from SBC that it could pass on to other carriers, and, contrary to competitors' claims, it does ***not*** engage in such resale arbitrage in the first place.

Opponents are also wrong in claiming that the merger will raise the potential for "price squeezes" or other anticompetitive conduct in the downstream market for retail enterprise services. The merger will not remotely increase either the incentive or the ability of SBC to engage in such conduct because, among other factors, SBC will have no greater opportunity than it has today to recoup in that downstream market the massive opportunity costs such conduct would present in the upstream special access market.

2. Internet Backbone. The opponents -- who notably are neither the customers of the major backbone providers nor their peering partners – contend that an SBC/AT&T combination, coupled with Verizon/MCI, will create two "mega peers" that will peer only with each other, will charge others for access, and will discriminate against other backbone competitors through degradation. These arguments are untethered to marketplace realities. SBC itself has only a small share of the backbone market, and there are at least two other backbone providers comparable to AT&T and MCI, as well as several broadband ISPs with a substantial share of Internet usage under their control. This competition will continue to discipline the backbone market; the merger will not affect peering transit; and targeted degradation will not occur.

3. Enterprise Market. Opponents' claims that the merger will reduce competition in services to retail business customers are wholly unsupported. As noted,

nothing about the merger will materially increase the merged company's control over such facilities. Opponents hypothesize "mutual forbearance" or "tacit collusion" between the merged SBC/AT&T and Verizon/MCI, ignoring the fact that the market is too competitive to permit any such conduct. And most important, customers – the most reliable judges of the market's operation – broadly recognize the tremendous, pro-competitive benefits of the proposed merger. They recognize that there are many competitors in the marketplace, that SBC and AT&T offer largely complementary services, and that the combined company will be able to respond to core customer needs better than either could do alone.

4. Mass Market. Because AT&T irrevocably decided last year to stop actively marketing traditional mass-market services, its mass-market services do not now, nor would they in the future, constrain SBC's pricing in the absence of the merger. The opponents do not seriously dispute that fact, and it is dispositive.

In summary, if the Commission restricts itself, as it should, to addressing the merger-specific issues presented in these transfer applications, it will approve the merger without conditions. SBC and AT&T are creating a world-class telecommunications provider capable of delivering the advanced network technologies necessary to offer integrated, innovative, and competitively priced telecommunications and information services. The merger will not mean any decrease in competition in any market segment or any geographic area. The proposed transaction serves the public interest, convenience and necessity, and the Commission should act promptly to grant the applications to transfer control of AT&T's FCC authorization to SBC without conditions.

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I. INTRODUCTION

SBC and AT&T demonstrated in their transfer applications that their proposed merger would serve the public interest by bringing together two companies with complementary strengths to create a vigorous and more effective American carrier with global competitiveness. The merger will maintain U.S. leadership in communications, strengthen national security, and increase innovation and investment that will benefit business and residential customers across the nation. Significantly, each of these benefits will arrive without any reduction in competition.

Most of those commenting on the transfer applications recognized these benefits of the merger and supported a swift grant of the transfer applications.[1] To illustrate, the

[1] Approximately 40 parties filed comments in support of the Applications. In addition, numerous customers have expressed their support of the merger. *See* Section III.G, *infra*.

Communications Workers of America said that the merger "is necessary to stop the hemorrhaging of jobs at AT&T" and will "result in a financially stable global leader in telecommunications, with the capacity to accelerate and expand the delivery of advanced technologies, services and features to all classes of customers."[2] The Hispanic-American Business and Professional Women's Association applauded the combined company's "commitment to expanding its network and operations" and said that its "strength and financial stability will usher in new products and services."[3] The Retailers Association of Massachusetts said that the combined company "will be able to deliver big-business solutions to small- and mid-sized businesses." [4]

A minority of commenters, consisting principally of competitors of SBC and AT&T, reacted differently. They raise a plethora of issues irrelevant to whether the Application should be approved, including UNE-P,[5] wireless resale requirements,[6] DSL line sharing,[7] "naked DSL",[8] tariffing,[9] OSS,[10] collocation,[11] rate regulation,[12] structural

[2] Comments of Communications Workers of America to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (April 25, 2005) at 2, 1.

[3] Comments of Hispanic-American Business and Professional Women's Association to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (April 25, 2005) at ¶ 2.

[4] Comments of Retailers Association of Massachusetts to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (April 25, 2005) at ¶ 4.

[5] Comments of the National Association of State Utility Consumer Advocates to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (April 25, 2005) at 10 ("NASUCA Comments"); Comments of the Texas Office of Public Utility Counsel to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (April 25, 2005) at 4-5 ("Tex. O.P.U.C. Comments").

[6] Opposition of Vonage Holdings Corp. to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (April 25, 2005) at 28 ("Vonage Opp.").

[7] NASUCA Comments, Economics and Technology, Inc. Report, Attachment A at 51 ("NASUCA Comments").

[8] Vonage Opp. at 19.

separation,[13] the digital divide,[14] lobbying efforts,[15] and consumer bills of rights.[16] "An application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry."[17] Rather, "merger review is limited to consideration of merger-specific effects."[18] The Commission thus should reject here these non-merger specific claims and attempts to reargue positions taken – and often already rejected – in other proceedings. Industry-wide policy issues should be addressed in the industry-wide rulemaking proceedings established to address those issues, and policy positions previously rejected by the Commission should be addressed through petitions for reconsideration or in new rulemaking proceedings.[19]

Footnote continued from previous page

[9] Comments of ACN Communications Services, Inc. et al. to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (April 25, 2005) at 71 ("ACN Comments").

[10] *Id.* at 73.

[11] Comments of Cox Communications, Inc. to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (April 25, 2005) at 3-4 ("Cox Comments").

[12] NASUCA Comments at 24.

[13] *Id*. at 11-12, Vonage Opp. at 9, 28.

[14] *See* Tex. O.P.U.C. Comments at 5-7; *see also* Petition to Deny of Consumer Federation of America, et al. to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (April 22, 2005) at 4, n.8 ("CFA Pet.").

[15] NASUCA Comments at 28; CFA Pet. at 18-19.

[16] Tex. O.P.U.C. Comment at 8-9.

[17] *In re General Motors Corp. and Hughes Electronics Corp. and News Corp. Ltd. For Authority to Transfer Control,* Memorandum Opinion and Order, 19 FCC Rcd. 473, 534 ¶ 131 (2003) ("*GM/Hughes*").

[18] *In re Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp to AT&T Comcast Corp.),* Order, 17 FCC Rcd. 22633, 22637, ¶ 11(2002) ("*Comcast/AT&T*").

[19] As the Commission has repeatedly stressed, the public interest is best served if industry-wide matters are addressed in broad proceedings of general applicability, which will enable it to "develop a comprehensive approach based on a full record that applies to all incumbent LECs so that the Commission treats similarly-situated incumbent LECs in the same manner." *In re Applications of AT&T Wireless Servs., Inc. & Cingular Wireless*

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The Commission also should reject these opponents' efforts to delay consideration of the merger beyond the 180-day timeline that the Commission sets for itself. These commenters claim the transfer applications are inadequate, citing to the Commission's request for additional information from the Applicants on April 18, 2005.[20] In fact, the transfer applications were exceptionally detailed, and the Commission found the applications acceptable for filing notwithstanding a request to delay acceptance until additional data could be obtained.[21] Moreover, the Commission routinely issues requests for additional information from applicants, and this fact alone typically does not require stopping the 180-day clock.[22] Opponents routinely do, and

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Corp., Memorandum Opinion and Order, 19 FCC Rcd. 21522, 21592 ¶ 183 (2004) ("*Cingular/AWS*"); *see also Comcast/AT&T*, 17 FCC Rcd. at 23257, 23300-01 ¶¶ 31, 137-38 (2002); *In re Applications of Southern New England Telecommunications Corp. and SBC Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21292, 21306 ¶ 29 (1998) ("*SBC/SNET*"); *In re Applications of Time Warner and America Online, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd. 6547, 6550, ¶ 6 (2001) ("*AOL/Time Warner*"); *In re Applications of Craig O. McCaw and American Tel. & Tel. Co.*, Memorandum Opinion and Order, 9 FCC Rcd. 5836, ¶ 123 (1994) ("*AT&T/McCaw*");*GM/Hughes*, 19 FCC Rcd. at 605-609, ¶¶ 304-09, 313-14; *In re Applications of Ameritech Corp. and SBC Communications, Inc.*, 14 FCC Rcd. 14712, ¶¶ 518, 526, 557-59, 569-71 (1999) ("*SBC/Ameritech*"); *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd. 3160, 3215, ¶ 117 (1999) ("*AT&T/TCI*").

[20] *E.g.*, Comments of the American Antitrust Institute to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (April 25, 2005) at 5-7 ("Am. Antitrust Inst. Comments"); ACN Comments at 2, 23-24, 46-47; Petition to Deny of Cbeyond Communications et al. to the Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (Apr. 25, 2005) at 5, 6, 9, 59 ("Cbeyond Petition").

[21] *See* Letter by Covad Communications et al., WC Dkt. No. 05-65 (Feb. 25, 2005) (requesting the Commission to refrain from issuing a Public Notice accepting the Applications); *Commission Seeks Comment on Application for Consent to Transfer of Control Filed by SBC Communications Inc. and AT&T Corp., Pleading Cycle Established*, Public Notice, WC Dkt. No. 05-65 (Mar. 11, 2005).

[22] *See, e.g.*, *Cingular/AWS*, Request for Additional Information, WT Dkt. No. 04-70 (June 30, 2004).

undoubtedly here will, avail themselves of the opportunities the Commission provides for continuing ex parte visits and submissions as consideration of the applications proceeds. Their ability to participate fully in this proceeding will not be prejudiced. However, delay will adversely affect the competitiveness of the marketplace and the companies' ability to move forward and achieve the benefits of the merger.

The opponents also offer other pretexts for wanting to extend consideration of the merger beyond 180 days. Some say that the Commission should stop consideration of this transaction until numerous ongoing proceedings are completed, including the Pricing Flexibility Proceeding, the Performance Metrics Proceeding,[23] the Section 272 Sunset Proceeding,[24] and the Intercarrier Compensation Proceeding.[25] Others want consideration of this merger consolidated with consideration of the Verizon/MCI merger.[26] In so doing, these commenters misapprehend the purpose of merger review proceedings, which is to consider whether the applications before the Commission comport with the public interest. Proceedings of general applicability (or proceedings involving parties other than SBC and AT&T) involve issues that, by definition, are not merger specific. They can and will be resolved by the Commission based on the full and targeted records developed in those dockets.

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[23] *See* CompTel/ALTS Pet. at 8, 11-13; Comments of Global Crossing North America, Inc. to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (Apr. 25, 2005) at 12, 20, n.18, n.31 ("Global Crossing Comments").

[24] Am. Antitrust Inst. Comments at 8.

[25] Global Crossing Comments at 24.

[26] *See, e.g.*, Amer. Antitrust Inst. Comments at 1-2.

Finally, the Commission should reject the opponents' efforts to deny the technological and marketplace changes that form the backdrop for this transaction. A key component of these changes is the decline of traditional wireline services, which are being displaced at a rapidly accelerating pace by new technologies, new providers and new customer communications practices. This intermodal competition is taking many forms. Cable television operators, for example, are expected to offer telephony to two-thirds of American homes by the end of 2005.[27] Wireline traffic is increasingly moving to wireless networks, as the already ubiquitous wireless carriers overtake wireline carriers in terms of total "lines" served.[28] The proliferation of broadband networks – while offering a host of new, IP-based services to consumers – is draining traffic off wireline networks at an astonishing clip.[29]

Both SBC and AT&T tried on their own – including by contracting with third parties – to adapt to the transformation of the telecommunications marketplace that has resulted from rapid technological advances. Each company, however, came to realize that it was missing key components for the future – components that the other possessed. By combining their complementary capabilities, the two companies will create an economically and technologically strong U.S.-based competitor, better able to deliver the

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[27] *E.g.*, Communications Daily (Feb. 16, 2005), *available at* 2005 WL 62275992; Craig Moffett *et al.*, *Cable and Telecom: VoIP Will Reshape Competitive Landscape in 2005*, Bernstein Research at 2 (Dec. 17, 2004).

[28] Daniel Longfield, *U.S. Communication Services Market Overview and Future Outlook, Historical Analysis and Future Strategic Planning for a Converging and Rapidly Evolving Market Landscape*, Frost & Sullivan at 89 (Sept. 2004).

[29] Matthew Friedman, *Report Says VoIP Is Killing Traditional Telephony*, EE Times, May 5, 2005, *available at* http://www.eetimes.com/showArticle.jhtm/?articleID= 162600155.

innovative services and quality of service that customers demand, and better able to help lead the country forward. The combined company, unlike either SBC or AT&T standing alone, will have the assets and expertise necessary to assemble a true nationwide and global end-to-end broadband network and thus play a major role in the ongoing technological transformation.

The Commission, then, should reject the opponents' efforts to unduly complicate the issues, delay action, and deny the changes the Commission has accepted and is addressing. Instead of approaching this merger from a backward-looking perspective, whether from 1984 or 1996, the Commission should focus on the merger-specific issues the transfer applications raise for the marketplace of today and tomorrow. If the Commission does so, it will become apparent that SBC and AT&T are creating a world-class telecommunications provider capable of delivering the advanced network technologies necessary to offer integrated, innovative, high-quality and competitively-priced telecommunications and information services to meet the evolving needs of customers at home and abroad. The merger will not result in any decrease in competition for any segment of the telecommunications market or any geographic area. The proposed transaction serves the public interest, convenience and necessity, and the Commission should act promptly to grant the applications to transfer control of AT&T's authorizations to SBC without conditions.

II. THE MERGER WILL GENERATE SIGNIFICANT BENEFITS TO BUSINESS, RESIDENTIAL AND GOVERNMENT CUSTOMERS.

Merger opponents barely question the numerous benefits of the merger demonstrated in the Public Interest Statement, including renewed American leadership in

communications; strengthened national security; and increased research, development, and innovation. Their few suggestions that the merger will not yield these benefits are unsupported and without merit.

A. The Merger Will Help To Renew American Leadership in Communications.

SBC and AT&T have demonstrated the benefits of combining their complementary capabilities, experience and services to create a carrier that will set the global standard for technology leadership.[30] They showed in the Public Interest Statement that, while our country was once the undisputed world leader in communications, there is now a perception that we have lost ground, with our broadband deployment lagging, and competing carriers and technology companies in Europe and Asia growing rapidly.[31] The complementary strengths of the two companies will create an American carrier that again will lead the way in delivering to all of its customers a full suite of best-in-class IP-enabled and broadband communications services. The creation of this U.S.-owned, financially stable and globally competitive carrier will benefit residential, business and government customers by expanding the delivery of advanced technologies, services and features; improving the security and reliability of communications services and networks; and assuring the integrity of national defense communications systems.

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[30] *See* Public Interest Statement, Declaration of Hossein Eslambolchi ¶¶ 8-12, 18-20 ("Eslambolchi Decl."); Public Interest Statement, Declaration of James S. Kahan ¶¶ 11-14 ("Kahan Decl."); Public Interest Statement, Declaration of Christopher Rice ¶ 4 ("Rice Decl."); Public Interest Statement, Declaration of Dennis W. Carlton & Hal H. Sider ¶ 86 ("Carlton & Sider Decl.").

[31] *See* Public Interest Statement at 14.

Only a few commenters challenge these benefits, none convincingly. Cbeyond contends that SBC "adds nothing to AT&T's global competitiveness."[32] This claim ignores the many complementary capabilities that SBC brings to the combined company as well as the combined company's improved financial strength, which is essential to enable competition against other global competitors such as British Telecom, France Telecom and Deutsche Telekom. Cbeyond and ACN maintain that American preeminence in communications is not a public interest benefit.[33] To the contrary, Congress created the FCC "to make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide and world-wide wire and radio and communication service with adequate facilities at reasonable charges, for the purpose of the national defense [and] for the purpose of promoting safety of life and property. . . ."[34] Anything less than a world-class communications system cannot achieve these economic and security goals, and helping to create such a system, as this merger does, is unquestionably a public interest benefit.

Indeed, as many have recognized, telecommunications is an essential economic engine, enhancing the productivity and competitiveness of virtually all businesses, as well as contributing to advances in health care, homeland security and national defense. The availability of a U.S. telecommunications company that offers a full range of advanced services and that is fully able to meet the needs of all American customers –

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[32] Cbeyond Pet. at 65-68

[33] *Id*. at 66; ACN Comments at 21-22.

[34] 47 U.S.C. § 151 (1996).

including U.S.-based multinational corporations – will facilitate the ability of all U.S. companies to compete in the global marketplace.

B. The Merger Will Strengthen National Security and Offer World Class Service to Government Customers.

The Public Interest Statement demonstrated that the merger would create a financially strong, U.S.-owned and U.S.-controlled telecommunications company with the resources and capabilities to improve support for the government's most critical and sensitive telecommunications requirements.[35] No opponent of the merger seriously challenges the benefits of the merger for national security. Those opponents that do address these issues ignore critical facts regarding the nature of the government marketplace, the different and complementary roles that SBC and AT&T play in that marketplace, and the important role that the combined company will play in enhancing national security.

For example, ACN asserts that the merger will result in reduced competition for federal government contracts for telecommunications services.[36] This claim is flatly wrong. AT&T and SBC have shown that they generally provide different, complementary types of services to the federal government.[37] AT&T's government contracts typically involve the development and provisioning of large, complex telecommunications systems, requiring extensive professional services capabilities and,

[35] Public Interest Statement at 17-21.

[36] ACN Comments at 66-68.

[37] Public Interest Statement at 17-19.

often, global capabilities.[38] For example, AT&T has extensive capabilities to undertake technically sophisticated classified projects, principally through its National Information Systems division, which has almost 1500 employees with high-level security clearances. SBC's government contracts generally are smaller contracts for voice and data services principally within SBC's incumbent region. SBC has experience performing classified government work, but those operations are considerably less extensive than AT&T's. Rather than reducing competition for government business, the merger of these two companies with complementary strengths will result in a U.S.-owned and controlled competitor for federal government contracts that is financially strong, with a unified, robust, and secure network for its government customers. The merger will enable the federal government to receive improved and more efficiently provided services, with corresponding fiscal and national security benefits.[39]

ACN suggests the combined IP networks that will result from the merger will not be important to national security and homeland defense customers.[40] However, combining AT&T's and SBC's strengths, including SBC's financial resources and local network expertise, will facilitate the expansion of the combined company's global footprint and especially expand its global capacity to provide end-to-end service, which is

[38] SBC generally does not compete for these types of contracts, but many other providers do – including not only long distance companies such as MCI, Sprint, and Qwest, but other government contractors like CACI, CSC, EDS, General Dynamics, IBM, Lockheed Martin, Northrop Grumman, Raytheon, and SAIC.

[39] In addition, the federal government is an unusually large and sophisticated purchaser of communications services. The size of the federal government's business and the sophistication of the processes it uses in conducting its procurements and in demanding high levels of performance ensure that it receives highly competitive, and high quality, communications and related IT services.

[40] ACN Comments at 68.

important for communications security as well as efficiency. These combined IP networks will provide the government with more secure and efficient routing for vital and sensitive government communications, with fewer transfer points.[41] The increased efficiency of the combined networks will reduce latency (delay in signal flow) and packet loss, which are particularly important for "real time" services such as essential high speed data and national security communications. The combined network also will have added diversity and redundancy, producing greater recoverability.[42] In the past, many classified networks often were designed with separate long distance and local components. As the Defense Department's need for integrated, worldwide, IP-based networks increases, a combined SBC/AT&T will be better positioned than the individual companies to compete to provide these networks on a higher-performing, end-to-end basis.[43] And, as previously noted, the combined company faces strong competitors who are also seeking this business.

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[41] *See* Public Interest Statement at 19-21.

[42] Rice Decl. ¶ 12. Cbeyond and CompTel suggest that the merger will harm national security by reducing "redundancy" in government networks. *See* Cbeyond Pet. at 64; CompTel-ALTS Pet. at 60 (raising the specter of the September 11, 2001 terrorist attacks). However, this suggestion ignores the fact that AT&T's and SBC's networks are largely complementary already – and have very limited overlap on the East Coast and especially the greater Washington, D.C. area (where security needs are particularly concentrated), and virtually no overlap in global network capabilities used by many of AT&T's national security customers. Merger opponents also ignore the difference between excess capacity, which is not economically feasible for any company of any size to maintain, and the levels of network redundancy that are operationally necessary to provide reliable and continuous service to enterprise and government customers. The combined company will be able to provide the necessary redundancy more efficiently and seamlessly. In addition, the combined company will provide a more robust network for such critical needs as National Command Authority communications, currently operated by AT&T, which involve capabilities assuring continuity of government, enabling the government to make an immediate and coordinated response to all emergencies, and allowing the President and other senior officials to be continuously accessible, even under the most difficult conditions.

[43] *See* Kahan Decl. ¶ 35.

C. The Merger Will Benefit Customers Through Increased Research, Development and Innovation and Other Significant Synergies.

SBC and AT&T demonstrated in the Public Interest Statement that the merger will increase research, development and innovation, as well as create significant other synergies, including enhanced network performance and cost savings.[44] Customers will benefit as the combined company becomes a more effective competitor that can deploy innovative products and services more broadly and more quickly.[45] Nothing in the opposition comments seriously calls this showing into question.

1. Research, Development and Innovation.

Cbeyond and ACN claim that the combined company will not pursue research, development and innovations because of its size.[46] These opponents make the unsubstantiated suggestion that the merger will prevent innovations because in the past SBC has been slow to develop and market new advanced services.[47] Qwest further claims that loss of a "maverick" innovator like AT&T will cause anticompetitive effects.[48]

These assertions do not stand up against SBC's demonstrated commitment to research, development and innovation. SBC Labs' research currently is focused on several advanced technologies, including Voice over Internet Protocol ("VoIP"), Wi-Fi,

[44] *See* Public Interest Statement at 21-44.

[45] *See id*.

[46] Cbeyond Pet. at 68-72; ACN Comments at 60-62; *see also* NASUCA Comments at 20.

[47] *See* Cbeyond Pet. at 69-70; ACN Comments at 61.

[48] Petition of Qwest Communications International, Inc. to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (Apr. 25, 2005) at 37-39 ("Qwest Petition").

fiber optic technologies, wireless/wireline integration and network optimization.[49] SBC has made milestone contributions in the development of packet technologies, an integral element in Internet transport.[50] SBC has developed new and innovative products and services that can be applied for the benefit of AT&T's enterprise customers as well as SBC's mass market and medium-sized business customers.[51] For instance, SBC has developed a secure architecture for its VoIP platform and customer network interface that protects transactions at the soft switch level and technology and software to facilitate the integration of wireless and wireline communications.[52] In addition, SBC has committed capital as well as personnel to develop advanced network capabilities. Most recently, SBC has undertaken multi-billion dollar initiatives to develop IP-based platforms and networks and to develop and deploy DSL services.[53]

The assertion that SBC has been slow to develop and market advanced services in the past is not only wrong, but also irrelevant. The fundamental point is that the merger will make SBC the owner of AT&T's national and global long distance network (as well as substantial other out-of-region facilities) and will give the combined company increased incentives to make additional, new and different kinds of investments. While

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[49] *See* Public Interest Statement at 23.

[50] *See id.*; Rice Decl. ¶¶ 27-28.

[51] *See* Public Interest Statement at 23; Rice Decl. ¶¶ 27-28.

[52] *See* Public Interest Statement at 29-30.

[53] *See id.* at 34; *see also* Patricia Fusco, *SBC Makes $6 Billion Broadband Play* (Oct. 18, 1999), *available at* http://internetnews.com/x/article.php/220301. In addition, SBC recently announced plans to invest $4 billion to deploy an integrated IP-based video, voice and data network to 18 million homes by 2007. *See SBC to Rapidly Accelerate Fiber Network Deployment in Wake of Positive FCC Broadband Rulings*, Fiber Optics Weekly, 2004 WLNR 12599989 (Oct. 22, 2004).

AT&T's investments have been, and would remain, adequate to meet its customer needs, this merger will, in the initial years alone, lead to $2 billion in investment in advanced network capabilities that are above and beyond those that would have occurred in the absence of the merger.[54]

In today's competitive, converging IP-enabled communications marketplace, the opponents' claims are implausible.[55] Following the merger, the combined company will face competition to develop new and innovative products and services from cable operators, VoIP providers, wireless carriers, other ILECs and CLECs as well as equipment manufacturers, Internet Service Providers, computer and software manufacturers and large electronics companies.[56] The merged company simply will not be able to rely on its size as a substitute for offering cutting-edge products and services. AT&T today innovates because it faces intense global and domestic competition that the merger will not reduce, and the combined company will, because it will inevitably continue to face increasing levels of competition, retain that same incentive while also having greater financial means to act on that incentive and a new incentive to secure the benefits of increased research and development across a broader range of customer and economic opportunities. In light of the many potential sources of research and

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[54] *See* Public Interest Statement at 34; Rice Decl. ¶ 19.

[55] *See* Public Interest Statement at 31-33; Carlton & Sider Decl. ¶ 35. *See also In re Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 18,025, ¶¶ 67-76 (1998) (rejecting claims that the merger of MCI and WorldCom would eliminate WorldCom as a maverick for providing advanced services in the long distance market) ("*WorldCom/MCI*").

[56] *See* Kahan Decl. ¶ 30; Carlton & Sider Decl. ¶¶ 81-89.

development, opponents have made no showing that there would be any harm to competition in any "innovation market."[57]

Cbeyond and ACN also claim that SBC and AT&T have not provided examples of or sufficient details about their plans for new products post-merger.[58] The Public Interest Statement provided an extensive discussion of how the merger will create the incentive for increased research and development, which points to an important public interest benefit that, by its nature, is prospective in its effect and thus difficult to predict with precision. The Public Interest Statement also indicated that the absolute amount of spending on advanced networks will increase dramatically. And the Public Interest Statement provides a lengthy discussion of how the combined company will use the complementary innovations of each company to benefit the other's customers.[59] SBC Labs has developed VoIP security and wireless/wireline integration products and services that can be applied to AT&T's enterprise customers. Likewise, AT&T Labs has developed a host of products and services originally designed for enterprise customers that can be adapted for the combined companies' mass market and medium-sized

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[57] *See* U.S. Dep't of Justice and FTC, Antitrust Guidelines for the Licensing of Intellectual Property, § 3.2.3, Example 4, *available at* http://www.usdoj.gov/atr/public/guidelines/ipguide.htm. (If there are four or more independently controlled entities with comparable capabilities and incentives to undertake research and development, then a combination is unlikely to adversely affect competition in innovation).

[58] *See* ACN Comments at 56-57; Cbeyond Pet. at 71. ACN also complains that the claimed public benefits of the merger are only supported by affidavits, rather than "outside sources." ACN Comments at 55-56. ACN cites no legal support for its claim, and the Commission has never imposed such a requirement. SBC and AT&T have provided authoritative declarations from the appropriate employees within the companies to support their factual assertions, and ACN has not provided any grounds to discredit their conclusions.

[59] *See* Public Interest Statement at 23-31.

business customers, including AT&T's fraud reduction and security solutions and AT&T's network storage solutions.[60] In addition, AT&T Labs is developing numerous IP-based products and services and other technologies that can serve as the basis for products and services for SBC's mass market and medium-sized customers. These products and services include: (1) speech/text technologies; (2) e-commerce capabilities; (3) service provisioning and repair; (4) applications support and network efficiency; (5) click-through provisioning; and (6) IP-based video.[61] The opponents do not offer any evidence to discredit these plans. SBC and AT&T have provided a high level of detail and precision, and it is difficult to conceive that either company – prior to the merger's completion – could anticipate in greater detail the research advances that the merger will produce.

2. Network Integration.

Cbeyond and ACN challenge the benefits of network integration and development of an IP-based network.[62] They claim that these benefits are not merger specific because SBC had plans to develop an IP-based network before it agreed to merge with AT&T. ACN further asserts that SBC could improve its network through contracting with AT&T or by purchasing a smaller entity like WilTel or another independent long distance provider. Neither argument has any merit.

[60] *See id*. at 24.

[61] *See id.* at 25-29. The Public Interest Statement provides additional detail about each of these products, services and technologies.

[62] Cbeyond Pet. at 72; ACN Comments at 52-55, 57-60, 63-65.

In arguing that the merger offers no network integration benefits because SBC plans to deploy its own IP-based network, Cbeyond and ACN fail to comprehend the benefits that will flow from the merger: those benefits do not derive solely from the deployment of an IP-based network, but from the combination of the networks of the two companies. Thus, while SBC plans to develop an IP-based network, the benefits achievable through the integration of both SBC's and AT&T's networks far outweigh the improvements which SBC could achieve on its own.

Similarly, whether SBC could theoretically purchase another entity is irrelevant to the transfer applications presently before the Commission. While there are a potentially large number of other entities that SBC might have acquired, the Commission is required under the Communications Act to determine whether these transfer applications are consistent with the public interest, not whether there is some other transaction it would prefer to see. Thus, Section 310 of the Communications Act makes clear that the Commission may not consider in the context of a transfer of control proceeding whether the public interest might be served by a different transaction.[63]

3. Cost Savings.

Cbeyond, NASUCA and ACN challenge the Applicants' claims of cost savings.[64] Cbeyond claims that SBC and AT&T have not provided sufficient information regarding those cost savings.[65] However, the Public Interest Statement offers a description of these

[63] 47 U.S.C. § 310(d) (1996) ("[I]n acting [on a transfer of control application] the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.").

[64] ACN Comments at 65; NASUCA Comments at 21; Cbeyond Pet. at 73-74.

[65] Cbeyond Pet. at 73-74.

synergies[66] as well as citations where the sources and amounts of these synergies are described more fully. SBC's response to the Commission's Initial Information and Document Request, and in particular the response to item 22 of that request, contains additional details regarding the anticipated cost savings and other benefits associated with the transaction.[67] As described in that response, SBC expects to achieve cost and capital expenditure savings with a net present value of approximately $13.3 billion after expenses necessary to achieve them.[68] These savings will be achieved in a number of ways including but not limited to migrating traffic to the AT&T network, consolidating overlapping organizations (including business, corporate and IT organizations), utilizing economies of scale in procurement, and optimizing out-of-region transport facilities.

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In short, the benefits of the merger are clear – restored American preeminence in communications, strengthened national security, increased innovation, and other significant synergies. The merger opponents' arguments do not undermine the Public

[66] *See* Public Interest Statement at 43-44, n.127 ("The sources of and amount of these synergies are described more fully in materials presented at the Special Analyst meeting by SBC and AT&T on February 1, 2005. Meeting transcripts *available at* http://www.sec.gov/Archives/edgar/data/5907/000104746905002185/0001047469-05-002185-index.htm, and meeting slides *available at* http://www.sec.gov/Archives/edgar/data/5907/000095012305001014/y05276d8defa14a.htm.").

[67] *See* Response of SBC Communications Inc. to Information and Document Request Dated April 18, 2005, WC Dkt. No. 05-65 at 178-96, (May 9, 2005) ("SBC Response to FCC Information Request").

[68] SBC estimates that the total net present value of all synergies, net of costs to achieve them, is approximately $15 billion. *See* Public Interest Statement at 44.

Interest Statement's showing that the benefits of the merger are significant, well-documented and directly related to the merger.[69]

III. THE MERGER WILL NOT LESSEN COMPETITION.

While merger opponents have alleged that the combination of SBC and AT&T would adversely affect competition, none of these contentions withstands analysis, for the reasons set out in detail below. In apparent recognition of this fact, the merger opponents primarily rely on claims that are nothing more than empty rhetoric. Almost without exception, the opponents contend that disapproval is required because a merger of AT&T and one of its former subsidiaries recreates portions of the Bell System and that this combination is somehow inconsistent with the Telecommunications Act of 1996.

These claims are nonsense. The former Bell System was a combination of (1) BOCs that collectively owned *de jure* monopolies that served over 80% of the nation's telephone lines and that were rate-of-return rate base regulated, (2) AT&T Long

[69] Other objections to the benefits are matters of general industry concern and should be addressed in proceedings of general applicability. *See supra* note 19. For example, the Alliance for Public Technology does not question that the combined company will enhance research, development and innovation, but expresses concern regarding access to IP-enabled services for those consumers with disabilities if the Commission concludes that IP-enabled services are outside of the current definition of "telecommunications." Comments of Alliance for Public Technology to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (Apr. 25, 2005) at 4-5. The issue of disabilities access to IP-enabled services affects the entire telecommunications industry and should be addressed by the Commission in its ongoing proceeding regarding the regulatory treatment of IP-enabled services. *See In re IP-Enabled Servs.*, Notice of Proposed Rule Making, 19 FCC Rcd. 4863, 4901-4903, ¶¶ 58-60 (2004) ("*IP-Enabled Servs. NPRM*"). Likewise, the New Jersey Division of the Ratepayer Advocate claims that if the Commission approves the transaction, it should modify its price cap regulations. *See* Comments of N.J. Division of the Ratepayer Advocate to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt No. 05-65 (Apr. 25, 2005) at 24-27 ("N.J. Ratepayer Advocate Comments"). As the N.J. Ratepayer Advocate recognizes, however, these regulations are the subject of two ongoing rulemaking proceedings. *Id.* at 25-26. Thus, these issues should be considered in the appropriate rulemaking proceedings.

Lines, which had a 90% share of long distance services that were potentially competitive, and (3) Western Electric, which had a monopoly share of sales of telecommunications equipment. In addition, and of equal importance to demonstrate the fallacy of the opponents' backward-looking claims, technology has dramatically and forever altered the telecom landscape. For example, the Internet did not exist to any substantial extent in 1984, DSL and cable modem did not exist, and wireless services had only begun to be made available, much less provide nationwide all distance, anytime, anywhere capabilities for voice and data services like those available today.

The Bell System was broken up in a different era. Because of the allegations that rate-of-return regulation created perverse incentives, the United States charged that the integrated Bell System had the ability and irresistible incentive to use local monopolies to prevent competition from developing in long distance and equipment manufacturing markets. To put an end to these controversies, the Bell System agreed to a consent decree, the MFJ, which, as a purely prophylactic matter, split the Bell System between monopoly and potentially competitive businesses, barred the divested BOCs from providing long distance services or manufacturing equipment until a particular competitive showing was made, and expressly barred (in section I(D)) reintegration of AT&T and any of the individual divested BOCs. All recognized that this prophylactic antitrust remedy denied consumers the benefits of vertical integration.

In the Telecommunications Act of 1996, Congress superseded the entire MFJ, which was subsequently vacated by the decree court, thereby eliminating the former categorical ban on mergers of AT&T and individual BOCs. Congress did so because intervening changes in the telecommunications industry had eliminated the conditions

that gave rise to it. Rate-of-return regulation of BOCs had been replaced with price caps or other forms of incentive regulation. The long distance (and manufacturing) markets had become intensely competitive – with AT&T having been declared nondominant the prior year. Perhaps most fundamentally, the 1996 Act required the opening of local telephone markets to competition and authorized BOCs vertically to reintegrate into long distance services when local markets became open – as all SBC's markets now are. Congress further understood that this Act could unleash a range of competitive and other forces that could change the structure of the industry in ways that were just as fundamental or far more fundamental than the radical changes that had occurred between 1984 and 1996.

That these profound further changes have in fact occurred, and are accelerating, is explained in detail in the Public Interest Statement. That AT&T is a vastly different company from the firm that existed in 1984 is undisputed and undisputable. That SBC faces real and growing competition for all its services is a reality. It is the sheerest sophistry for any commenter to suggest that today's AT&T and SBC, and the markets in which they provide service, remotely resemble those that existed in 1984 and that had provided the reason for the breakup of the former Bell System.

But the fundamental fact is that by vacating the MFJ and its prohibition on the reintegration of AT&T and individual BOCs, Congress plainly intended to *permit* such mergers whenever they satisfy the standards of the nation's antitrust laws and further the public interest as defined by this Commission and other regulatory bodies. Congress plainly intended that these determinations be made by applying these antitrust and public interest standards to the conditions that will exist in particular markets, not by mindlessly

invoking images of the former Bell System. As detailed below, this review abundantly demonstrates that the merger of SBC and AT&T will have no adverse competitive consequences and will benefit the nation's consumers. The opponents' rhetoric and claims about the former Bell System are simply attempts to distract the Commission from these controlling facts.

A. The Merger Will Not Harm Consumers of Services That Depend on SBC Special Access Services or Substitutes to Them.

In the Public Interest Statement, SBC and AT&T demonstrated that the merger would not adversely affect consumers of services that depend on SBC special access services and substitutes for them. The merger will not produce any price-affecting increase in concentration in any special access markets because AT&T has only limited alternative local facilities in SBC's region, and there are many other CLECs with comparable local networks and greater wholesale capabilities.[70] Indeed, the integration of SBC's in-region local facilities and AT&T's national enterprise business will produce efficiencies that will benefit the ultimate consumers.[71] And as SBC and AT&T further explained, this merger proceeding is not an appropriate forum for the airing of longstanding disputes about special access regulation.[72] Rather, those allegations involve industry-wide issues and should be reserved for the Commission's pending *Special Access NPRM* and other proceedings.[73]

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[70] Public Interest Statement at 105 n.347.

[71] *Id.* at 96-101.

[72] *See supra* note 19.

[73] *See In re Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp., Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Notice of Proposed Rulemaking,

Footnote continued on next page

Significantly, while there has been a remarkably vehement outpouring of opposition on this issue, none of this opposition comes from the business or government customers who are the ultimate consumers of services that use special access as inputs.[74] To the contrary, many of these customers actively support the merger, in recognition of the benefits that will result to them.[75] Instead, SBC's and AT&T's *competitors* contend that the merger will eliminate substantial horizontal competition to SBC and lead to region-wide increases in SBC's special access prices. These opponents further contend that, whether or not there are substantial adverse horizontal effects, the merger will result in vertical price squeezes or other discrimination that will harm competition and consumers. As demonstrated below, both sets of claims rest on false factual premises and do not withstand analysis.

1. The Merger Will Not Result in Substantial Increases in Horizontal Concentration.

Much of what the merger opponents' argue is plainly irrelevant to this proceeding. As they candidly acknowledge, much of their argument rehashes arguments in ongoing Commission proceedings.[76] Thus, the merger opponents assert that there are

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WC Dkt. No. 05-25, 2005 WL 235782 (rel. Jan. 31, 2005) ("*Special Access NPRM*"); Public Interest Statement at 105 n.347.

[74] Some consumer representatives discuss special access, *see, e.g.*, CFA Pet. at 24; N.J. Ratepayer Advocate Comments at 25-27, but none argue that their concerns warrant denial of the transfer applications or the imposition of conditions. The positions they raise are addressed elsewhere in this Joint Opposition.

[75] Reply Declaration of Dennis W. Carlton and Hal S. Sider ("Carlton & Sider Reply Decl.") ¶ 72. *See generally* Section III.G.1, *infra*.

[76] *See* ACN Comments at 35; CompTel-ALTS Pet. at 11-13, 15-16; Opposition of Broadwing Communications LLC & SAVVIS Communications Corporation to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 (Apr. 25, 2005) at 32-34 ("Broadwing & SAVVIS Opp."); Cbeyond Pet. at 22-24; Global Crossing Comments at 20.

substantial economic barriers to the deployment of alternative loop and transport facilities[77] and that there are no alternatives to ILECs' special access services in many areas of the country.[78] They contend that ILECs have been able to raise the price, and degrade the quality, of their special access services, despite the predictions that underlie the Commission's grants of Phase I and Phase II pricing flexibility.[79] And they complain that ILEC tariffs that provide discounts based on maintenance of certain levels of region-wide usage are anticompetitive and harm consumers.[80] As these opponents correctly state, these are allegations AT&T has made in recent years. But they are also allegations that ILECs (including SBC) have just as repeatedly disputed and – more to the point – that the Commission is now addressing in other proceedings.

Thus, the opponents are quite wrong in claiming that the Commission must decide the issues in the *Special Access NPRM* here in a proceeding applicable to only one ILEC and determine whether SBC now has special access market power that is unconstrained by regulation.[81] The only question here is whether a combination of AT&T and SBC and the resulting *changes* in industry structure would be harmful or beneficial to consumers.

The answer is that no such harmful changes can result from this merger. The realities are that AT&T's local facilities in the SBC region are not uniquely situated to provide a competitive alternative to SBC's special access services, that there are

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[77] Cbeyond Pet. at 22-24.

[78] Cbeyond Pet. at 25-30; Broadwing & SAVVIS Opp. at 22-23; CompTel-ALTS Pet. at 15; Global Crossing Comments at 15.

[79] Broadwing & SAVVIS Opp. at 29-33; Global Crossing Comments at 16.

[80] Broadwing & SAVVIS Opp. at 24-25; CompTel-ALTS Pet. at 17-18.

[81] *Compare* CompTel-ALTS Pet. at 11. *See supra* note 19.

numerous CLECs who operate in the SBC states, and these other CLECs are primarily focused (as AT&T is not) on providing wholesale alternatives to SBC's special access services and can readily replace all or virtually all of AT&T's existing facilities and wholesale services. The opponents' contrary suggestions are belied by the facts and ignore the Commission's findings in the *Triennial Review Remand Order* and prior orders. Moreover, they would embroil the Commission in building-by-building evaluations that it has elsewhere eschewed[82] and that would demonstrably serve no substantial purpose here.

Specifically, merger opponents contend that AT&T's position as one of the largest purchasers of SBC's special access services has enabled AT&T to use its volume discounts to *resell* SBC special access services throughout SBC's region at rates significantly below the rates SBC gives other wholesale customers.[83] This contention is simply false. SBC's region-wide discount plans provide no unique discounts to AT&T by virtue of its larger volumes, and AT&T does not – and could not – engage in resale arbitrage of SBC's special access services.[84]

There is also no substance to the related contentions that the merger would result in increased special access prices in a *region-wide* special access market by virtue of SBC's acquisition of AT&T's local facilities. The merger will not materially reduce the

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[82] *In re Unbundled Access to Network Elements*, Order on Remand, WC Dkt. No. 04-313, CC Dkt. No. 01-338, 2005 WL 289015, ¶ 163 ("*Triennial Review Remand Order*").

[83] Broadwing & SAVVIS Opp. at 23; CompTel-ALTS Pet. at 14; Cbeyond Pet. at 24; Global Crossing Comments at 15.

[84] Reply Declaration of Parley C. Casto ("Casto Reply Decl.") ¶¶ 3-7. Indeed, at least one of the merger opponents advancing this claim gets discounts greater than those offered to AT&T. *Id.* ¶ 2.

number of competitively supplied commercial buildings in SBC's region and thus could have no impact on region-wide retail or wholesale pricing even under the merger opponents' own theory.[85] In fact, under the *Triennial Review Remand Order*, CLECs would not be "impaired" in replacing AT&T's facilities in most buildings where AT&T is the only competitive carrier, and the amount of service AT&T provides in the remaining buildings is far too trivial to have any market impact.

Finally, the handful of individual building routes for which existing CLEC alternatives and the Commission's own findings do not already establish will remain subject to competitive supply could not, in all events, justify the broad conditions and divestitures that the merger's opponents seek. As detailed below, whether the inquiry is region-wide, city-by-city, or, as some merger opponents suggest, building-by-building, any horizontal effects are simply too few, too immaterial and too widely dispersed to have any conceivable real world impact on special access pricing.

a. The Merger Will Not Adversely Affect SBC's Region-Wide Special Access Prices.

The merger opponents' claims that the merger will have adverse effects on pricing of special access services in a region-wide market are entirely meritless.[86] Some merger opponents argue that it is the "loss" of AT&T's resale of SBC's special access services that will allow SBC to raise prices region-wide. Others contend that it is the loss of

[85] *Compare* CompTel-ALTS Pet. at 14-15; Global Crossing Comments, Statement of Joseph Farrell ¶¶ 29-36.

[86] Broadwing & SAVVIS Opp. at 24; Cbeyond Pet. at 24; CompTel-ALTS Pet. at 15; Global Crossing Comments, Farrell Statement ¶¶ 29-36.

facilities-based competition from AT&T that will enable region-wide price increases. Both arguments rest on demonstrably incorrect factual premises.

Resale. Broadwing, CompTel, Cbeyond and Global Crossing claim that AT&T has historically operated as a unique constraint on SBC's region-wide special access facilities, because SBC gives AT&T very large special access discounts, which enable AT&T to resell SBC special access services throughout SBC's region at prices below those SBC charges its other (smaller) special access customers.[87] They assert that AT&T can resell special access service in every LATA[88] and that it does so broadly through its so-called "Type II" local private line service.[89]

But these contentions are simply false, as these merger opponents would discover if they read SBC's special access tariffs. First, AT&T does not receive greater discounts from SBC than other carriers based on AT&T's volume of purchases. Unlike the BellSouth tariffs, upon which the merger opponents incongruously rely, SBC's region-wide discount tariffs used by AT&T provide term discounts to *any* special access purchaser that meets the minimum $10 million annual threshold – as many special access purchasers, including some of those complaining here, do – but *no* additional discounts based on a particular purchaser's volume level. Indeed, the per-circuit rates that AT&T

[87] *See* Broadwing & SAVVIS Opp. at 23; Cbeyond Pet. at 24; Cbeyond Pet., Declaration of Simon Wilkie ¶ 11 ("Wilkie Decl."); CompTel-ALTS Pet. at 13-14; Global Crossing Comments at 15.

[88] Broadwing & SAVVIS Opp., Declaration of Gary Zimmerman ¶ 12 ("Zimmerman Decl.").

[89] Broadwing & SAVVIS Opp. at 22; Global Crossing Comments at 15. This is also the apparent basis for CompTel's startling contention, CompTel-ALTS Pet. at 13-14 – which is also refuted in Section III.A.2, *infra* – that the Commission must count all the special access circuits that AT&T currently obtains from SBC as "lost" due to the merger.

pays for special access are higher than those paid by at least one of the CLECs complaining here.[90]

Second, AT&T does not resell SBC special access to other carriers in competition with SBC – at discounted rates or otherwise.[91] While AT&T purchases SBC's special access as an input to its own end-to-end long distance services (and, in very limited circumstances, certain of its local private line services), it does not, and economically could not, make standalone offers of resold SBC special access services in competition with SBC.[92]

In this regard, the opponents' references to AT&T's Type II private line service as "resale" of SBC's special access services is grossly misleading. AT&T provides two types of local private line service in the 19 SBC region metro areas in which AT&T has deployed its own limited local facilities.[93] "Type I" local private line service is provided entirely over AT&T's alternative facilities and makes no use of SBC's facilities.[94] "Type II" local private line service, by contrast, uses AT&T facilities for two of three links in the private line (one tail and the transport) and obtains one of the tails from SBC as special access.[95] AT&T does not provide a wholesale private line if it requires obtaining more than one tail from the ILEC, and AT&T does not resell SBC special access services

[90] Casto Reply Decl. ¶ 6.

[91] *Id*. ¶ 7.

[92] Reply Declaration of Anthony Fea, Anthony Giovannucci, Bob Handal, C. Michael Lesher and Michael Pfau ("Fea Reply Decl.") ¶ 39.

[93] *Id*. ¶ 12. The metropolitan areas are Austin, Chicago, Cleveland, Columbus, Dallas, Detroit, Dayton, Hartford, Houston, Indianapolis, Kansas City, Los Angeles, Milwaukee, Reno, St. Louis, Sacramento, San Antonio, San Diego, and San Francisco.

[94] *Id*. ¶ 41.

[95] *Id.* ¶ 41.

as standalone circuits.[96] Thus, whereas SBC earns $2.5 billion annually from wholesale special access services, AT&T earns less than [REDACTED] annually from the wholesale provision of local private line in the SBC service territories.[97] And, contrary to Broadwing-SAVVIS's claim,[98] only a small fraction of these local private line sales [REDACTED] were from Type II service that merely *include* a circuit obtained from another CLEC or SBC.[99]

Facilities-Based. Global Crossing and CompTel also advance a different theory of region-wide harm.[100] They note that SBC's special access tariff provides discounts that are based on whether a customer's region-wide usage of special access exceeds a particular percentage of the customer's historic levels. They further assert that the willingness of CLECs to subscribe to these tariffs is inversely related to the number of routes in the SBC region that are served by CLECs, and that the merger will result in a significant reduction in CLEC-served routes.[101]

Even assuming, *arguendo*, that the opponents had advanced a reasonable analytical framework and model, these contentions, too, rest on false factual premises. Contrary to their assertions, AT&T does not account for a large fraction of the CLEC-owned building connections in the SBC region, and the Commission's prior findings

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[96] *Id.* ¶¶ 37, 39.

[97] *Id.* ¶ 36.

[98] Broadwing & SAVVIS Opp. at 23.

[99] Fea Reply Decl. ¶ 43.

[100] CompTel-ALTS Pet. at 16-18; Global Crossing Comments, Farrell Statement ¶¶ 29-36.

[101] Global Crossing Comments, Farrell Statement ¶¶ 29-36.

establish that all or virtually all of the few unique connections that AT&T owns can be readily replaced by other CLECs. In particular, while AT&T may well be one of the larger CLECs based on the total number of circuits in operation nationally, some CLECs independently, and certainly all of the other CLECs collectively, provide many more building connections in the SBC region than AT&T does.

This is clear from data that AT&T has collected from certain CLECs in the ordinary course of AT&T's business.[102] There are over [REDACTED] CLECs from which AT&T purchases wholesale private line services in SBC states.[103] To facilitate the provision of service to AT&T, many of those CLECs provide AT&T (on a monthly or quarterly basis) with lists of the specific buildings that they can serve through their own Type I building connections (AT&T generally declines to obtain Type II service from CLECs).[104] These data understate the number of buildings served by CLECs other than AT&T insofar as they do not include building connections of some significant CLECs from whom AT&T does not take service. They do not, for example, include data from Sprint, and they include very little data from cable-based providers of special access, notwithstanding that a March 2005 SBC survey found that [REDACTED] of the DS-1 circuits that SBC had lost to competitors in 2004 were lost to cable providers.[105] Indeed, whereas the CLECs that provide data to AT&T have an average of [REDACTED] local

[102] *See* Fea Reply Decl. ¶¶ 16-17.
[103] *Id.* ¶ 15.
[104] *Id.* ¶ 16.
[105] Carlton & Sider Reply Decl. ¶ 30.

networks in the SBC areas in which AT&T operates local fiber networks, the New Paradigm Research Group reports an average of 7 networks.[106]

But even these incomplete data in AT&T's possession show that CLECs collectively have constructed dedicated lit fiber connections to [REDACTED] buildings and unlit fiber connections to [REDACTED] buildings in SBC's territories.[107] By contrast, AT&T has direct connections to only [REDACTED] commercial buildings in the SBC region, and [REDACTED] of these are already served by other CLECs as well.[108] Thus, even if AT&T's unique connections were not replaced by other CLECs, and even ignoring buildings served by CLECs from whom AT&T does not purchase special access services (and therefore has no building information), the merger would not materially reduce the number of buildings that are already served by CLECs in the SBC region.[109]

Further, as detailed below, other CLECs could readily replace the AT&T connections in all or virtually all of the approximately [REDACTED] buildings where AT&T is the only CLEC with direct connections. In the [REDACTED] of these buildings,[110] which account for more than [REDACTED] of the bandwidth that AT&T

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[106] *Id.* ¶ 29.

[107] Fea Reply Decl. ¶ 18; *see also* Carlton & Sider Reply Decl. ¶¶ 32-35 (providing data on MSA-specific basis). The number of unique buildings served by these CLECs is somewhat lower because some CLECs serve the same buildings with these fiber connections. Carlton & Sider Reply Decl., ¶ 33.

[108] Fea Reply Decl. ¶ 19; *see also* Carlton & Sider Reply Decl. ¶¶ 32-35 (providing data on MSA-specific basis).

[109] *See* Carlton & Sider Reply Decl. ¶¶ 15-16.

[110] *Id.* ¶ 36 & Table 4; *see also* Fea Reply Decl. ¶¶ 30-31.

provides through direct connections buildings in SBC territory,[111] AT&T is providing the OCn-level (or near OCn-level) facilities, which the Commission has found can be readily deployed by any efficient CLEC.[112] . This data alone refutes any suggestion that loss of AT&T buildings could adversely affect SBC's region-wide special access prices.

While these data alone refute any suggestion that the merger could have an impact on region-wide special access prices, the Commission's findings further establish that CLECs can readily replace AT&T's facilities even in the minority of buildings where AT&T is not currently providing Ocn or near Ocn levels of service. Many of these other buildings are in the nation's most dense urban wire centers where the Commission's findings establish that, under an analysis that excludes AT&T collocations, there is no impairment to the competitive deployment of DS3, or even DS1, facilities.[113] Others are served by wireless connections that competitors could readily duplicate.[114] And virtually all of the rest present other conditions that would allow alternative facilities to be deployed.[115]

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[111] Carlton & Sider Reply Decl. ¶ 36.

[112] *Triennial Review Remand Order*, 2005 WL 289015, ¶¶ 12, 20, 30.

[113] *Id.* ¶¶ 174-81; *see* Carlton & Sider Reply Decl. ¶¶ 15, 37-43; Fea Reply Decl. ¶ 16.

[114] *Triennial Review Remand Order*, 2005 WL 289013, ¶¶ 174-81; Fea Reply Decl. ¶ 34; Carlton & Sider Reply Decl. ¶¶ 37-43.

[115] Fea Reply Decl. ¶ 34. For example, some of AT&T's largest multi-location customers will demand that all of their locations be placed "on net." *Id.* ¶ 34. In such instances, most such locations will have OCn-level demand but some smaller offices may only have DSn-level demand. Because of the overall value of the contract, AT&T was able economically to deploy fiber for lower demand locations that would not be economic on a stand-alone basis. But this also means that other competitive carriers could self-deploy in these circumstances too. AT&T is also sometimes able to "hub" multiple buildings on a "campus" to a central point of aggregation. *Id.* ¶ 34. In those circumstances, some of the individual buildings might have less than OCn-level demand, but because of their proximity and ease of access, it is feasible to install short laterals to those individual buildings and backhaul the traffic to a common point of aggregation. Again, because of

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For all of these reasons, there is no substance to the claim that the merger could have any adverse effects on SBC's region-wide special access prices.

b. None of the Merger Opponents' More "Granular" Theories of Horizontal Competitive Harm Has Merit.

Although the absence of any adverse region-wide effects on SBC's prices should end the matter, the merger opponents alternatively contend that the Commission is required to make building-by-building and route-by-route determinations and disapprove the merger if there are *any* buildings where the effect might be to reduce existing special access suppliers from 2 to 1 or from 3 to 2.[116]

This exercise is as unnecessary as it is inappropriate. Whatever the conditions in isolated instances, there is no basis for any finding that the merger could have substantial adverse consequences in any of the areas in which AT&T has local facilities. The contrary suggestions here, too, ignore the existence of other CLECs with similar networks and identical capabilities and the Commission's findings as to the circumstances in which there are no barriers to the supply of alternative transmission facilities. There is, therefore, no basis for the Commission to block, or even condition, approval of this merger based on these unfounded arguments.

(i) AT&T Offers Limited Resale Special Access Service.

There is one fundamental respect in which the local networks of other CLECs possess far more competitive significance than do the AT&T local networks. Many other

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Footnote continued from previous page
the aggregate revenue opportunity presented in such circumstances, other competitive carriers have the same economic ability to self-deploy facilities.

[116] Broadwing & SAVVIS Opp. at 28; Cbeyond Pet. at 22-23; Global Crossing Comments at 11-13 & Farrell Statement ¶¶ 23-28.

CLECs (*e.g.*, Time Warner Telecom and McLeod) have deployed facilities to aggressively offer wholesale local private line and special access services to other carriers.[117] By contrast, AT&T has designed and deployed its local networks, not to support wholesale "special access" service to other carriers, but to provide dedicated connections to retail customers that AT&T serves (through self-supply of special access functionalities).[118]

AT&T is only a minor supplier of special access substitutes to other carriers. As noted, AT&T earns less than [REDACTED] a year from "wholesale" local private line sales to other carriers in SBC service territories – mostly from sales to large carriers that do not oppose the merger. AT&T supplies truly trivial amounts of special access substitutes to the [REDACTED] competitive carriers that oppose the merger.[119] Overall, in SBC's region, AT&T supplies only about [REDACTED] local private line circuits to these competitive carriers, and these private lines generate about [REDACTED] a month in revenues – which averages to only [REDACTED] circuits and [REDACTED] in revenues per each competitive carrier.[120] There is thus no basis for any notion that the "loss" of AT&T would substantially lessen the ability of these carriers to obtain last-mile access to customers.

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[117] *See* http://www.twtelecom.com/cust_solutions/carrier.html; http://www.mcleodusa.com/MarketSegment.do?com.mcleodusa.req.MARKET_SEGMENT=CARRIER.

[118] Fea Reply Decl. ¶ 35.

[119] Fea Reply Decl. ¶¶ 36-37. The following competitive carriers have alleged that the combination of SBC's and AT&T's local network facilities raises competitive concerns: ACN, ATX, Broadwing, Bullseye, Cavalier, Cbeyond, Cimco, Conversent, Cox, CTS, Eschelon, Gillete, Global Crossing, Granite, Lightship, Lightyear, NuVox, Pac-West, RCN, SAVVIS, TDS, Tele-Pacific, US LEC, Xspedius, and XO. *Id.* ¶ 37.

[120] *Id.* ¶ 37.

CLECs opposing the merger can argue otherwise only by grossly overstating AT&T's local presence and capabilities. One group, for example, alleges that SBC's acquisition of AT&T would eliminate some 53% of the "lit" CLEC buildings in Cleveland and 64% in Milwaukee, depriving carriers of a critical supplier of special access alternatives.[121] These figures – which apparently count as "lit" buildings those to which AT&T *has no connection at all* and to which AT&T provides service by leasing SBC special access channel terminations – are completely irrelevant.[122] The merger will, of course, have no effect on the availability of SBC special access services to reach these buildings, and CLECs will have the same ability to reach these buildings post-merger as they do today.

(ii) Other CLECs Can Easily Replicate AT&T's Self-Provisioned Special Access Capacity.

Nor does AT&T's status as a retail supplier of business services provide it with any unique capabilities as a potential supplier of special access services to other retail suppliers. Other retail providers can self-supply local connection inputs or purchase them from the many CLECs in SBC states upon whom AT&T relies to provide inputs into its

[121] Cbeyond Pet. at 26-27 & Wilkie Decl. ¶¶ 18-20.

[122] For example, AT&T has a total of only [REDACTED] on-net commercial buildings in Cleveland. [REDACTED] of these buildings are already connected by other CLECs as well, and all but [REDACTED] of the rest serve near OCn-level or above demand that the Commission has recognized is often sufficient to economically justify competitive building connections by other CLECs. *See* Fea Reply Decl. ¶ 21. Likewise, AT&T serves only about [REDACTED] of the competitively lit buildings in Milwaukee where there is no overlap between AT&T and competitive carriers. *Id.* ¶¶ 24-25. Moreover, with regard to the AT&T buildings that are not served by active or inactive CLEC fiber, the substantial majority [REDACTED] have near or above OCn-level demand. *Id.*

own retail services. And CompTel's claim that AT&T has special legal rights under state law to construct local facilities is pure fabrication.[123]

In short, AT&T has no unique or "special" local assets or capabilities that cannot be readily replicated by other firms after AT&T merges with SBC. Even the merger opponents appear to acknowledge that the merger cannot be found to have anticompetitive effects if the AT&T facilities would be replaced by other firms if the combined company sought to raise prices after the merger.[124]

A more detailed analysis "by the numbers" confirms that any horizontal effects of the merger are far too limited and attenuated to have any conceivable effect on special access prices or competition. Although the opponents' focus is on building connections, most of AT&T's fiber laterals are entrance facilities,[125] for which the Commission has

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[123] CompTel-ALTS Pet. at 17 & n.17. AT&T and SBC do not enjoy "special" rights to construct facilities in California that many other carriers do not have. While at one time California law gave only established carriers the right to construct facilities without having to go through a review process, the California state commission has now granted that same right to over 100 other carriers. *See, e.g.*, *In re Competition for Local Exchange Service*, Order, 63 CPUC2d 763 (1995) (31 carriers); 73 CPUC2d 257 (1997) (7 carriers); 75 CPUC2d 681 (1997) (7 carriers); 77 CPUC2d 390 (1997) (4 carriers); 80 CPUC2d 468 (1998) (12 carriers); 85 CPUC2d 398 (1999) (5 carriers); *Order Instituting Rulemaking on the Comm'n's Own Motion into Competition for Local Exch. Serv.*, Decision 99-06-083 (1999) (10 carriers); Decision 99-10-025 (1999) (3 carriers). *See also* 47 U.S.C. § 253 (prohibiting state laws that have the effect of creating barriers to entry).

[124] *See* Global Crossing Comments, Farrell Decl. ¶ 25; *see also WorldCom/MCI*, 13 FCC Rcd. at 18098 ¶¶ 128-9 (where one of the merging parties does "not possess any special retail assets or capabilities," the merger "is not likely to affect adversely competition"); *SBC/SNET*, 13 FCC Rcd. at 21302, ¶ 20 ("There is no evidence in the record . . . upon which we could conclude that SBC has any significant capabilities or incentives to compete in the relevant local business market in Connecticut that are not shared by many of these other entrants in local business markets.").

[125] Fea Reply Decl. ¶¶ 7-9.

made a national finding of non-impairment.[126] In light of this finding, there can be no credible claim that the "loss" of AT&T as an independent supplier of entrance facilities would substantially lessen competition.

Nor does the "loss" of AT&T's metropolitan fiber as a substitute for SBC's dedicated interoffice transport raise any substantial competitive concerns. As the Commission has determined, the central business districts and other dense areas of the metropolitan areas where AT&T's metro fiber is concentrated are served by many other CLECs' fiber rings and are also the areas that offer the greatest "potential for further competitive build-out."[127] The presence of multiple CLECs with competitive optical fiber facilities further undermines any basis for competitive concerns arising from the impact of the transaction on AT&T's metropolitan "transport" fiber.[128]

An analysis of AT&T's fiber-based collocations confirms the extent to which AT&T's local fiber already has been and can be duplicated by other competitive carriers. As the Commission has found, "[f]iber-based collocation in a wire center very clearly indicates the presence of competitive transport facilities in that wire center and signals that significant revenues are available from customers served by that wire center sufficient to justify the deployment of transport facilities."[129] AT&T has [REDACTED] facilities-based collocations associated with its metro fiber.[130] Most ([REDACTED]) are

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[126] *Triennial Review Remand Order*, 2005 WL 289015, ¶ 141.

[127] *Id.* ¶¶ 70, 94-95.

[128] *See, e.g.*, *WorldCom/MCI*, 13 FCC Rcd. at 18056, ¶ 51; *In re AT&T Corp., British Telecomms., PLC, VLT Co. L.L.C., Violet License Co. L.L.C., and TNV [Bahamas] Limited Applications,* Order, 14 FCC Rcd. 19140, 19150 ¶ 19 (1999).

[129] *Triennial Review Remand Order*, 2005 WL 289015, ¶ 96.

[130] Fea Reply Decl. ¶ 13.

in an SBC office that satisfies (without counting AT&T's collocations) the "triggers" the Commission established for de-listing both DS1 and DS3 transport,[131] and an additional [REDACTED] are in offices that satisfy the "triggers" the Commission established for de-listing DS3 transport (again, without counting AT&T's collocations).[132] Indeed, as Drs. Carlton and Sider show, there are multiple CLECs collocated in all but [REDACTED] of the central offices in which AT&T has collocated and these handful of offices are spread throughout SBC's entire 13 state territory.[133] These [REDACTED] central offices are far too few and dispersed to have any general competitive significance, and, in any event, they can be reached by other CLECs who deploy entrance facilities to them.

An analysis of AT&T's high capacity loop facilities similarly demonstrates the lack of any competitive impact from the merger. Although merger opponents thus exclusively focus on AT&T's connections to commercial buildings in the SBC region, the fact of the matter is, as explained above, that there are only [REDACTED] such AT&T "lit" buildings in SBC's entire 13-state region[134] (of the hundreds of thousands of commercial buildings in SBC's region that have dedicated connections).[135] About

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[131] The Commission made a national finding of nonimpairment for all transport routes above 12 DS3s of capacity, for all DS3 transport routes between in wire centers having over 24,000 lines or 3 or more facilities based collocators, and for all DS1 transport routes between wire centers having over 38,000 business lines or 4 or more fiber based collocators. *Triennial Review Remand Order*, 2005 WL 289015, ¶ 66.

[132] Fea Reply Decl. ¶ 13. The remaining minority represent about [REDACTED] of SBC switch locations. *Id*. ¶ 13 n.5.

[133] Carlton & Sider Reply Decl., Table 8.

[134] Fea Reply Decl. ¶ 18.

[135] Carlton & Sider Reply Decl. ¶ 31.

[REDACTED] of the AT&T buildings are *already* served by other CLECs[136] – and these buildings represent the substantial majority of the bandwidth AT&T provides to customers today over alternative local facilities in SBC's region.[137]

Because AT&T was able economically to deploy a fiber lateral to all the buildings to which AT&T has direct connections, other CLECs could readily replace the AT&T facilities after the merger. Indeed, the very fact that AT&T constructed facilities to a particular building to serve a particular customer is powerful evidence that the customer is willing to purchase services from a facilities-based competitor and that the customer's demand is sufficient to make it economical to construct facilities to that building. Thus, when AT&T's contract with that customer expires, and the customer's business is again "up for grabs," other carriers have the competitive opportunity to deploy their own facilities and win the customer that AT&T had initially.[138] SBC's retail and wholesale special access prices will thus continue to be constrained by the threat of competitive bypass after the merger, as it is today.

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[136] Fea Reply Decl. ¶ 18; Carlton & Sider Reply Decl., Table 5 (providing data on MSA-specific basis).

[137] Carlton & Sider, Decl. 38, Table 6.

[138] *See* Fea Reply Decl. ¶ 29. Qwest also suggests that consumer harms would result because the merger would eliminate independent competition that AT&T provides through local switches that have been deployed in SBC service territories. Qwest Pet., Bernheim Decl. ¶ 48. But, as Qwest itself has previously argued, there are scores of CLECs who have deployed switches for the purpose of serving customers, and the Commission has made national findings of non-impairment not only for the enterprise switches that AT&T has deployed, *see In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd. 19020 ¶¶ 451-58 (2004) ("*Triennial Review Order*"), but also for mass market switching. *Triennial Review Remand Order*, 2005 WL 289015, ¶¶ 199, 205-225. *Compare*, Reply Comments of Qwest Communications to Application of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 04-313, Oct. 19, 2004 at 48-64, 75-78.

The ability of other CLECs to serve the remaining [REDACTED] buildings is starkly confirmed by the fact that the majority of AT&T's facilities to these buildings would not meet the impairment criteria established in the *Triennial Review Remand Order*. The substantial majority of AT&T's building connections are OCn or near OCn level facilities for which the Commission has already found that there is no impairment anywhere in the country.[139] Indeed, there are many CLECs ready, willing and able to deploy such facilities.

As to AT&T's remaining DSn level facilities, these represent a *de minimis* percentage of AT&T's competitive local activity, for over [REDACTED] of the bandwidth that AT&T provides to customers over local facilities in the SBC region is at the Ocn-level (*i.e.*, two or more DS3s).[140] Further, of AT&T's DSn level facilities, many are in wire centers where the Commission's findings establish that there is no impairment to the deployment of DS1 or DS3 loops (under an analysis that does not count AT&T's existing collocations).[141] Indeed, applicants estimate that of only [REDACTED] percent of the buildings where AT&T is the sole competitive provider of dedicated access services would be deemed "non-impaired" under the Commission's *Triennial Review Remand Order*.[142] And many of these latter buildings are locations to which CLECs could readily construct facilities for other reasons if SBC were to seek to exploit the elimination of AT&T as an independent firm by raising prices to wholesale or retail

[139] *See* Carlton & Sider Reply Decl. ¶¶ 35-36 & Table 4, 5; *see also* Fea Reply Decl. ¶ 30.
[140] Carlton & Sider Reply Decl. ¶ 36.
[141] *Id.* ¶ 41 & Table 5.
[142] *Id.* ¶ 42 & Table 5.

customers in these buildings.[143] The remaining buildings in any given metro area are far too few to have a material effect on price.[144]

When compared to the approximately [REDACTED] direct building connections established by other CLECs – many of whom are firmly in the wholesale business and have established "common space" arrangements that allow them to serve all floors and all customers in their "on-net buildings – it is clear that AT&T's facilities are neither unique nor competitively significant.[145] Thus, any attempt by a combined SBC/AT&T to raise

[143] Fea Reply Decl. ¶¶ 32-34.

[144] Cbeyond's "facts" are not to the contrary. Cbeyond Pet., Wilkie Decl. ¶¶ 22-27. Cbeyond bases its claim that the merger would increase prices by 100% on a single undocumented anecdote about a purportedly typical bidding arrangement for some unspecified capacity of service. *Id*., Wilkie Decl. ¶ 24. While it is not impossible that bids like those alleged have been received in some isolated RFPs, these could only arise in genuinely unique situations in which only AT&T has a short-term cost advantage because of the proximity of AT&T's network to the building housing the particular the customer. Fea Reply Decl. ¶ 38. But as reflected in the description of AT&T's facilities in the text and in AT&T's declarations, these situations are rare. Indeed, if AT&T had the substantial competitive cost advantage over other CLECs and SBC suggested by Professor Wilkie, AT&T would have more than a miniscule share of dedicated access services. *Id.* ¶ 38.

[145] *See WorldCom/MCI*, 13 FCC Rcd. at 18015 ¶ 51 ("An attempted exercise of market power can be constrained if rivals and new entrants have the capabilities and incentives to expand output in response to any anticompetitive practices of all or a group of incumbents."); *In re AT&T Corp., British Telecomms., PLC, VLT Co. L.L.C., Violet License Co. L.L.C., and TNV [Bahamas] Limited Applications,* Order, 14 FCC Rcd. 19140, 19150 ¶ 19 (1999) ("The Commission also seeks to determine if . . . rivals and new entrants have the capabilities and incentives to expand output in response to any anticompetitive practices by the merging entities."); *Ford v. Stroup,* No. 96-5455, slip op. at 4 (6th Cir. 1977*)*("[e]xcess capacity, thereby, deprives a relatively large 'market share' of its normal 'market power.'"); Horizontal Merger Guidelines, 57 Fed. Reg. 41552 (1992), revised, 4 Trade Reg. Rep (CCH) ¶ 13104 at § 2.22 (1997) (a firm is "unlikely" to be able to raise prices "unilaterally" unless "a sufficiently large number of the merged firm's customers would not be able to find economical alternative sources of supply, *i.e.*, competitors of the merged firm likely would not respond to the price increase and output reduction by the merged firm with increase in their own outputs sufficient in aggregate to make the unilateral action of the merged firm unprofitable"); *see also In re AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, 3303, ¶¶ 57-58 (1995); *In re Review of the Prime Time Access Rule*, Report and Order, 11 FCC Rcd. 546, 557, ¶ 24 n.44 (1995).

prices would only succeed in driving customers to alternative providers of special access services that currently serve the dense urban areas covered by AT&T's local networks. There is thus no basis for any divestiture condition.[146]

2. The Vertical Integration That Results From the Merger Will Benefit Consumers in Downstream Markets.

The merger opponents also contend that the merger will harm competition in downstream long distance and other markets that use special access as inputs. Several of these vertical arguments are entirely derivative of claims that the merger will eliminate horizontal competition and substantially increase concentration in wholesale special access markets.[147] For the reasons explained above, the merger will have no substantial adverse effects on horizontal special access competition.

But the merger opponents also advance claims that the merger will have anticompetitive vertical effects even if horizontal special access competition is

[146] For this reason, Qwest is reduced to suggesting that divestiture of AT&T's local assets in SBC's region is somehow preordained by the *preliminary* position the Department of Justice reportedly took *in advance* of a detailed antitrust investigation of a transaction that *never* occurred: Qwest's proposed purchase of Allegiance Telecom in 2004. In particular, that transaction had been proposed in connection with an expedited bankruptcy auction in which the bankruptcy judge and Allegiance creditors were looking for a deal that was quick, with minimal risk. Ron Orol, *Qwest challenges SBC-AT&T tie-up*, Daily Deal (April 27, 2005). Because the proposed Qwest-Allegiance transaction was announced on December 18, 2003 and because the Bankruptcy Court auction was to be held two months later, on February 19, 2004, there was then no or "little time for a full DOJ review." *Id.* In this context, it was clear that DOJ gave "Qwest two options: Either [conditionally agree to] sell off overlapping assets right away in return for regulatory approval or let the agency conduct a much longer analysis." *Id.* Qwest thus conditionally agreed to a divestiture, but as Qwest admits in its Petition, it "reserved the right to continue to argue with DOJ for a less stringent divestiture after the auction and prior to closing its transaction with Allegiance." Qwest Pet. at 47. But because Qwest was not the high bidder at the auction, the transaction did not occur, and DOJ (and the Commission) never conducted a full investigation.

[147] Global Crossing Comments, Farrell Statement ¶¶ 38-40; Qwest Pet., Bernheim Decl. ¶ 89.

unaffected. Several opponents repeat allegations that the Commission is investigating in the Special Access Pricing and Section 272 Sunset Proceedings – *i.e.*, that SBC has market power over special access services and that the Commission's existing regulations allow SBC and other ILECs to charge monopoly prices. These commenters contend that the merger should be disapproved because it will somehow increase the incentive or ability of SBC to harm downstream competitors by raising special access prices or to engage in nonprice discrimination.[148]

These claims do not withstand scrutiny. Rather, the vertical integration that will result from the merger will benefit consumers.[149] Moreover, in any event, the questions of the extent of ILEC market power and the optimal set of price and nonprice regulations of special access services are industry-wide issues for the *Special Access NPRM* and other proceedings and not for this merger review.[150]

In fact, vertical combination through merger generally *benefits* consumers by "reduc[ing] the costs of producing the relevant goods and services, improv[ing] the quality of products, or increas[ing] the variety of alternatives available to consumers."[151]

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[148] Global Crossing Comments at 17-19; Broadwing & SAVVIS Opp. at 31-33.

[149] Carlton & Sider Reply Decl. ¶¶ 68-72.

[150] *See supra* note 19.

[151] *In re Merger of MCI Communications Corp. and British Telecommunications PLC*, Memorandum Opinion and Order, 12 FCC Rcd. 15351, 15409 ¶ 154 (1997) ("*MCI/BT*"); *see also* Carlton & Sider Reply Decl. ¶¶ 69-73; *see also In re Amendment of Section 64.702 of the Commission's Rules and Regulations* ("*Second Computer Inquiry*"), Final Decision, 77 F.C.C.2d 384, 461 ¶ 202 (1980) ("*Computer Inquiry II*") ("vertical integration normally represents, a benign, efficiency-producing method of organizing production"); *In re Qwest's App. to Provide InterLATA Services I*, Order, 17 FCC Rcd. 26303, 26532, ¶ 427 (2002) ("[T]he entry of the BOC into the interLATA market, leads to increased competition for all services. This competition, in turn, should foster efficiencies, innovations, and competitive pricing for communications services. A party alleging a price squeeze must show that the consequences of the price squeeze undermine these benefits."); *United States v. Cargill*; Public Comments and Plaintiff's Response, 65

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As SBC and AT&T demonstrated in their Public Interest Statement, this merger will produce precisely such "[t]ransaction-specific efficiencies" that "are likely to flow-through as benefits" to consumers.[152] SBC and AT&T showed that the integration of SBC's and AT&T's networks, systems and personnel will enable the merged firm not only to respond more quickly and efficiently to business customers' changing and sophisticated needs, but also to offer those customers higher quality, more reliable services, or lower prices than would exist in the absence of the merger.[153]

a. The Merger Will Not Impede Competition for Retail Services Dependent on Special Access Services.

All of the price and non-price discrimination claims advanced by merger opponents rest on the premise that SBC, as an incumbent LEC, has market power in provisioning of special access services and that the merger will enable SBC to "leverage" this market power to impede competition in downstream retail services that depend on special access inputs.[154] SBC and other incumbent LECs, however, *already* are vertically integrated participants in both input and downstream markets, and the merger opponents'

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Fed. Reg. 15982-01 (Mar. 24, 2000) ("In many circumstances, vertical integration is actually procompetitive, allowing firms to reduce their costs."); Herbert Hovenkamp, Federal Antitrust Policy, The Law of Competition and Its Practice, 332-36 (1994); 1984 Merger Guidelines, 49 Fed. Reg. 26823-03, § 4.24 (June 29, 1984).

[152] *In re Whitehall Enterprises, Inc.*, Hearing Designation Order, 17 FCC Rcd. 17509, 17522 ¶ 36 (2002).

[153] *See* Public Interest Statement at 39-44; *see also In re Whitehall Enterprises, Inc.*, 17 FCC Rcd. 17509, ¶ 36 (2002) ("Transaction-specific efficiencies that lower the marginal cost of production are likely to flow-through as benefits."); Carl Shapiro, *Mergers with Differentiated Products*, 10 Antitrust 23, 28 (1996) (even a monopolist "will have an incentive to set a lower price, the lower are its incremental cost"); *accord* Phillip E. Areeda, *et al.*, Antitrust Law ¶ 1003b (2002)(vertical mergers benefit consumers when they reduce input costs of downstream firm).

[154] *See, e.g.*, ACN Comments at 35; Broadwing & SAVVIS Opp. at 29-31.

vertical price squeeze and discrimination arguments are the subject of intense debate in the ongoing industry-wide proceedings. There, the Commission will determine the appropriate mix of regulation and market forces to address any such concerns that may be found to have merit.[155]

The merger opponents contend that deferral of price and non-price discrimination issues to pending Commission rulemaking proceedings is inadequate because those proceedings cannot restore competition "lost" from the merger.[156] But as explained above, no substantial horizontal competition is eliminated by the merger.

b. The Opponents' Other Claims Are Meritless.

The additional "vertical" theories advanced by merger opponents are patently insufficient to establish such merger-specific harms. To the contrary, close inspection of the merger opponents' special access-related discrimination claims exposes them as opportunistic and makeweight attempts to advantage or protect opponent-competitors by

[155] *See Special Access NPRM*, 2005 WL 235782, ¶ 1 (we have "commenced a broad examination of the regulatory framework to apply to price cap local exchange carriers' ("LECs") interstate special access services"); *In re Performance Measurements and Standards for Interstate Special Access Services*, Notice of Proposed Rulemaking, 16 FCC Rcd. 20896, 20897, ¶ 1, n.3 (2001) ("*Special Access Performance Measures NPRM*") (we will examine whether incumbent LECs are discriminating in "favor of [their] own retail operations" with respect to "special access provisioning"); *In re Section 272(F)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Further Notice of Proposed Rulemaking, 18 FCC Rcd. 10914, 10931, ¶ 32 (2003) ("We seek comment on whether BOCs and independent LECs possess market power with respect to inputs which they could use to raise rivals' costs because these inputs are critical to a firm's ability to provide in-region, interstate and international, interexchange telecommunications services to end user customers."); *id.* ¶ 35 (we will adopt the "regulatory requirements, if any, [that] are necessary to protect against potential harms to these markets that might result from BOCs' and independent LECs' market power in local exchange and exchange access markets"); *see also supra* note 19.

[156] *See* Broadwing & SAVVIS Opp. at 34-35; Global Crossing Comments at 20-21, Farrell Decl. ¶ 37.

denying consumers the very real benefits of integration.[157] Merger opponents do not even attempt to show that the price, performance and other regulations that they are currently urging the Commission to impose on all vertically integrated incumbent special access providers would not be equally efficacious at constraining the risk – increased or not – of the same types of special access-related discrimination by a combined SBC/AT&T. Nor could they in light of the Commission's repeated findings – endorsed by the courts – that it is fully capable of using direct price and non-price regulation to protect against any real and substantial threats of access-related predatory behavior.[158]

For example, Qwest's argument that the mere addition of AT&T's long distance network might increase SBC's incentives to discriminate in the provision of access services, because SBC is today dependent upon wholesale long distance transport

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[157] *See, e.g.*, *Illinois Cities of Bethany v. FERC*, 670 F.2d 187, 200 (D.C. Cir. 1981) (the price squeeze "doctrine is not . . . , we emphasize, designed to subsidize particular retail competitors"); *In re Joint Application by SBC Communications Inc., et al.*, Order on Remand, 18 FCC Rcd. 24474, 24480, ¶ 13 (2003) (valid access-related discrimination claims must show that "*efficient* competitors are [precluded] from entering a market") (emphasis added); *see also Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) ("we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition").

[158] *See, e.g.*, *In re Access Reform Order, Price Cap Performance Review of Local Exchange Carriers*, First Report and Order, 12 FCC Rcd. 15,982 ¶¶ 277-81 (1997) ("*Access Reform Order*"), *aff'd, Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 548 (8th Cir. 1998); *In re Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9597-98 ¶¶ 19-20 (2000), *aff'd, CompTel v. FCC*, 309 F.3d 8 (D.C. Cir. 2002); *In re Bell Atl. Mobile Sys. Inc. and NYNEX Mobile Communications Co.*, Memorandum Opinion and Order, 12 FCC Rcd. 22280, 22288 ¶ 15, n.44 (1997) (rejecting claim that Commission's regulatory authority is inadequate to deal with any increased incentive and ability to price squeeze or engage in non-price discrimination that might result from the merger); *SBC/SNET*, 13 FCC Rcd. at 21303-304 ¶¶ 23-24; *In re Application of GTE Corp. and Bell Atlantic Corp.*, Memorandum Opinion and Order, 15 FCC Rcd. 14032, 14124-26, ¶¶ 196-198 (2000) ("*Bell Atlantic/GTE*").

purchased from other carriers,[159] has already been rejected by the Commission in the very proceeding that created today's Qwest. In that proceeding, opponents of the merger argued that the merged company's ownership of both local access and inter-exchange facilities (as compared to the incumbent LEC's pre-merger resale of inter-exchange services) would increase its incentive to "discriminate against long distance rivals and give[] it the ability to degrade the quality of access provided for calls by [its] competitors that terminate in [its local] service territory."[160] The Commission, consistent with Qwest's urging in that merger proceeding, dismissed this contention, reasoning that "an incumbent LEC . . . would have the same incentive to degrade the quality of . . . access it provides to competing interexchange carriers whether the incumbent LEC is providing . . . [interexchange] service over facilities it constructed or that it purchased from another carrier."[161]

And contrary to Global Crossing's claim,[162] SBC's acquisition of AT&T's established national and international enterprise business undermines the price squeeze concern. The national and international enterprise customers that AT&T brings to the merger tend to be very high-demand customers that typically require the OCn-level

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[159] Qwest Pet., Bernheim Decl. ¶¶ 84-87.

[160] *In re Qwest Communications Int'l Inc. and US West, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 5376, 5397, ¶ 40 (2000) ("*Qwest/US West*").

[161] *Qwest/US West*, 15 FCC Rcd. at 5398, ¶ 42; *see also SBC/PacTel*, 12 FCC Rcd. at 2449, ¶ 54 ("we observe that both SBC and PacTel are capable of price squeezes at present, and the pertinent issue in this [merger] proceeding is the incremental increase in the scope of the price squeeze that the proposed transfer will make possible for the first time"). These holdings likewise provide the complete answer to Broadwing's claims based on SBC's alleged history of favoritism with regard to its Section 272 affiliate. Broadwing & SAVVIS Opp. at 32-33.

[162] Global Crossing Comments at 18.

services that the Commission has found are suitable for competitive supply.[163] Even to the extent such customers are located primarily in SBC's region – and most are not – SBC simply has no ability or incentive to raise special access prices above marketplace levels; all that would accomplish would be to induce retail providers either to build their own facilities to serve these customers or to contract with other CLECs to do so.

c. The Merged Company Will Not Be More Able To Effect a Price Squeeze.

In all events, the opponents ignore that an attempted price squeeze in this context requires a substantial upfront sacrifice of profits the firm would otherwise enjoy, and that an incentive to incur these opportunity costs can therefore only exist where the firm can expect to recoup them through future exercises of market power in the downstream market. The merger, however, will not increase at all the ability of SBC to "recoup" the profits it would sacrifice from undertaking a price squeeze strategy.

As the Commission has recognized, predatory conduct involving profit sacrifice is only rational if it achieves durable market power in downstream markets:

> Such a strategy could be profitable only if the vertically integrated firm cannot already fully extract monopoly rents from its control of the input price, and even then only in certain circumstances. For instance, the integrated firm subsequently must be able to raise the downstream price of the end-user service long enough to recoup its losses after its rivals have exited the market, without inducing new entry.[164]

[163] *Triennial Review Remand Order*, 2005 WL 289015, ¶ 177.

[164] *MCI/BT*, 12 FCC Rcd. at 15413, ¶ 162 (1997); *see also Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 23 (1st Cir. 1990) ("the extension of monopoly power from one to two levels does not necessarily, nor in an obvious way, give a firm added power to raise prices").

The Commission has held that those conditions rarely exist in "dynamic" telecommunications markets subject to active Commission oversight: "We find that firms in dynamic industries such as telecommunications generally do not have the incentives to engage in predatory practices, because the success of such practices rests on a series of speculative assumptions."[165]

The opponents do not even remotely demonstrate that the merger will enhance the likelihood that SBC would "recoup" any profit sacrifice. For recoupment to be possible, the price squeeze must have succeeded in giving SBC sustainable market power in retail long distance markets that are today robustly competitive. In other words, to succeed with this strategy, SBC would have to so permanently foreclose competition for the minority of retail enterprise customers that are heavily focused in-region – notwithstanding, *inter alia*, customer, product and provider differentiation and regulatory oversight – that it could *sustain* significant retail price increases.

But SBC could not succeed if demand from the majority of customers that are *not* heavily focused in SBC's region would be adequate to ensure the survival of other national and regional competitors that would both retain their national networks and would, indeed, continue to serve many locations in SBC's region in providing service to customers that, although not heavily focused in SBC's region, have offices there. If the *potential* in-region competition from these existing players, who could use their existing

[165] *AT&T /TCI*, 14 FCC Rcd. at 3215, ¶ 118 n. 327; *In re Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23891, 23979, ¶ 199 n.405 (1997); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588-91 (1986) (predatory conduct that requires profit sacrifice is "rarely tried, and even more rarely successful").

sales forces and infrastructure to respond to bid requests from sophisticated in-region customers seeking alternatives to SBC's raised retail prices, would defeat any significant price increase, then SBC would have no possibility of recoupment. And the merger opponents have failed entirely to show that the merger makes that any less likely – with or absent the merger, other providers of long distance infrastructure and capabilities will remain in the market, and they will be no more dependent on SBC for local access after the merger than before.

For these reasons, the Commission has previously rejected claims that ILECs could use market power in local services to effect vertical price squeezes that will foreclose competition in long distance markets, where the existence of numerous established carriers with sunk investments in national networks renders improbable any claim that ILECs could hereafter recoup the profits that would be sacrificed.[166] Likewise, the Commission in the *Triennial Review Remand Order* rejected price squeeze claims in long distance markets where there are established firms with sunk investment.[167]

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[166] *See, e.g., In re Application by SBC Communications Inc., et al. for Authorization to Provide In-Region, InterLATA Services in California*, Memorandum Opinion and Order, 17 FCC Rcd. 25650, 25741-41, ¶¶ 157-59 (2002); *see also WorldCom, Inc. v. FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001) ("the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed," because "that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market"); *Access Reform Order*, 12 FCC Rcd. at 16102-03, ¶ 281 ("At least four interexchange carriers – AT&T, MCI, Sprint, and LDDS WorldCom – have nationwide, or near-nationwide, network facilities that cover every LEC's region. . . '[e]ven in the unlikely event that [LECs' interexchange affiliates] could drive one of the three large interexchange carriers into bankruptcy, the fiber-optic transmission capacity of that carrier would remain intact, ready for another firm to buy the capacity at distress sale and immediately undercut the [affiliates'] noncompetitive prices [']").

[167] *Triennial Review Remand Order*, 2005 WL 289015, ¶ 36 & nn.107, 64. The only context in which the Commission in that order credited evidence of risks of vertical price squeezes are in local service markets where competition is still developing and where the

Footnote continued on next page

d. The Merger Will Not Affect Incentives to Engage in Non-Price Discrimination.

The opponents' claim that the merger will enhance SBC's incentive to engage in non-price discrimination[168] fares no better. Indeed, they fail to identify anything about the merger that would impact SBC's incentives in this regard. Non-price discrimination, no less than price discrimination, generally comes with significant upfront opportunity costs in the form of reduced sales of high-margin services. And here there is not only future recoupment to worry about, but also the risk of substantial fines and penalties if the conduct is detected. This is a very real risk, because to be effective as a means of foreclosing downstream rivals, non-price discrimination must be both sufficiently severe and occur over a sufficiently long period of time that customers find the rivals' services so inferior that they would be willing to pay SBC more for the same services.

Special access inputs are relatively simple from a provisioning standpoint, have been provided for decades, and do not require the same complex systems that had to be developed to provide UNEs and enable local competition. In positing broader post-merger non-price discrimination, therefore, the merger opponents predict circumstances in which detection is certain and punishment likely to be *more* severe, thereby reducing incentives to engage in the misconduct.[169]

Footnote continued from previous page
Commission has addressed the risk by granting local carriers access to certain ILEC loop and transport facilities at cost-based rates. *Id.* ¶ 64.

[168] Broadwing & SAVVIS Opp. at 31-33; CompTel-ALTS Pet. at 50.

[169] The merger opponents raise a host of unsubstantiated claims of non-price abuses by SBC. Those claims are irrelevant to the Commission's consideration of the merger. *See Qwest/US West,* 15 FCC Rcd. at 5403-04 ¶ 59 (although complaints about past discrimination raise "serious" issues, "we are not persuaded that the merger would *increase* US WEST's incentive or ability to provide poorer performance" to rivals) (emphasis added).

In sum, the opponents have raised no special access-related discrimination claims that would result from the merger that could possibly justify the conditions they seek – or, indeed, that are even appropriate for consideration in this merger proceeding, given the pendency of ongoing industry-wide rulemaking proceedings in which the Commission is considering these issues. If the merger opponents demonstrate that special-access related discrimination is a real and substantial threat, the Commission will address it directly with appropriate industry-wide regulation. That is the appropriate way to deal with such concerns and does not create the very real risk of party-specific conditions that not only deny consumers the benefits of vertical integration, but create a tilted playing field that handicaps some competitors relative to others.

B. The Merger Will Not Reduce Competition in Provision of Internet Backbone Services.

The most striking thing about the oppositions as they relate to Internet backbone competition is not what the opponents say, but what they do not say.

- There is *no* suggestion that this transaction involves the combination of two large Tier 1 backbones, (like the prior cases MCI/WorldCom and WorldCom/Sprint), nor is there any dispute about the fact that SBC is not a Tier 1 backbone.

- There is no argument that this transaction alone will lead to dominance or de-peering (only speculation about the combined effect of this deal and Verizon/MCI).

- There is no concern expressed by numerous other backbone providers of varying sizes – many of which are peered with AT&T – including Level 3, Global Crossing, Sprint, NTT Verio, Cogent, Equant, Teleglobe, or XO Communications, about being de-peered or otherwise disadvantaged by this transaction.

- There is no concern expressed by major backbone customers such as ISPs like AOL and MSN, nor by access providers representing over 90% of the

residential and small business broadband lines not served by either SBC or Verizon.

- There is no economic evidence or analysis (as opposed to rampant speculation) of any anticompetitive effect in backbone services.

Rather, a few opponents attempt to create backbone issues where none exist, in a transparent attempt to further their commercial advantage.

1. Concerns Over the Creation of Two Potential "Mega Peers" and Global De-Peering Lack Factual and Economic Foundation.

No party has argued that the combination of SBC and AT&T alone will harm competition in the Internet backbone segment. Not a single commenter claimed that the combination of SBC and AT&T, in the absence of a Verizon/MCI merger, would have any adverse effect on backbone competition. It is, therefore, undisputed that the combined company would not be of sufficient size to engage, on its own, in a strategy of global degradation or de-peering. And that should be the end of the question. Moreover, if SBC/AT&T and Verizon/MCI only peered with each other, the most immediate impact would be on other major backbones, but none of the other major backbones – among them, Level 3 and Sprint – expressed concern about backbone competition in their filings here.[170]

[170] Their silence on this issue contrasts quite sharply with their position in prior proceedings where these competing backbones did not hesitate to raise such issues with the Commission. *See* Ex Parte Presentation of Sprint Corp. to Application of MCI/Worldcom in CC Dkt. No. 97-211 at 2 (June 1, 1998) ("The proposed merger . . . will adversely affect competition in the core Internet backbone market."); Comments of Global Crossing Telecommunications, Inc. to Application of MCI/Sprint in CC Dkt. No. 99-333 at 2 (Feb. 18, 2000) ("The combination of MCI's and Sprint's Internet backbone businesses would raise concentration levels to unacceptably high levels by any traditional measure."); Reply Comments of Level 3 Communications, Inc. to MCI/Sprint, CC Dkt. No. 99-333 at 17 (Mar. 20, 2000) ("The Commission now has the unique . . . opportunity to . . . preserve pro-competitive interconnection in the Internet backbone market.").

a. The Combined Effect of Two Transactions Will Not Create Two "Mega-Peers".

Lacking a basis to challenge this transaction on its own merits, ACN, CFA, CompTel/ALTS, EarthLink and Broadwing argue that the Commission must examine the impact of the SBC/AT&T transaction in the context of, and concurrently with, the acquisition of MCI by Verizon.[171] The theory is that the two combined companies will become "mega-peers" that will peer only with each other, forcing all other backbone providers to pay for service. However, an understanding of the current competitive nature of the backbone and fundamental economic principles demonstrates that the speculative claims of these opponents must be rejected.[172]

First, SBC is not a Tier 1 backbone today and thus its merger with AT&T will not have an adverse impact on peering. Second, MCI's backbone is no longer so large that a Verizon/MCI transaction would create a "mega-peer." MCI's fall from the top of the Internet backbone business was documented in SBC's and AT&T's Public Interest Statement, and confirmed in the Public Interest Statement filed by Verizon and MCI. As noted there, MCI is now just one of at least 7 companies that each has between 5 and 12.5 percent of total Internet traffic.[173]

[171] As discussed above in the Introduction, the Verizon/MCI merger is not relevant to this proceeding.

[172] SBC and AT&T note that the "two mega-peer" arguments being advanced are premised on assertions ranging from mutual forbearance to outright collusion. These claims are addressed in Section III.H *infra*. The arguments advanced here show that, in any event, there is no cause for concern as to backbone competition.

[173] *See* Application for Approval of Transfer of Control of Verizon Communications, Inc. and MCI, Inc. in WC Dkt. No. 05-75, Exh. 1 (Public Interest Statement) at 64 (Mar. 11, 2005).

A number of critics challenge the traffic and revenue data originally advanced by SBC and AT&T, claiming that they are out of date. In response, SBC and AT&T have compiled additional information from AT&T's records on peering capacity (which may be viewed as another proxy for relative size and significance of a backbone), and from SBC's records on traffic flows by originating and destination backbone. Dr. Schwartz has compiled those data in Tables 1-3 to his Reply Declaration attached to this Joint Opposition.

As shown there, MCI not only is not at the top, it is in fact well down the list as measured by peering capacity with AT&T. Further, there are four additional backbones that are all quite close to MCI, and several of them have increased their peering capacity with AT&T more rapidly than has MCI.[174] Even if Verizon's traffic represented 50% of MCI's traffic today (which is the approximate ratio of SBC's traffic to AT&T's), the combined Verizon/MCI would still rank no higher than third and would be well behind AT&T's top peer.[175]

Thus, there will not be two "mega-peers" but rather there will be several backbone providers of comparable size. Consequently, SBC/AT&T's incentives to peer with Verizon/MCI will be the same as they will be with at least the two additional backbone providers that will remain, post-merger, larger than Verizon/MCI, as well as with several other backbones of comparable size – some of which are exhibiting growth rates in excess of MCI's. SBC/AT&T, even acting in conjunction with Verizon/MCI,

[174] Reply Declaration of Marius Schwartz ("Schwartz Reply Decl."), Table 1.
[175] *Id.*

would not have the leverage to de-peer these other backbones. As Dr. Schwartz concludes:

> In sum, the above facts reveal that the global degradation/de-peering scenario is unsupported and indeed far fetched. Even assuming collusion or forbearance between a merged SBC/AT&T and Verizon/MCI, those entities would still have too small a share of the Internet user base, and would face too many comparable competitors, to impose de-peering on all their current IBP peers.[176]

In other words, SBC/AT&T would have the same incentive as AT&T has today to peer with all other backbone providers.

A number of opponents claim that the traffic share analysis of Dr. Schwartz is flawed because it does not account for movement of SBC's current transit traffic away from Sprint and onto AT&T.[177] However, as Dr. Schwartz explains, the simple answer is that only a small fraction of SBC's total Internet traffic used in the calculations in his initial Declaration was subject to the Sprint transit agreement, and moving this traffic from Sprint to AT&T will not materially alter the market shares of any Internet backbone provider ("IBP").[178]

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[176] *Id.* ¶ 26.

[177] SBC notes that the original declaration of Christopher Rice stated that SBC has purchased transit from Sprint, Level 3 and WilTel. SBC has subsequently confirmed that it purchases Internet backbone transit only from Sprint; it uses the three named carriers for its other transport.

[178] *Id.* ¶ 8. Further, the aggrieved party would be Sprint, not EarthLink or CompTel/ALTS who raised this issue, and Sprint has not filed any objection to the transaction.

b. The SBC/AT&T and Verizon/MCI Transactions Will Not Place Enough "Eyeballs" in the Merging Parties to Support Global De-Peering.

The opponents try to distinguish SBC/AT&T and Verizon/MCI from other backbones by arguing that SBC's and Verizon's broadband ISPs give these two backbones access to more "eyeballs" (*i.e.*, residential and business users who are in search of content). The theory is that eyeballs are more valuable than content (*i.e.*, web pages or other internet destinations). Even assuming, *arguendo,* that a monopoly over eyeballs would lead to a monopoly over content, SBC's and AT&T's shares of eyeballs do not remotely approach monopolization levels.

(i) Cable Companies and Other ISPs Have Significantly More "Eyeballs" Than the Two Merging Parties.

When evaluating traffic shares of IBPs, it must be remembered that an IBP competes for Internet traffic provided by ISPs. While some ISPs (including SBC and Verizon) are themselves IBPs, many are not. For those ISPs that are not IBPs, the movement of any one of them from one IBP to another will have a significant impact on the traffic shares of the affected IBPs. The table below sets forth the number of residential and small business broadband lines reported in public statements by the broadband ISPs listed:

SBC	5.6 million
Verizon	3.9 million
Total	**9.5 million lines**

Comcast	7.4 million
Time Warner Cable	3.9 million
Cox	2.6 million
Bell South	2.3 million
Charter	1.88 million
Adelphia	1.4 million
Cablevision	1.35 million

Qwest	1 million
Sprint	551,000
Covad	547,000
Insight	367,000
Mediacom	367,000
AllTel	283,000
RCN	220,000
Cable One	178,000
CenturyTel	173,000
Cincinnati Bell	131,000
Total	**24.64 million lines**

Source: Company websites or 10-K Filings, reporting latest available line counts (either First Quarter 2005, or Fourth Quarter 2004).

The opponents cannot seriously argue that global de-peering is a viable strategy when, for residential and small business customers more than 70% of the total "eyeballs" are controlled by ISPs not party to either this or the Verizon/MCI transaction.

(ii) Large Business Customers Likewise Are Not Controlled by the IBPs.

Larger business customers also are able to, and do, switch ISPs, leading in turn to a switch in IBPs. As detailed in the Reply Declaration of Marius Schwartz, dedicated Internet access customer switching is common, and "[c]ustomers can retain their web and e-mail addresses when switching" backbone suppliers.[179]

In addition to its residential DSL customers, SBC of course also serves business customers with dedicated Internet access. As noted by Dr. Schwartz, however, that traffic is of considerably less volume than SBC's DSL traffic.[180] SBC recently completed an analysis of lost broadband business customers, and concluded that it had experienced

[179] Schwartz Reply Decl. ¶ 25.

[180] *Id*. ¶ 23.

significant customer turnover, with a majority of the disconnected circuits being lost to cable companies.[181] AT&T also has experienced an appreciable level of business Internet access customer churn.[182]

For all the above reasons, it is not credible to assert that this transaction by itself, or even the two transactions combined, could lead to global de-peering.

2. Claims of Targeted Degradation/De-Peering Are Not Credible.

Broadwing alternatively claims that, in the absence of global de-peering, the newly-created "mega peers" would adopt a policy of refusing "to accept terminating traffic or . . . demand[ing] economically ruinous paid for peering or transit payments."[183] They hypothesize that SBC and AT&T would utilize this strategy on an individual IBP basis, thereby "picking off the smaller rivals first" in order to increase their market shares. This theory is both factually baseless and contrary to SBC/AT&T's economic interests.

Any increase in the merged company's transit prices (or attempts to impose paid peering) would, in fact, only result in the migration of traffic to one of several other IBPs (with which the merging parties would have to continue accepting as peers), thereby defeating the price increase and simultaneously reducing the merged company's own traffic. Additionally, AT&T's existing pre-merger peering relationships with several IBPs that are only a fraction of its own size indicate that a strategy of targeted de-peering

[181] *Id.* ¶ 24.

[182] Reply Declaration of Susan Martens ("Martens Reply Decl.") ¶ 13.

[183] Broadwing & SAVVIS Opp., at 44.

is not a profitable one. After the merger, just as before, SBC/AT&T will continue to peer with a very large number of IBPs.

a. Targeted De-Peering Rests on Assumptions That Are Contrary to Fact.

As Dr. Schwartz explains, the economic theory of targeted de-peering has, as a necessary condition, that the supposed victim be denied the ability to reach the de-peering backbone via another route. Where the supposed victim can reach the de-peering backbone's customers via a transit agreement with another Tier 1 IBP that is peered with the de-peering backbone, targeted de-peering cannot be successful.[184]

As noted by Dr. Mathew Dovens, Broadwing's economist, only a single transit agreement with a Tier 1 IBP is required to achieve universal connectivity.[185] Since there are a sufficient number of significant-sized Tier 1 IBPs remaining after the merger that can provide such connectivity, transit opportunities will remain competitively priced. Such transit does not have to be purchased from the merging parties, contrary to the statements of opponents.

Moreover, transit is, and will remain, competitively priced. The highly competitive nature of transit is indicated by the steep fall in transit prices. According to Telegeography, the price of transit in major U.S. cities declined by 55% in the 12-month period from the second quarter of 2003 to the second quarter of 2004. The competitive nature of the business is further evidenced by Internet sites such as Band-X,[186] where

[184] Schwartz Reply Decl. ¶ 30; Broadwing & SAVVIS Opp., Declaration of Dr. Matthew P. Dovens at 7, ¶ 17 ("Dovens Decl.").

[185] *See* Broadwing & SAVVIS Opp., Dovens Decl. ¶ 13 (noting that "a single transit contract with a Tier-1 peer is sufficient to ensure connectivity with any Internet user").

[186] *See* http://www.band-x.com/en/networks/.

transit prices can be easily observed and transit purchased in a competitive auction environment. If the connections to be switched are collocated at one of the hosted peering points (for example, at Equinix or NAP of the Americas), the costs to switch from one IBP to another as the transit provider are trivial – most such connections are made at hosted sites in any event, so the cost consists mostly of reconfiguring routers within an existing location. Thus, the merger will have no impact on the competitive level of transit prices.

The same facts demonstrate that targeted de-peering would not be a profitable strategy, since the performance of the SBC/AT&T backbone and the targeted backbone will both suffer in comparison to the number of other Tier 1 backbones for which service is not degraded. As Dr. Schwartz explains, while there is a potential "first effect" gain from attempted targeted de-peering, any analysis must account for the "negative second effect" – the loss of competitiveness against the significant number of non-degraded rivals that remain. Thus, whether measured by total traffic or other proxies for the size of the customer bases, *even a large relative size advantage over a rival is not sufficient to make targeted degradation profitable*."[187]

Thus, the claim of targeted de-peering fails because it rests on assumptions that are counterfactual.

b. Peering Policies Will Continue to Be Competitive.

[187] Schwartz Reply Decl. ¶ 31.

Broadwing argues that the combined SBC/AT&T will be "eyeball" heavy, and that a monopoly over eyeballs will eventually lead to a monopoly over content.[188] There are numerous flaws with the Broadwing arguments.

First, as Dr. Schwartz notes, the core premise of the complaint is that SBC/AT&T will have the capability to engage in global de-peering, a premise that has been shown to be false. Second, SBC and AT&T have compared their in/out ratios with numerous other companies, including both Internet backbones and cable companies.[189] As the tables in those declarations show, the in/out ratios are well within the 2:1 generally used by larger IBPs.[190] It is, therefore, mathematically impossible for the combination of SBC and AT&T to alter the ratios in question enough to warrant de-peering any of the existing AT&T peers on the basis of a change in in/out ratios. As Dr. Schwartz points out, "it is difficult to comprehend why the merger of two similar 'eyeball heavy' networks would produce a material change in their inbound/outbound ratio with a network like SAVVIS."[191]

At bottom, the Broadwing/SAVVIS complaint is that, because of their own business decisions, Broadwing or SAVVIS may fall out of balance with the combined

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[188] Broadwing & SAVVIS Opp. at 49.

[189] *See* Reply Declaration of Ren Provo ("Provo Reply Decl.") ¶ 4, Table 1; Martens Reply Decl. ¶ 16.

[190] This is not surprising since the bandwidth of data required for queries sent to websites is not much different than the bandwidth of the webpage returned in response. "Content" is really driven by large file transfers, such as video downloads or very large email file attachments. Reply Declaration of Christopher Rice ¶ 9 ("Rice Reply Decl."). Business customers are likely to be significant senders and receivers of such content, which is consistent with the balance of in/out traffic observed by the parties. Schwartz Reply Decl. ¶ 28.

[191] Schwartz Reply Decl. ¶ 34.

company, and thus not meet the 2:1 ratio that SAVVIS itself says is a common requirement of IBPs today. Given that there are valid cost-based reasons for the 2:1 ratio,[192] it is difficult to see how the issue – which seems unique to these opponents, and in any event is governed by their own business decisions – gives rise to a merger-specific competitive concern.[193]

(i) AT&T's Pre-Merger Conduct Demonstrates That Targeted De-peering Would Not Occur.

If targeted de-peering based on the relative size of total Internet traffic were a viable strategy, one would have expected one of the largest backbones to selectively de-peer the very smallest of its peers, as a strategy to grow share. AT&T's pre-merger conduct, however, undercuts any notion that such targeted de-peering occurs.

As detailed in Table 1 to the Schwartz Reply Declaration, AT&T today peers with two companies that, based on peering capacity, are approximately one-tenth the size of Level 3. Moreover, since Level 3 is approximately the same size as AT&T in traffic, AT&T today is peering with companies that represent a share of total Internet traffic that

[192] *See, e.g.*, Martens Reply Decl. ¶¶ 3-10; Rice Reply Decl. ¶¶ 5-9.

[193] Broadwing recognizes this imbalance imposes economic costs by having adopted their own in/out ratios for peering, but argue that increased costs should be borne by ISP serving the consumers rather than the ISP serving the content providers. *See* Broadwing & SAVVIS Opp. at 53. (IBPs should "charge those eyeball customers the additional costs of delivering their traffic.") The effect of that proposal, however, will be to raise consumer rates for Internet access, a result hardly consistent with the public interest.

Similarly, EarthLink's complaint that it will lose "free" access to SBC's customers should be rejected. EarthLink Pet. at 5. As the Commission has consistently held, the continued economic health of a particular party is not relevant to its evaluation of a transaction. What is relevant is whether the transaction will deprive the public of access to competitive sources of supply. Given the competitive nature of the Internet, and of Internet access, there is no basis for Commission action here. Certainly ISPs cannot credibly ask this Commission to grant settlement-free access to the much larger and therefore more valuable AT&T backbone network.

also is about one-tenth of the size of the Internet traffic accounted for by AT&T. If AT&T did not find it profitable to selectively de-peer in these circumstances, there is no evidence or theory that would support the claim that SBC/AT&T would selectively de-peer much smaller IBPs post-merger.[194]

Post-merger, there will still be at least ten companies whose share of total Internet traffic will be large enough to justify continued peering (assuming that all peering policy criteria are otherwise satisfied, as they are today by these companies) and, with the exception of SAVVIS, none of the Internet backbone providers in question has complained about the backbone aspects of this transaction. Moreover, as noted below, the peering policies of the major IBPs generally require only a minimum of traffic (normally 1 Gbps),[195] in addition to the criteria of geographic coverage and in/out ratios. Thus, even smaller Internet backbones will continue to qualify for settlement-free peering post-merger, whether or not their proportion of total Internet traffic grows, so long as they continue to meet the terms of the peering policies.

C. The Merger Will Not Increase Any Supposed Potential for Discrimination by the Merged Company Against Competing Providers of IP-Enabled Services.

There is no merit to the claim, advanced by Vonage, Global Crossing, ACN and others, that the merger will increase the risk of discrimination against unaffiliated providers of VoIP and other IP-enabled services.[196] These opponents contend that the

[194] EarthLink's comments that AT&T would not peer with any backbone that is less than one-third the size of AT&T is thus contrary to the facts. *See* EarthLink Pet. at 4; Schwartz Reply Decl. ¶¶ 27-28.

[195] Martens Reply Decl. ¶ 9.

[196] *See*, *e.g.*, Vonage Opp. at 9, 10; Global Crossing Comments at 22-24; ACN Comments at 45 n.111, 73-74; Qwest Pet. at 31, 36; CompTel-ALTS Pet. at 36-38.

merged company would have the incentive and ability to use its last mile or backbone facilities to favor its own VoIP (and other IP-based) products. But the merger will not increase concentration for last-mile broadband or Internet backbone services.

Accordingly, none of the opponents' concerns have anything to do with the merger. Indeed, most are complaints that opponents already have raised in various pending Commission proceedings, and they labor in vain to explain how the merger could give those complaints greater plausibility. The concerns raised here should be examined in one of the pending rulemaking proceedings opened for the purpose of investigating these alleged discrimination concerns on an industry-wide basis and should not be addressed in this proceeding.[197]

1. The Merged Company Will Not Increase the Potential Risk of Discrimination Against Unaffiliated VoIP Providers in the Last Mile.

Vonage and Global Crossing argue that the combined company will have a greater incentive to use its last mile facilities to discriminate against competing VoIP providers.[198] But this argument fails at step one. By the end of 2004, AT&T CallVantage had signed up only a modest 53,000 subscribers *nationwide,* only a fraction of whom reside in SBC's territory.[199] And SBC has already invested heavily in the

[197] *See, e.g.*, *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Notice of Proposed Rulemaking, 17 FCC Rcd. 3019, 3040-41, ¶ 43-44 (2002); *IP-Enabled Services NPRM*,19 FCC Rcd at 4911-13 ¶¶ 73-74.

[198] *See generally* Vonage Opp. at 14-16; Global Crossing Comments at 23-24.

[199] AT&T Corp., SEC Form 10-K Statement (filed Mar. 10, 2005) at 9 (providing information for year ending December 31, 2004); *see also* Public Interest Statement at 42-43; Kahan Decl. ¶ 33; Polumbo Decl. ¶ 13; Carlton & Sider Decl. ¶¶ 42, 55; Lehman Brothers, *Equity Research, Change of Earnings Forecast: AT&T* at 3 (Jan. 21, 2005) ("[w]ithout demonstrated success, we are not assuming significant CallVantage growth.").

development of its *own* suite of VoIP and other IP-enabled services for business customers, a product AT&T lacks.[200] The addition of AT&T's CallVantage VoIP product will therefore change almost nothing. In the near future, AT&T CallVantage will represent just one small part of the two companies' combined deployment of such IP-enabled services.[201] In short, the merger could not possibly increase whatever theoretical incentive SBC might otherwise have to discriminate against unaffiliated VoIP providers.

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[200] SBC now offers VoIP service to business customers through its Hosted IP Communication Service ("HIPCS") product line, which has included VoIP since its launch in 2003. Press Release, *SBC Communications Introduces IP Product Portfolio To Serve Enterprise Customers Nationwide* (Nov. 20, 2003), *at* http://www.sbc.com/ gen/press-room?pid=4800&cdvn=news&newsarticleid=20741; *see also* SBC Communications Inc., *SBC PremierSERV SM Hosted IP Communication Service (HIPCS), at* http://www02.sbc.com/ Products_Services/Business/ProdInfo_1/1,,1358--1-1-0,00.html. And SBC recently announced its planned "U-verse" brand of IP-based products and services, which will include a consumer-oriented VoIP service. Press Release, *SBC Communications Unveils U-Verse Experience At International Consumer Electronics Show* (Jan. 6, 2005) *at* http://www.sbc.com/ gen/press-room?pid=4800&cdvn=news&newsarticleid=21541. SBC has further committed $4 billion to the deployment of a new fiber-rich network to provide VoIP and other IP-enabled services to 18 million households in SBC's 13-state region by 2007. Press Release, *SBC Communications Selects Microsoft TV For Advanced IP Television Service: Targeted For 2005, Service Will Change Entertainment For Millions* (Nov. 17, 2004) *at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news& newsarticleid=21463. SBC's advocacy before the Commission similarly demonstrates its long-term commitment to IP-enabled services. *See, e.g.*, *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29 (filed Feb. 5, 2004); Comments of SBC Communications Inc. to FCC's Notice of Proposed Rulemaking Regarding IP-Enabled Services in WC Dkt. No. 04-36. (May 28, 2004).

[201] As Chris Rice notes in his Reply Declaration, "SBC both originates and terminates VoIP traffic. SBC is currently a provider of VoIP service, for example in its suite of business services. Further, SBC intends to expand the range of VoIP services it provides, including using AT&T's CallVantage platform to roll out VoIP services to the mass market. On May 5, 2005, SBC announced an agreement with Covad that will, post merger, support the provision of broadband DSL for SBC's VoIP offering out of region. Under current practices, when VoIP traffic is exchanged between providers' networks, the receiving network treats the traffic on a 'best efforts' basis, as indeed any receiving network treats any IP traffic handed off to it. SBC shares the concerns of other providers that VoIP traffic be handled consistent with today's practices by all providers, both originating and terminating." Rice Reply Decl. ¶ 12.

Not surprisingly, then, these opponents make no serious effort to explain how their concerns could be "traceable to the merger."[202] Instead, they focus on a laundry list of (unsupported) allegations about SBC's conduct *today*. For example, Vonage and Global Crossing raise concerns about PSTN interconnection, access to switched access services, E911 service, white pages listing, number porting, and access to resold wireless Internet service[203] – all of which relate to issues Vonage and others have *already* raised, pre-merger.[204] Some are the subject of disputes between Vonage and SBC today,[205] and many, if not all, are being squarely addressed in ongoing Commission proceedings.[206] Indeed, most of the issues Vonage raises are – as Vonage concedes – concerns Vonage

[202] *AT&T/TCI*, 14 FCC Rcd. at 3215 ¶ 117. *See also supra* note 19.

[203] Vonage Opp. at 22-23 (PSTN interconnection); Qwest Pet. at 37 (same); Global Crossing Comments at 22-24 (switched access services); Vonage Opp. at 6-8 (access to tandem switching for, *e.g.*, E911 services); Global Crossing Comments at 22 (same); Vonage Opp. at 16-19 (number porting to VoIP providers); Vonage Opp. at 12, 16-19 (access to white pages directory listings); Vonage Opp. at 12-13, 16-19 (access to resold wireless Internet services).

[204] While Vonage tries to suggest that removing AT&T from the market will exacerbate these concerns by, for example, removing a potential source of VoIP-PSTN interconnection or numbers, *see, e.g.*, Vonage Opp. at 5-6, there are myriad other carriers that can provide that interconnection including those with which Vonage interconnects today, and Vonage, like SBC's own VoIP affiliate, can seek permission from the FCC to obtain numbers directly.

[205] *See, e.g.*, Lynn Stanton, *SBC Asks Vonage for More Data on VoIP '911' Needs*, TR Daily, Apr. 26, 2005.

[206] *See, e.g.*, *IP-Enabled Services NPRM* ¶ 76 & n.226 (numbering); *In re Admin. of the N. Am. Numbering Plan*, Order, CC Dkt. No. 99-200, (Feb 1, 2005) (same); *In re Tel. Number Portability*, Second Further Notice of Proposed Rulemaking, 19 FCC Rcd. 18515 (2004) (number portability). Even Global Crossing acknowledges that these issues are being resolved elsewhere on an industry-wide basis. Global Crossing Comments at 23 & nn.57-58 (noting switched access issues are being considered in the *IP-Enabled Services* and *Intercarrier Compensation* proceedings).

would have with respect to *all* "providers of high-speed Internet access connections" or *any* "entity like SBC that either owns or controls a broadband Internet connection."[207]

In any event, these opponents are flatly wrong in suggesting that the merged company will have any serious incentive to discriminate against competing VoIP providers in order to protect its own VoIP revenues.[208] The overriding concern for the combined company, as it is for SBC now, will be to retain its existing broadband customers and to obtain new ones by offering broadband Internet access services that are superior to rival broadband services, including the cable modem services that command a clear majority of the broadband market today.[209] The merged company would undermine that goal, and drive consumers to alternative broadband providers, if it began blocking or degrading complementary applications such as the VoIP services offered by the many

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[207] Vonage Opp. at 14, Farrell Statement at 7, 16, 17, 20, 23 (discussing practices of the "ILECs" or "RBOCs").

[208] There is even less merit to Qwest's contention that the merged company will have an incentive to suppress *all* VoIP products, including AT&T CallVantage, in order to protect its circuit-switched revenues. *See* Qwest Pet. at 31, 36. The merged company, like SBC today, will have strong incentives to provide VoIP (and make others' VoIP services available to its broadband customers) in order to retain customers that seek a broadband VoIP alternative to circuit-switched voice service. For this reason, as noted above, SBC already has invested in IP-based services. But in any event, this claim is no more merger-specific than those discussed in the text: SBC's combination with AT&T could not possibly *increase* any incentive SBC might have to protect its circuit-switched revenues.

[209] *The 20 largest cable and DSL providers In the U.S.*, Consumer Electronics, Nov. 15, 2004, *available at* 2004 WLNR 12927872 (cable has sustained its significant lead over DSL through the third quarter of 2004, boasting 18.8 million subscribers as compared to the 12.2 million subscribers served by DSL); Competition in the Provision of Voice Over IP and Other IP-Enabled Services, *IP-Enabled Services*, WC Docket No. 04-361 (filed May 28, 2004); *see also*, *In re Petition for Forbearance of the Verizon Tel. Cos. Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd. 21496, 21506-07, ¶ 22 (2004) ("*Verizon Tel. Cos. Forbearance*") ("[C]able modem providers control a majority of all residential and small-business high-speed lines."); *Verizon Tel. Cos. Forbearance*, 19 FCC Rcd. at 21510-11, ¶ 30 ("[T]he BOCs have limited competitive advantages with regard to the broadband elements, given their position with respect to cable modem providers and others in the emerging broadband market.").

unaffiliated providers that have already won the loyalty of a large and growing number of consumers.[210] This threat of consumer defection would trump any theoretical, contrary incentive of the merged company to engage in such discrimination.[211] Even if a blocking strategy delivered a few VoIP customers, the merged company ultimately would lose much more in total broadband revenues as other customers defected.[212] It is thus no coincidence that the handful of isolated allegations in the comments suggesting that SBC

[210] For example, Vonage, perhaps the best-known VoIP provider today, now has over *550,000 subscribers.* Vonage Opp. at 3. Growing at its current rate of 3% *per week*, Vonage's subscriber base alone could easily triple in a year. *See* Vonage Opp. at 3 (noting its "explosive subscriber growth"); Press Release, *Vonage Becomes First Broadband Telephony Provider To Activate Over 500,000 Lines*, (Mar. 7, 2005), *at* http://www.vonage.com/corporate/press_index.php? PR=2005_03_07_1 (noting the company is adding 15,000 lines per week). And Vonage is but one of hundreds of VoIP providers. Skype, which operates an extremely popular Internet-to-Internet VoIP service, has recently launched a service that will interconnect with the PSTN and allow it to compete more vigorously with Vonage and other VoIP providers. Evan Hansen, *Skype Goes for the Gold*, CNet News.com (Mar. 17, 2005) *at* http://news.zdnet.com/2100-1035_22-5621463.html. And well-known companies such as AOL are entering the VoIP market. *See* Jim Hu, *AOL Unveils VoIP Plans*, C|Net News.com (Mar. 8, 2005) *at* http://news.com.com/AOL+unveils+VoIP+plans/2100-7352_3-5604324.html.

[211] As the FCC has found, moreover, a variety of last mile broadband alternatives to wireline telephone companies and the market-leading cable companies have emerged in the market. *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd. 20540, 20547 (2004) ("Wi-Fi joins an increasingly lengthy list of other wired and wireless methods of accessing the Internet, . . . [including] WiMax, personal area networks, satellite technologies, fiber-to-the-home, and broadband over power lines, in addition to more familiar cable modem and [DSL] services.").

[212] Indeed, despite the cable companies' lead in the broadband market and the rapid roll-out of their own VoIP products, they also have made clear that they will not block rival VoIP services. *See*, *e.g.*, Lynn Stanton, *Comcast COO Says Port Blocking Would Be 'Bad Business,'* TR Daily, Mar. 11, 2005 (quoting Comcast's Steve Burke as saying, "We're not nor would we block ports. . . . I think that would be bad business."); Declan McCullagh, *Telco agrees to stop blocking VoIP calls*, CNet News.com, Mar. 3, 2005, *at* http://news.com.com/Telco+agrees+to+stop+blocking+VoIP+calls/2100-7352_3-5598633.html ("Many large cable companies have pledged never to engage in the practice.").

discriminates against independent VoIP providers *today* are – in each case – unsupported by any actual facts.[213]

Finally, because the merger will not materially increase concentration in the broadband segment,[214] it obviously could not increase the combined company's *ability* to discriminate against independent VoIP providers in the last mile. Indeed, despite Vonage's contention that the merged company might seek to block ports (or routes) commonly assigned to VoIP,[215] Vonage itself has acknowledged that it can enable end users to defeat such efforts by using different "private" ports or by "cycling" through ports unpredictably.[216] And the other "packet discrimination" scenarios described by Vonage and ACN[217] would either be cumbersome and ineffective[218] or could easily be evaded through packet encryption, which is increasingly common as a result of other

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[213] *See, e.g.*, Global Crossing Comments at 22, nn.53-54.

[214] *See* Public Interest Statement at 110; Polumbo Decl. ¶ 12 (noting that AT&T has a "minimal presence" in the market for broadband and that it is "no longer actively seeking new DSL customers").

[215] *See* Vonage Opp. at 14-15.

[216] Vonage apparently used port-cycling to avoid Madison River's alleged attempt to block VoIP traffic over its last-mile facilities. Vonage reported that it had, as a temporary solution, diverted its customers to "different Internet entryways." Anne Marie Squeo, *Vonage Dispute Draws Scrutiny*, Wall St. J., Feb 17, 2005. More generally, although Vonage claims that the Madison River episode reveals the potential for anti-VoIP discrimination, Vonage Opp. at 15, the fact remains that neither SBC nor any other major broadband provider has ever blocked or degraded traffic of independent VoIP providers, and Vonage does not contend otherwise.

[217] *See, e.g.*, Vonage Opp. at 14; ACN Comments at 45, n.111; *id.* at 74.

[218] *See, e.g.*, Sane Solutions LLC, *Analyzing Web Site Traffic: A Sane Solutions White Paper*, 2002, *at* http://webdesign.ittoolbox.com/browse.asp?c=WDPeerPublishing&r=%2Fpub%2FCM022502.pdf ("Packet sniffing has some major drawbacks," including that it "cannot read the encrypted data," "is expensive if you have multiple servers because you have to install a separate packet sniffer for each server," and "can be difficult to manage if your servers are in different geographic locations.").

security considerations.[219] Again, moreover, nothing about the *merger* could possibly *increase* the companies' ability to engage in such discriminatory conduct, and there accordingly is no basis to address these concerns in this proceeding.

2. The Merged Company Will Have No Greater Incentive or Ability Than Either Company Has Today To Discriminate Against Unaffiliated Providers of IP-Enabled Services over the Internet Backbone.

The Commission should likewise dismiss arguments by Vonage, ACN, CompTel and others that the combined company's position in Internet backbone services will create a merger-specific risk of discrimination against competing VoIP and IP-enabled service providers.[220] SBC occupies only a small share of that segment. The merger will not materially increase concentration or decrease competition among backbone providers, and no one could plausibly argue that the merged company will have anything approaching the level of dominance that was the source of the Commission's concern in prior transactions.[221] In short, the merger could not possibly *increase* any ability or incentive to engage in backbone-related discrimination, and any residual concern about such discrimination – like any concern about last-mile broadband discrimination – is not properly presented in this proceeding.[222]

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[219] *See, e.g.*, http://www.skype.com/products/ (touting that "Skype automatically encrypts everything" and transmits it in a way that "nobody can intercept").

[220] *See, e.g.*, Vonage Opp. at 10-11; ACN Comments at 73-74; Cox Comments at 14; EarthLink Pet. at 11-12; Independent Alliance Comments at 4-6, 9; CompTel-ALTS Pet. at 32-33, 36-39.

[221] *See* Public Interest Statement at 105-08; Schwartz Reply Decl. ¶ 29 ("No one company can be said to have anything approaching a dominant position in the Internet Backbone space" and the "combination of SBC and AT&T will not materially alter the current status quo") (internal quotation marks omitted).

[222] Schwartz Reply Decl. ¶ 17; s*ee supra* note 19.

In any event, the competitive nature of the backbone segment ensures that any effort by the merged company to use its backbone facilities to disadvantage the services of rival providers would be ineffective and ultimately self-destructive. As Vonage has acknowledged,[223] there is no evidence that independent VoIP providers have been subject to discrimination on the Internet backbone. And, as noted above, any attempt by the merged company to refuse interconnection of its backbone with competing VoIP providers would succeed only in driving those providers to choose from one of the many backbone alternatives,[224] thereby depriving the combined company of the revenues it could otherwise earn from a transit agreement with the VoIP provider.[225] The combined company's incentives will thus be the same as AT&T's today: AT&T provides both Internet backbone and VoIP services, and it does not attempt to block VoIP traffic.[226]

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[223] Vonage Opp. at 9 ("To date, Vonage has not had an issue getting the Internet Backbone access it needs from companies like UUNET and AT&T."); Erik Siemers, *Internet Providing Phone Service*, Albuquerque Tribune (New Mexico), Jan. 17, 2005 at B1 (Vonage has "quite robust connections" to the Internet backbone, even though it has no backbone facilities of its own) (quoting Vonage's Brooke Schulz).

[224] *See* Schwartz Reply Decl. ¶¶ 27-28 & Table 3 (showing dispersion of revenue across multiple backbone providers); Schwartz Reply Decl. at Appendix 4 (showing that Autonomous System connections, each of which represents a unique ISP and other organization connected to the Internet, are not concentrated on any particular Internet backbone).

[225] As the Commission found in the AT&T-Teleport merger, "adequate alternative sources of supply after the merger" eliminate concerns that the merger will create any ability to discriminate against rival providers. *In re Applications of Teleport Communications Group Inc., and AT&T Corp. for Transfer of Control from Teleport Communications Group, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 15236, 15260 ¶ 42 (1998) ("*AT&T/TCG*"); *see also* Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, FCC OPP Working Paper No. 32, at 18-21 (2000), *available at* www.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf (describing incentives in a competitive backbone market).

[226] CompTel contends that AT&T's control of a large and efficient Multi-Protocol Label Switching ("MPLS") backbone enables it to discriminate against providers of applications that depend on efficient packet routing, such as VoIP, by price discriminating against service providers that are particularly dependent upon MPLS networks. CompTel-ALTS Pet. at 36-39. But CompTel provides no evidence that

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In addition, even if the merged company *did* refuse to carry VoIP traffic over its own backbone facilities (assuming, as discussed above, that it could readily detect such packets in the first place),[227] it will occupy too small a share of backbone services to have much effect. As noted, no single provider controls more than a small portion of traffic on the Internet backbone, and the addition of SBC's small backbone business to AT&T's will not change that fact. Since the Internet Protocol standard "directs the packets in the most efficient route, automatically rerouting packets when particular links cannot be transversed or are congested,"[228] VoIP packets blocked from one backbone would simply be redirected to another. A single provider's blocking efforts would therefore be entirely ineffective in preventing VoIP calls from going through.

D. The Merger Will Not Adversely Affect Competition in Wholesale Long Distance.

Several opponents claim that the merger will harm competition in the provision of wholesale long distance services as a result of the vertical integration of AT&T (a wholesale seller) and SBC (a wholesale buyer). This integration, they claim, will harm wholesale competition by depriving wholesale buyers of an important seller and wholesale sellers of an important customer. Both claims are wrong. The provision of

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AT&T's incentive to discriminate in this fashion is increased in some manner by the merger—nor that AT&T has engaged in any such discriminatory practices to date. *See also* Vonage Opp. at 9 (arguing that "not all Internet backbone services are created equal" but admitting that it "has not had an issue" to date with AT&T).

[227] For the same reasons that port blocking would be ineffective on the last mile, as discussed above, it would also be ineffective in the backbone, notwithstanding ACN's unsupported suggestion to the contrary. ACN Comments at 45 n.111.

[228] Ian C. Ballon, *18th Annual Institute on Computer Law*: *The Emerging Law of the Internet*, Practicing Law Institute, 507 PLI/Pat 1163, 1174 (1998) (quoting Harley Hahn, The Internet Complete Reference 21 (2d ed. 1996)).

wholesale long distance services is among the most intensely competitive segment in any industry today, and it will remain so after the merger.

These opponents speculate that the merged firm would abandon AT&T's multi-billion dollar wholesale business or degrade that service through discriminatory offerings simply because many wholesale customers are likely to be competitors of the combined company. Consumer Federation of America claims that, if the merger is approved, "SBC's and Verizon's competitors will have difficulty gaining this [wholesale long distance] input and are more likely to go out of business."[229] Others claim that the merged company will selectively withdraw from the wholesale business by withholding service from retail competitors or providing service to those retail competitors at higher prices or with lower quality.[230] This is so, opponents claim, because the combined company will be able to and will have an increased "incentive to abuse their control over these [long distance transport] assets to diminish competition for their retail business rather than maximize the revenues flowing over those assets."[231]

These arguments rest on an entirely incorrect assumption that the combined company would have market power in the provision of wholesale long distance services and ignore the enormous capacity as well as the intense competition that now exists and that will clearly continue to exist in the aftermath of the merger. The merger opponents do not even attempt to establish that the market is anything but competitive. Thus, while

[229] CFA Pet. at 24.

[230] *See*, *e.g.*, EarthLink Pet. at 12; US Cellular Comments at 3; CFA Pet. at 23-24; Independent Alliance at 3-4.

[231] CFA Pet. at 24.

many of AT&T largest wholesale customers are also its direct retail competitors today, AT&T has vigorously competed to serve those customers because they have multiple alternative sources of supply and because the wholesale revenues that they generate increase AT&T's net revenues and provide substantial contributions to the recovery of costs of its long distance network. Following the merger, the combined SBC AT&T will have the same economic incentives to provide wholesale long distance services to customers that are also retail competitors. Moreover, even if it did not, the merger could not possibly harm either wholesale customers or their ultimate consumers, because a number of wholesale competitors would be entirely capable of providing service in SBC AT&T's stead – as the Commission has found in many analogous contexts.[232]

The wholesale long distance business is widely recognized as among the most competitive sectors of the telecommunications industry and, indeed, of the entire national economy. "The established long-haul carriers – AT&T, MCI, and Sprint – not only compete with each other, but also with relative upstarts such as Level 3, Global Crossing, 360networks, WilTel, and a host of others."[233] WilTel, for example, has correctly stated that it engages in "fierce competition" "primarily with AT&T, MCI, Sprint, Qwest, Level 3, Global Crossing and Broadwing," as well as "numerous other service providers that focus either on a specific product or set of products or within a geographical region."[234] "The wholesale market suffers from extreme overcapacity"; and as a consequence, "all

[232] *See infra* notes 241-243 and accompanying text.

[233] Bernstein Research Call, *U.S. Telecom: Wholesale Segment Too Large to Sweep Under Rug*, at 1, 4 (Jan. 6, 2005) ("Bernstein Research Report").

[234] Leucadia National Corp., SEC Form 10-K Statement, at 12 (filed Mar. 4, 2005) (providing information for year ending December 31, 2004).

carriers are pricing very aggressively to try to gain scale."[235] The "persistent pricing pressure" caused by this "capacity glut" has led wholesale voice prices to fall by 10-12% annually, and data prices to decline in excess of 20% annually.[236] And these figures understate actual price declines because they do not reflect customers' substitution of larger-capacity (and lower unit cost) services for lower-capacity services. When this adjustment is made, "unit prices for wholesale IP services have fallen by as much as 45-50% per year in recent years."[237] As this analysis confirms, contrary to EarthLink's claims,[238] no separate, less competitive market exists for long distance transport of IP-based traffic, and none is created even as particular competitors improve and add features to their IP networks.

These competitive conditions have led the Commission to conclude repeatedly that wholesale (and retail) long distance services are intensely competitive. For example, a decade ago, the Commission found that the deployment of ubiquitous long haul networks by multiple carriers made the long distance market structurally competitive.[239] On this same basis, the Commission approved the MCI/WorldCom merger in 1998,

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[235] Goldman Sachs, Report on MCI Corp., at 4 (Nov. 10, 2004). As WilTel's parent company observes, as a result of the high level of investments in wholesale capacity during the 1990s (and resulting bankruptcies among service providers), "telecommunications capacity now far exceeds actual demand and the resulting marketplace is characterized by fierce price competition as competitors seek to secure market share." 2004 Leucadia 10-K, at 12; *see also* J. Smith & T. Bouzayen, *Wholesale Competition Remains Fierce*, Phone+ (July 2004).

[236] *See* Bernstein Research Report at 4, 8.

[237] *See id*. at 8.

[238] EarthLink Pet. at 11-12.

[239] *In re Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271 (1995).

rejecting claims that wholesale competition might be diminished by the combination of even the second and fourth largest providers because there was no possible basis for concern that the merged firm could harm competition by reducing its output.[240] Since then, the number and capacities of long-haul fiber networks has expanded enormously, and the Commission has reiterated that the existence of multiple "ubiquitous" long-haul networks assures the competitiveness of long distance services, and the Commission so found yet again earlier this year.[241] The Commission's conclusions have always been based on an analysis of the national long distance market, which is consistent with and required by carriers' pricing practices. As such, there is no merit to Qwest's suggestion that the Commission examine particular routes where SBC's and AT&T's long distance transport facilities overlap.[242] Nor does Qwest provide any justification for this proposed departure from established practice.

In light of these competitive conditions, it would be irrational for the combined SBC AT&T to refuse to offer long distance services to competitors for resale or to offer services on discriminatory terms – even if such practices were not precluded by the Commission's nondiscrimination and resale requirements. AT&T's wholesale long distance revenues exceeded [REDACTED] billion in 2003. AT&T's largest wholesale customers include long distance competitors, retail service competitors in the mass

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[240] *See WorldCom/*MCI, 13 FCC Rcd. 18,025, ¶¶ 67-76.

[241] *See Triennial Review Remand Order*, 2005 WL 289015, ¶ 36 n.107; *In re Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Va. State Corp. Comm'n Regarding Interconnection Disputes with Verizon Inc. & for Expedited Arbitration*, Memorandum Opinion and Order, 18 FCC Rcd. 17722, 17762-63, ¶ 91 (2003).

[242] *See* Qwest Pet. at 20-21.

market and business segments, and competitors in managed network services. There is no conceivable advantage that the combined company could secure at the retail level that could possibly justify forgoing this very significant revenue and associated returns, through either complete denial of service or through discriminatory offerings.[243] And even if the combined company acted irrationally by withdrawing from the wholesale business in whole or part, there could be no harm to competition or consumers – other carriers would be all too happy to provide the services provided today by AT&T, and they have the excessive capacity to compete as robustly for that business the day after the merger as they do today.

Nor is there any merit to suggestions that SBC's diversion of its wholesale purchases to AT&T's network will somehow diminish competition. Opponents claim that, as a result of demand diverted from the network of WilTel in particular, "independent facilities-based long distance providers may no longer have a viable market in which to participate" and "no significant, viable market" will remain to "support independent facilities-based long distance providers."[244] These claims are absurd in light of the size of the wholesale business, the number of alternative suppliers and users of this capability and the relative insignificance of SBC's demand. A leading independent

[243] The Commission reached just this conclusion when opponents challenged the MCI/WorldCom merger, even though the wholesale market was far less competitive then than it is today. The Commission rejected "claims that the merged MCI WorldCom will have reduced incentives to sell wholesale services to resellers," explaining that "other firms appear equally capable of providing the wholesale long distance services presently provided to resellers by WorldCom and MCI, [and thus] the combined firm's rational approach would be to continue supplying resellers rather than to cede these revenues to other carriers." *WorldCom/MCI*, 13 FCC Rcd. at 18067, ¶ 70.

[244] ACN Comments at 29-30.

analyst estimates that total U.S. long distance wholesale revenues in 2004 exceeded $18.5 billion and will exceed $19 billion in 2005, and that the total wholesale market exceeds $45 billion.[245] Yet, SBC purchased less than $1.04 billion of services from WilTel in 2004, which represented the overwhelming majority of SBC's total wholesale long distance purchases.[246]

In light of the competitive nature of the wholesale market, the effect the transaction might have on a single competitor obviously provides no basis for challenging the merger. Competition law, including the Commission's review of competitive effects of proposed mergers, is designed to protect competition, not individual competitors.[247] In a broad range of contexts, courts have held that the Commission cannot act to benefit single firms or even smaller, commercially disadvantaged carriers generally.[248]

E. The Merger Will Not "Foreclose" Competitive Special Access Providers.

CompTel contends that the vertical integration of SBC's in-region special access supply and AT&T's in-region special access purchases will result in "customer

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[245] *See* Bernstein Research Report at 3-4.

[246] *See* 2004 Leucadia 10-K, at 7(b). The insignificance of SBC's wholesale demand is even more apparent when imputed self-supply by wholesale providers that use their networks to provide retail services is considered, and this supply is relevant because networks used for retail purposes can be deployed for wholesale service provision when it is profitable to do so.

[247] *E.g.*, *In re Bell Atl. Mobile Sys. Inc. and NYNEX Mobile Communications Co.*, Memorandum Opinion and Order, 12 FCC Rcd. 22280, 22288 ¶ 16 (1997).

[248] *SBC Communications Inc.* v. *FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) ("The Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors"); *Competitive Telecomms. Ass'n* v. *FCC*, 87 F.3d 522, 531-32 (D.C. Cir. 1996) (striking down "interim" rule designed to protect smaller IXCs at expense of AT&T); *W. Union Tel. Co* v. *FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981); *Hawaiian Tel. Co.* v. *FCC*, 498 F.2d 771, 775-776 (D.C. Cir. 1974); *See also United States* v. *W. Elec. Co.*, 969 F.2d 1231, 1243 (D.C. Cir. 1992) (antitrust laws cannot be employed to ("[M]innows against the trout . . . .").

foreclosure" with respect to the wholesale special access and UNE-P "replacement services" that its members offer to AT&T and others.[249] This is so, CompTel claims, because "the competitive fiber-based carriers that are currently in the market will lose the benefit, and potential benefit, of providing service to AT&T."[250] The allegations are meritless.

Special Access Alternatives. Contrary to CompTel's suggestion, the merger will impact only a trivial percentage of the demand for competitive alternatives to ILEC special access services, whether viewed on a national or regional basis. Specifically, the overall special access market is over $14 billion a year.[251] Not only are these services purchased by other major IXCs such as MCI, Sprint, Qwest, Global Crossing and Level 3, but also by wireless carriers, system integrators and other retail providers of bandwidth intensive telecommunications or data applications. These other purchasers represent the overwhelming majority of special access purchases nationwide and in SBC's region, and the merger will not deprive competitive carriers of a single dollar of business from these companies.

And, as shown above, only a very small portion of even AT&T's purchases of special access service are directed to CLECs, and, even for this small subset of special access purchases, the merger will not affect AT&T's purchases beyond the SBC region.

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[249] CompTel-ALTS Pet. at 19, 22.

[250] CompTel-ALTS Pet. at 7.

[251] *See* FCC Statistics on Common Carriers, Table 2.8, line 10 (Oct. 12, 2004), *available at* http.//www.fcc.gov/Bureaus/Common_Carrier/FCC-state-line/SOCC/03SOCC. pdf (reporting that the RBOCs by themselves had over $14 billion in special access revenues in 2003).

Following the merger, a combined SBC/AT&T will obviously have every incentive to continue to purchase special access from competitive carriers outside of SBC's region to the extent those carriers continue to offer favorable rates and high quality services. Further, not only are AT&T's purchases too insignificant to affect competition, but any diversion of AT&T's in-region purchases to SBC will not significantly affect any particular CLEC provider.[252] There is no basis to CompTel's unsupported claim that the loss of AT&T would be "devastating" to competitive access providers.[253]

UNE-P "Replacement." CompTel also claims the merger of SBC and AT&T would harm mass market competition by depriving "wholesale" providers of UNE-P "replacement" services of their "largest" customer.[254] The complete answer to CompTel's claim is that, pre-merger, AT&T decided to cease marketing wireline local mass market services.[255] In the wake of that decision (and AT&T's pre-merger price increases), AT&T's local market share has fallen sharply and will continue to do so. As a carrier that is receding from the market, AT&T has no interest in and has not pursued any opportunities with CLECs that might provide "replacement" UNE-P services, and it has ended its very limited trial arrangement with McLeod.[256] Instead, AT&T is negotiating

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[252] AT&T purchases of dedicated access services are spread among numerous carriers and are not a significant percentage of revenues of even its largest suppliers. Fea Reply Decl. ¶ 46.

[253] CompTel-ALTS Pet. at 22.

[254] CompTel-ALTS Pet. at 19.

[255] *See* Public Interest Statement at 44-56, Polumbo Decl. ¶¶ 2, 9; Horton Decl. ¶¶ 2, 7.

[256] Indeed, in its Section 214 application for authority to transfer the affected AT&T customers to McLeod, McLeod explained to the Commission that ending the trial, and transferring the customers to McLeod, would "enhanc[e] competitive choices for telecommunications consumers," would "benefit customers by enhancing McLeod USA's ability to offer a broad range of domestic telecommunications products and services," and would "enable McLeod USA to *strengthen* its competitive position."

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terms for UNE-P replacements with ILECs that will allow AT&T to continue to provide quality service to its existing base as it dwindles away through churn. Given these facts, none of which CompTel denies, there is no way AT&T can be considered a "make or break" customer of UNE-P "replacement" services, with or without the merger.

In short, CompTel has not shown any foreclosure or any material effect on either special access and UNE-P "replacement" services of competitive carriers. It also has failed to establish any harm to competition. While making sweeping statements about the importance of AT&T to the competitive carrier industry, CompTel offers no evidence that, but for AT&T, any of these companies would be rendered competitively unviable. CompTel cannot show that competitors as a group are likely to be harmed or even that an individual CLEC is likely to be harmed, that CLECs are unable to protect themselves through negotiation as sophisticated commercial entities, or that the CLECs' sunk investment would not preclude harm to competition even if there were harm to particular carriers.[257] Because CompTel offers no evidence that the postulated "foreclosure" will actually result in a substantial lessening of competition, there is no basis for conditioning or blocking the merger as CompTel requests.[258]

Footnote continued from previous page
Application for International and Domestic Section 214 Authority to Transfer Customer Assets of McLeod USA Telecommunications Services, Inc. AT&T Corp. and AT&T Communications of the Mountain States, Inc., FCC 05-93, Ex. A at ii-iii (Mar. 4, 2005) (emphasis added). The Commission approved the transfer.

[257] *See WorldCom, Inc. v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001).

[258] The party alleging customer foreclosure must show that the foreclosure has an actual anticompetitive effect in the market – *i.e.*, that it enhances the ability of the foreclosing firm to raise prices or restrict output. *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 151 (4th Cir. 1990) (party claiming foreclosure "must allege injury to competition, not just to one competitor"); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 478 (7th Cir. 1988). That requires more than merely assuming that the foreclosure may harm a particular competitor or group of competitors.

F. The Merger Will Not Adversely Affect Competition in, or Increase SBC's Incentive To Increase Prices for, Mass Market Services.

Opponents of the merger have no serious response to SBC's and AT&T's showing that AT&T's mass market services do not now, and would not in the future, constrain SBC's pricing in the absence of a merger. AT&T made an irreversible decision last year to stop actively marketing traditional mass market services, and SBC's mass market prices are constrained today and will continue to be constrained *only* by other existing and emerging active competitors whose competitive activities are unaffected by the merger. Thus, the proposed merger plainly can have no significant effect on either the scope or intensity of mass market competition.[259]

Nonetheless, various merger opponents contend that the merger would raise serious competition issues. They claim that AT&T's exit from the mass market is not really irrevocable; or that even AT&T's dwindling operations somehow provide an important check on SBC pricing; or that the merger would eliminate an indispensable VoIP competitor. As explained below, none of these claims has merit.

1. AT&T's Irrevocable Strategic Refocus of Its Business.

The opponents recognize implicitly the competitive significance of an irrevocable decision by AT&T to refocus its business away from the consumer market; their principal assertion is that AT&T has not, in fact, made such an irrevocable decision. Some opponents suggest that AT&T's decision is "suspect" because it was announced less than a year before the merger announcement and because making such an announcement publicly "makes no business sense."[260] Others characterize AT&T's claims regarding its

[259] *See* Public Interest Statement at 44-67.

[260] ACN Comments at 24-25.

consumer strategy as "speculative,"[261] or as a mere "stated intention[]" about actions that are yet to be taken.[262]

The record is clear that there is nothing contrived or artificial about AT&T's decision to refocus its business or its execution of that strategy. The conditions leading to the AT&T Board of Directors' decision are well known to the entire industry, and the business reasons for that decision were presented in the Public Interest Statement and attested to under oath by senior AT&T officials. That decision, announced and as part of AT&T's release of second quarter earnings, followed on the heels of the D.C. Circuit's decision that effectively eliminated regulated access to UNE-P.[263] The reason for AT&T's public announcement should also be no mystery: a public announcement of such a significant refocusing of AT&T's business was entirely consistent with basic corporate governance principles and securities law requirements, and the announcement also facilitated AT&T's internal realignment required to execute that strategy.

Nor is the execution of that strategy speculative or merely a stated intention regarding future actions. It is, instead, now an established fact. While AT&T has undertaken efforts, such as its agreement with Qwest, that allow it to continue to serve existing customers (albeit at increasing rates) rather than simply discontinue service abruptly, the company has already taken extensive steps to implement its strategic refocus.[264] Following the announcement of the new strategy, AT&T immediately and

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[261] Nev. Att'y Gen. Comments at 7.

[262] Cbeyond Pet. at 37.

[263] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[264] *See* Polumbo Decl. ¶¶ 11-15.

drastically reduced its marketing and advertising activities.[265] It eliminated a very significant number of marketing and customer care positions in 2004 and has since implemented additional headcount reductions.[266] AT&T has also retired much of the physical infrastructure used to support these activities, including dialers, databases, computers and servers, 800 numbers, switches and high capacity lines, and other facilities.[267] These actions have had real effects: in the past three quarters, AT&T's mass market customer base has declined by more than 640,000 customers, and its *quarterly* mass market revenues have declined by more than $300 million.[268]

Other merger opponents argue that AT&T's strategic refocusing is not "irrevocable" because they claim that AT&T could, under certain circumstances, remain in or re-enter the consumer market. Qwest's economist, for example, concedes that "AT&T's inability to compete effectively for residential subscribers is a consequence of the current technological, regulatory and legal environments," but argues that "[t]he environment may change" through the introduction of new technologies such as wireless services that "eventually provide viable alternatives to the wireline loop," through regulatory changes, or by becoming a " target[] for intermodal CLECs."[269] ACN suggests that AT&T could continue to compete vigorously in the consumer market "by

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[265] *See id*. ¶¶ 12-15, 17-18.

[266] *See id*. ¶¶ 15, 20-22.

[267] *See id*. ¶¶ 23-30.

[268] *See* AT&T Corp., Press Release, AT&T Announces First-Quarter 2005 Earnings, *available at* http://www.att.com/news/2005/04/21-2 (April 21, 2005) (first quarter 2005 results); AT&T Corp., SEC Form 10-Q Statement (filed Aug. 4, 2004) at 1 (providing information for quarter ending June 30, 2004).

[269] Qwest Pet., Bernheim Decl. at 27, ¶ 77.

partnering with a CLEC to implement a UNE-L approach,"[270] and Cbeyond suggests that AT&T could await further review of the FCC's *Triennial Review Remand Order* or persevere in the market by reaching a "UNE-P like agreement" with the BOCs similar to those entered by Sage Telecom and Granite Telecommunications.[271]

The merger's implications hinge on present reality, not on these commenters' idle speculation or wishful thinking about what a different company could or should do. AT&T, based on information it has about its own operations, carefully examined many other options and determined, given AT&T's circumstances, that these other avenues of mass market entry (or waiting for lightning to strike from possible technological breakthroughs) would not result in an acceptable return on investment.[272] The opponents have offered no reason to believe that AT&T's management has chosen an inappropriate course for its mass market business. None of the highly speculative regulatory, commercial or technological scenarios outlined by opponents addresses the fundamental regulatory and commercial considerations on which AT&T's management and Board made its decision. Indeed, the scenarios they present are so contingent and unlikely that they cannot underpin any sound merger analysis.[273] Because SBC is merging with a company that has ceased to be an active competitor in the mass market, the merger

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[270] ACN Comments at 25.

[271] Cbeyond Pet. at 39-40.

[272] Polumbo Decl. ¶ 3-9; Public Interest Statement at 50-51.

[273] Press Release, AT&T Announces Second-Quarter 2004 Earnings Company to Stop Investing in Traditional Consumer Services; Concentrate Efforts on Business Markets (July 22, 2004), *at* http://www.att/com/news/2004/07/22-13163 (quoting AT&T Chairman David Dorman: "This decision [to refocus the business] means that AT&T will focus on lines of business where we are a clear leader, where we control our destiny and where we have a distinct competitive advantage").

cannot eliminate a relevant constraint on SBC's mass market pricing. And if opponents prove to be right regarding the eventual economics of competitive entry or technological change, presumably there are many companies that, unlike AT&T, are committed to the mass market and will enter and compete using those changes in technological or commercial circumstances.

2. AT&T's Ongoing Provision of Mass Market Services to Existing Customers.

A handful of merger opponents claim that AT&T's continuing provision of service to mass market customers in some manner provides a constraint on SBC's pricing that the merger would eliminate. ACN, for example, argues that AT&T's determination to refocus its business is "essentially irrelevant" because AT&T continues to provide service to mass market customers and may still acquire current SBC customers.[274] Cbeyond argues that AT&T's "very existence as an independent company" providing service in that market creates a restraint on SBC's prices.[275]

These opponents fail to address the evidence that, as part of its strategic refocus, AT&T not only "is not competing on price with other active mass market producers," but also is raising prices to its existing customer base.[276] In late 2004, AT&T increased many of its retail rates for local service in almost every state in the country and has raised rates in many locales for its all-distance bundles of services.[277] Moreover, AT&T is not actively engaged in any efforts to market these services at these higher prices. At the

[274] ACN Comments at 25.
[275] Cbeyond Pet. at 38.
[276] Polumbo Decl. ¶ 31.
[277] *See id*. ¶¶ 32-33.

same time, AT&T has ceased efforts to match competitive offerings and price reductions of the active mass market participants, including SBC and the many other providers of local and long distance service in SBC's region.[278] These pricing decisions are an integral aspect of AT&T's strategic repositioning away from mass market services, and its determination to continue to provide service on an interim basis to many longstanding customers rather than to abruptly terminate their service.[279] Because AT&T is not actively competing on price or marketing itself as an alternative to SBC, this transaction will not change SBC's current pricing incentives.[280] The merger's opponents do not address, and have no rejoinder to, these competitive facts.

Qwest's economist makes a slightly different, but equally invalid, claim when he asserts (without argument) that "AT&T's many residual long-distance subscribers will likely fare better if SBC is forced to compete for their business."[281] This argument ignores the fact that AT&T was already raising prices with the expectation of losing customers.[282] As a result, SBC's decision to price competitively today is driven by competitors other than AT&T, including cable and wireless service providers.

Moreover, SBC will have a strong incentive to price to retain current customers after the merger. SBC incurs a substantial opportunity cost when it loses a local or long distance telephone customer. SBC has made very substantial network and other

[278] *See* Public Interest Statement at 52-53.
[279] *See* Polumbo Decl. ¶ 11.
[280] *See* Carlton & Sider Decl. ¶ 52.
[281] Qwest Pet., Bernheim Decl. at 27, ¶ 76.
[282] *See* Polumbo Decl. ¶¶ 31-32.

investments to be able to provide traditional wireline, DSL, wireless and other mass market services. Further, SBC is investing heavily in its next-generation IP network. It is well established – and SBC's own experience confirms – that it is much easier and more cost effective to cross-sell new services to satisfied existing customers than to consumers with which a supplier has no existing customer relationship. Existing satisfied customers that purchase all telephone services from SBC are much more likely to purchase from SBC larger bundles of services that include DSL, wireless, video and other services. In addition, existing customer relationships facilitate and reduce the costs of marketing.

These considerations also foreclose a related assertion by Cbeyond's economist, Dr. Simon Wilkie, who claims, using estimated AT&T and SBC margins and an assumption regarding AT&T's churn, to establish that the combined company will, after the merger, have an incentive to increase prices for AT&T's current "wireline bundled product" customers.[283] Dr. Wilkie reasons that if AT&T's current margins are lower than SBC's for these customers, and if a high proportion of AT&T customers would choose SBC's bundled offering if they sought an alternative, the combined company would increase prices to current AT&T customers because the company would capture equal or greater profits for those customers that selected SBC service and because relatively few customers would choose other carriers.[284] In fact, the assumptions employed are not

[283] Cbeyond Pet., Wilkie Decl. ¶ 46.

[284] *Id*. Dr. Wilkie also purports to extend this analysis to the entire "national wireline market." *Id*. ¶ 47. The absence of supporting reasoning makes this analysis not only impenetrable, but also not creditable. The declaration simply asserts, without explanation or argument, that SBC could effect a price increase for all of its long distance and local customers and all of AT&T's current stand-alone long distance customers and that the

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correct. Apart from the other items discussed below, Dr. Wilkie fails to consider the effect on pricing to current AT&T customers of the reductions in cost that will occur as a result of the merger. And, as discussed below, his analysis points to considerations that confirm that the combined company will have every incentive to continue to price competitively to AT&T's customer base, not the least of which because these customers have numerous competitive offers to which they can go if the combined company raises prices.

If SBC were to increase prices for AT&T's current bundled service customers, there would be three effects, all of which are misjudged by Dr. Wilkie.

First, Dr. Wilkie underestimates the consequences to SBC of losing a customer when that customer instead selects bundled services, including telephony, offered by cable providers. A post-merger price increase will cause current AT&T customers to re-evaluate their competitive options – not just for long distance or a local/long distance bundle, but for all of their communications services. It is one thing for an SBC access line customer to switch his stand-alone long distance service provider from AT&T to another long distance carrier. However, the revenue impact is far greater when SBC loses that customer to the cable operator's bundle of services and loses revenue for local and long distance services. Further, customers that move from SBC to the cable

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result, again unexplained, would be a price increase for all wireline services – local and long distance – on a national basis, including markets where SBC and AT&T do not even compete today. Assuming that SBC or other BOCs would – or that they could – change their local service rates or increase prices in the indisputably competitive long distance market (and cause other long distance providers to follow suit) would be contrary to regulatory constraints applicable to local exchange service and previous Commission conclusions regarding competition in wireline markets.

operator's bundle of services are very difficult to win back. The threat of losing customers to cable providers is a real and important influence on SBC's pricing.

Dr. Wilkie's analysis also underestimates the proportion of customers that would be lost as a result of a price increase, because the relatively few bundled service customers remaining at the merger's close can reasonably be expected to be those who are least likely to switch to SBC, as they have resisted returning to SBC despite AT&T's increasingly non-competitive offering.

Second, Dr. Wilkie disregards the value to SBC of retaining customers to whom it can sell additional ancillary services that are much more readily cross-sold to a customer that retains wireline service with the combined company. As described above, the combined company particularly values each additional AT&T customer not only for payments for bundled wireline services, but also as more likely customers of DSL, wireless, video programming and other services for which SBC has incurred very significant sunk costs.

Third, Dr. Wilkie understates or ignores efficiencies and cost savings that will result from the merger and will reduce the combined company's marginal costs of providing service to AT&T's customers.

For similar reasons, the much more basic analysis of Consumer Federation of America also misses the mark. CFA estimates the increased market shares of the combined company and concludes, *ipso facto*, that the merger must be denied.[285] But CFA simply ignores the controlling legal standard. CFA's back-of-the-envelope version

[285] CFA Pet. at 20-23; *see also* Nev. Att'y Gen. Comments at 6-7.

of a traditional analysis of market definitions and static market shares is the wrong measure of the true impact of the merger on competition where, as here, AT&T's "present market share [is] an inaccurate reflection of its future competitive strength."[286] AT&T is not a price-constraining competitor for mass market services today, and therefore the elimination of AT&T as an independent competitor will have no negative impact on competition.[287]

3. SBC's Pricing Incentives Are Determined by Competitors Other Than AT&T, Including VoIP and Intermodal Competitors.

As SBC and AT&T demonstrated in their Public Interest Statement, the merger will not lessen competition for mass market services. AT&T is not a significant competitor in that market, and the merger leaves unaffected significant carriers and service providers that compete with SBC in that market. As such, the merger will have no effect on the pricing discipline that these other competitors provide today.

[286] *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 700 (8th Cir. 1979); *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 315 (7th Cir. 1994) (Posner, C.J.) (it has been "many years since anyone knowledgeable about antitrust policy thought that concentration by itself imported a diminution in competition"); *see Cingular/AWS*, 19 FCC Rcd. at 21565, ¶ 96, n.309 (noting that for "a growing and dynamic industry . . . HHIs and changes in HHIs may be less predictive as to whether the merger could result in anticompetitive behavior in a particular geographic market than they would if the market were stable"); *id.* At 21575, ¶ 133 (finding that recent changes in "market share and porting data suggest that Verizon Wireless, T-Mobile, and Nextel may provide more effective competitive constraints on the Applicants than their current subscriber-based market shares might indicate"); *id.* at 21594, ¶ 186 (concluding that "even rival carriers with relatively small market shares currently may have the ability to discipline the market in the future if they do have adequate capacity to add customers").

[287] *See, e.g., Ball Mem'l Hosp., Inc.* v. *Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986) ("Market share is just a way of estimating market power, which is the ultimate consideration. Market share reflects current sales, but today's sales do not always indicate power over sales and price tomorrow.") (Easterbrook, J.).

a. Elimination of AT&T as a VoIP Competitor Will Not Adversely Affect Mass Market Competition.

A few commenters express concern that the merger will eliminate AT&T as an independent provider of VoIP services,[288] but those concerns ignore current reality. These commenters rely almost entirely on AT&T statements made at the time its VoIP service was launched more than a year ago, which suggested that AT&T would invest heavily in VoIP with the intention of winning a large customer base.[289] As noted above, today's reality is very different from AT&T's early press statements. In the wake of its strategic refocus on business services, AT&T has ceased direct marketing for its VoIP service. As a result, AT&T is not now and even without the merger will not be a significant VoIP competitor on its own. More significantly, the merger will not affect the many other VoIP competitors that provide a much more substantial competitive threat to SBC.[290]

As these commenters note, when AT&T decided to cease active marketing of traditional mass market services, it had initially intended to press ahead with its VoIP offering. By mid-year 2004, AT&T had launched its VoIP service nationally. However, AT&T realized as it gained experience with the service that its acquisition and customer care costs were considerably higher than expected.[291] AT&T's actual marketplace

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[288] *See* Qwest Pet. at 36 ("SBC is eliminating its largest potential rival in the VoIP market."); CFA Pet. at 10-11 ("[E]liminating AT&T CallVantage as a competitive threat may have been a factor in SBC's acquisition of AT&T."); ACN Comments at 24-25 (AT&T could still use AT&T CallVantage to serve the mass market).

[289] *See, e.g.*, CFA Pet. at 10.

[290] *See infra* Section III.F.4 (explaining that VoIP competitors are not adversely affected by the fact that many ILECs have not yet offered DSL to consumers that do not purchase its circuit-switched telephony).

[291] *See* Reply Declaration of Cathy Martine ("Martine Reply Decl.") ¶¶ 3, 4.

success has not matched its early, publicly stated hopes,[292] and AT&T made the economic decision, given its enterprise focus, that continuing to pursue its VoIP offering as originally envisioned was unsustainable and that it had to make severe cuts in its marketing efforts.[293]

These results are in stark contrast to those of other existing VoIP competitors, especially those that operate or can exclusively target broadband facilities. Most obviously, and contrary to Qwest's claim,[294] SBC's "principal" VoIP rivals are clearly the cable companies and companies such as Vonage, not AT&T. The nation's cable companies are facilities-based broadband providers and together pass approximately 85 percent of U.S. households with broadband service,[295] and they are actively providing VoIP service. Cox, Time Warner, and Cablevision offer VoIP throughout their service areas, and have inherent advantages in providing VoIP to their own customers. Vonage has more than 600,000 customers and expects to "have more than one million by year's end."[296] Time Warner had 372,000 VoIP subscribers at the end of March and is approaching 500,000 subscribers.[297] Cablevision has 400,000 VoIP subscribers and is

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[292] *See* Martine Reply Decl. ¶¶ 6, 7.

[293] *Id.*

[294] Qwest Pet. at 36.

[295] *See Nat'l Cable & Telecomms. Ass'n, Broadband Services, at* http://www.ncta.com/Docs/PageContent.cfm?pageID=37 (last visited May 9, 2005) (cable's advanced digital services are available to 88% of U.S. households passed by cable); *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Dkt. No. 04-227, FCC 05-13, at 12-13 ¶¶ 18-19 (rel. Feb. 4, 2005) (noting that NCTA estimated that 95% of occupied homes with a television were passed by a cable system at the end of 2003).

[296] Erica Davis, *Vonage Raises $200 Million in Bid to Capture Internet Phone Market*, San Jose Mercury News, May 6, 2005.

[297] *Id.*

adding 7,000 each week.[298] Comcast will offer VoIP in 20 markets by the end of 2005 and throughout its territory by 2006.[299] Other major cable operators offer VoIP in at least some of their markets and have announced plans to expand their VoIP services and to offer VoIP throughout their territories by the end of 2006.

Such results already dwarf those of AT&T's CallVantage service, and the cable companies' shares will only continue to grow rapidly: indeed, cable MSOs may serve as many as 1.75 million VoIP customers by the end of 2005, and 14 million by the end of 2009.[300] "More than 25 million homes today can get phone service from their cable operator" and industry observers predict that, driven by the growth in implementation of VoIP technology, cable telephony will be available to over two-thirds of U.S. homes by the end of 2005, and to over 90 percent of U.S. homes by 2008.[301] Analysts predict that the growth of these and other VoIP providers "poses a significant competitive challenge" to incumbent telephone companies.[302] Many other firms are making significant inroads offering VoIP to customers who "bring your own broadband," and AT&T is merely one of many such competitors. For example, as Vonage confirms, it currently has nearly 10

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[298] *Id.*

[299] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Dkt. No. 04-227, FCC 05-13, 2005 WL 275740, ¶ 51 (2005) (citing Comcast Corp., Presentation to UBS 32nd Annual Media Conference, Dec. 9, 2004, at 20; *see also* John Curran, *Study Predicts VoIP Sector Will Grow 100-Fold by 2008*, TR Daily, Aug. 30, 2004.

[300] Stratecast Partners, *The Year Ahead: Cable Outlook 2005*, January 19, 2005, at 1-2.

[301] *Cable and Telecom: VoIP Will Reshape Competitive Landscape in 2005*, Bernstein Research, Dec. 17, 2004, at 2.

[302] *The Growth of VoIP*, Comm. Daily, April 13, 2004, *available at* 2004 WLNR 6951619 (quoting Standard & Poor's).

times as many customers as AT&T.[303] Other "bring your own broadband" providers, such as 8x8, Level 3, Trinsic (formerly Z-Tel), and Covad,[304] are entering and are well-positioned to be successful.[305] AOL, which has 29 million ISP subscribers,[306] has entered the VoIP business and now offers unlimited local and long distance calling for $29.95 per month. Cisco has announced that it will enter the market and offer a "bring your own broadband" consumer VoIP service.[307]

In short, AT&T is not a unique VoIP competitor, and AT&T's VoIP offering does not command any significant share of the mass market. Many other competitors offer the same essential capabilities as AT&T; AT&T's brand demonstrates no particular advantage for the company in the provision of VoIP services – and even limits AT&T's ability to target its marketing to broadband-enabled customers. Cable and other firms focused on broadband services are far better positioned for success in the provision of these services than is AT&T standing alone. Under these circumstances, elimination of AT&T as a VoIP competitor will not adversely affect mass market competition.

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[303] Vonage Opp. at 3.

[304] There are "more than 400 smaller VoIP outfits chasing Vonage." Press Release, Vonage, Om Malik, Vonage's Smooth Operator (Feb. 8, 2005), *available at* http://www.vonage.com/corporate/press_news.php? PR=2005_02_08_0; *see also* Carlton & Sider Decl. ¶ 28.

[305] *See, e.g.*, Ken Brown & Almar Latour, *Heavy Toll: Phone Industry Faces Upheaval As Ways Of Calling Change Fast*, Wall St. J., Aug. 25, 2004, at A1; Shawn Young, *A Price War Hits Internet Calling*, Wall St. J., Aug. 26, 2004, at D1; Utendahl, Vonage-Telecom Services: VoIP, Co. Update, *VoIP Pioneer Paints Upbeat Picture of the Future*, at 7 (Nov. 4, 2003); *Everything over IP*, Merrill Lynch, at 16, *available at* www.vonage.com/media/pdf/res_03_12_04.pdf. Overall, analysts estimate the cost per subscriber at $568 for circuit switched telephony, but $152-375 for premises powered VoIP. Press Release, Comcast, Comcast Report Second Quarter 2004 Results, at 10 (July 28, 2004).

[306] Time Warner Inc., SEC Form 10-Q Statement (filed November 3, 2004) at 2 (third quarter 2004).

[307] *See* http://www.linksys.com/voice (visited May 5, 2005).

b. Wireless Services Are Important Competitors for Wireline Carriers and the Merger Will Not Reduce That Competition.

Some merger opponents question whether wireless services are perfect substitutes for wireline services.[308] But that is not the relevant question. Among the merger opponents, Qwest admits that wireless is an increasingly important intermodal competitor to wireline services, and states that "no one can dispute that substitution occurs in the long distance market."[309] Indeed, Qwest states that "[c]onsumers have demonstrated that they are increasingly willing to replace our wireline service with the wireless services of our competitors."[310] Yet other opponents, like NASUCA and CFA, deny that wireless services provide competition for wireline services because, among other reasons, according to these opponents, only a small percentage of consumers have "cut the cord" and dropped wireline service entirely.[311] These commenters ignore evidence that wireless substitution is significant and growing. More important, they completely ignore the very significant migration of voice traffic – both local and long distance – from wireline to wireless carriers. A Yankee Group survey in October 2004 reported that "in U.S. households, more than 36% of local calls and 60% of long-distance calls have been replaced by wireless."[312] That trend is reflected in the continuing decline in wireline

[308] *E.g.* Qwest Pet., Bernheim Decl. ¶¶ 79-81; NASUCA Comments, Selwyn Decl. at 30-33.

[309] Qwest Pet. at 25, 28, 34-35 ("Qwest agrees that residential wireless services are a substitute for consumer wireline voice and data services in our region, ... [o]ur [unaffiliated] competitors have every incentive to, and do, design their services to encourage wireline replacement.").

[310] *See id*. at 35.

[311] NASUCA Comments, ETI Report at 30-35; ACN Comments at 18-19; Cbeyond at 31-32 and Wilkie Decl. ¶¶ 43-44.

[312] Carlton & Sider Decl. ¶ 22.

minutes. Indeed, the Commission has expressly recognized the extent of "minute substitution."[313]

The merger opponents may ignore this phenomenon, but wireline carriers cannot. Cbeyond's expert suggests that "only six million households have cut the cord, despite wireless prices falling 80 percent."[314] He fails to note that the number of wireless minutes used are increasing while the number of wireline minutes are decreasing. It is clear that wireless substitution is an important competitive phenomenon even beyond the cases of complete replacement, and that the threat of partial or complete wireless substitution is a factor constraining wireline pricing.[315]

Several merger opponents try to diminish the significance of the intermodal competition from wireless carriers by pointing out that SBC is a part-owner of Cingular Wireless. But the significant and growing substitution of wireless minutes and lines for wireline minutes and lines has occurred notwithstanding the ownership of wireless

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[313] *See, e.g., Cingular/AWS Order* ¶ 237 and n.551; *Ninth CMRS Competition Report* ¶¶ 213-14; *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, 18 FCC Rcd 10,914, 10,919 ¶ 8 (2003).

[314] Cbeyond Pet., Wilkie Decl. ¶48.

[315] Qwest's expert, Professor Bernheim, mischaracterizes the declaration submitted by Professor Richard Gilbert in the Cingular/AWS merger. Contrary to Professor Bernheim's statement, Bernheim Decl. ¶ 79, neither Professor Gilbert nor Cingular contended that wireless service does not compete with wireline. Rather, Professor Gilbert observed that "consumer substitution *from wireless to wireline* would not be sufficient" to constrain *wireless* pricing, and therefore it was reasonable to look at a wireless-only product market in evaluating the merger of two wireless carriers. Application for Transfer of Control in the Matter of AT&T Wireless Corp., WT Docket No. 04-70, Ex. 1, Attachment 1 (Declaration of Professor Richard Gilbert), ¶ 44 (March 18, 2004) (emphasis added). The Commission appreciated this distinction: "[W]e agree with the Applicants that few customers would substitute other telecommunication services, such as wireline services, for mobile telephony services…. However, some consumers may find wireless services to be a good substitute for wireline service." *Cingular/AWS*, 19 FCC Rcd. at 21558, ¶ 74 n. 267.

carriers by SBC and other ILECs and has flowed from the vigorous competition among wireless carriers. Even if, contrary to fact, SBC had an incentive to cause Cingular to not compete, firms such as Sprint, Nextel, T-Mobile, U.S. Cellular, Metro PCS, Leap Wireless and others have no incentive to pull their punches to protect wireline businesses.[316] Moreover, BellSouth, which has 50% control of Cingular has no new incentive as a result of the SBC/AT&T deal not to compete for wireless business. The FCC rejected such an argument with respect to SBC and BellSouth in approving the Cingular/AT&T Wireless merger.[317]

SBC's merger with AT&T has no impact on wireless competition. AT&T has no significant wireless operations, and therefore the merger will have no impact on the vigor of intermodal competition. While Qwest, rewriting very recent history, incredibly claims that the Commission "only allowed the Cingular/AT&T Wireless merger" because it concluded most consumers do not now consider wireless service to be a close substitute for their wireline primary line,[318] in fact the Commission found that any potential harm to intermodal competition from that merger was "quite limited."[319] This was primarily

[316] While Sprint is currently an ILEC in some areas, it has announced plans to spin off that business following its proposed merger with Nextel. Even today, most of Sprint's profits come from its wireless business, not its wireline business. *See* Sprint Corp., SEC Form 10-K Statement, at 4-6 (providing information for year ending December 31, 2004) (reporting wireless net operating revenues of $14.647 billion against combined local and long distance net operating revenues of $13.348 billion and wireless operating income of $1.766 billion against combined local and long distance operating losses of $1.823 billion). Similarly, ALLTEL, the nation's sixth largest wireless carrier, which has agreed to merge with Western Wireless, is an ILEC but has extensive wireless operations outside its ILEC territory. It too has little to gain and much to lose from failing to compete aggressively in its wireless business.

[317] *See Cingular/AWS*, 19 FCC Rcd. at 21618, ¶¶ 247-48.

[318] Qwest Pet. at 27.

[319] *Cingular/AWS Order*, 19 FCC Rcd. at 21618, ¶ 247. Moreover, Qwest itself has highlighted the competitive pressures that wireless services exert on its wireless business.

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because of the other sources of intermodal competition faced by SBC and BellSouth, including other independent wireless carriers.[320] None of the commenters has made any showing as to how this merger will in any way affect the development and growth of intermodal competition between wireless and wireline carriers. The Commission should reject the speculative claims made by merger opponents.

c. The Merger Will Not Affect Other Sources of Mass Market Competition.

The merger opponents do not even question the existence or significance of other sources of mass market competition. As SBC and AT&T demonstrated in the Public Interest Statement, cable companies also offer circuit-switched telephony in many markets and have won millions of customers. Other CLECs have negotiated commercial arrangements to use SBC's facilities, or provide service through their own switches by leasing SBC loops. The Commission has determined that SBC has irreversibly opened its local markets to competition in compliance with Section 271 of the 1996 Act, and federal and state regulation continues to constrain SBC's wholesale and local exchange pricing

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Qwest Communications International Inc., SEC Form 10-K Statement (filed March 1, 2005) at 62 (providing information for year ending December 31, 2004). ("We compete in a rapidly evolving and highly competitive market, and we expect competition to intensify. We have faced greater competition in our core local business from cable companies, wireless providers (including ourselves), facilities-based providers using their own networks as well as those leasing parts of our network (unbundled network elements), and resellers. . . . Our revenue decline over the past few years is largely attributable to our continued loss of access lines, which is a result of increased competition and technology substitution (such as wireless and cable substitution for wireline telephony.)".

[320] The Commission noted that other independent wireless carriers have every incentive to exploit the opportunity to draw consumers away from wireline service and that several regional carriers were actively promoting "cord cutting." *Id.*, ¶ 248. It also observed that there are other sources of intermodal competition such as cable and VoIP providers. *Id.* at n. 590.

as well. No commenter seriously contends that the merger will have any impact on any of these competitive and regulatory constraints on local service pricing.

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In short, AT&T is not an active, price-constraining competitor in the mass market. Where either SBC or AT&T is "not a significant competitor" in the market or does "not possess any special retail assets or capabilities that would make it more likely than other carriers to become a major participant in the mass market," the merger "is not likely to affect adversely competition in this consumer market."[321] That should be the end of the inquiry here: the merger cannot have any adverse effect on mass market competition.

4. VoIP Competes Robustly with Traditional Voice Service Even Without "Naked DSL" Services.

Several opponents, including CFA and the Texas Office of Public Utility Counsel, contend that until or unless SBC offers DSL to consumers that do not purchase its circuit-switched telephony (*i.e.*, "naked DSL"), the Commission may not consider VoIP as a source of competition to SBC's local voice service.[322] But this argument does not reflect competitive realities and customers' choices today (as evidenced by the large number of customers that have chosen Vonage and similar companies), and is nothing more than a thinly disguised effort to inject into this merger proceeding an industry-wide issue that is squarely pending in another proceeding before the Commission.

[321] *WorldCom/MCI*, 13 FCC Rcd. 18025 ¶ 129.

[322] *See, e.g.*, CFA Pet. at 16; Texas O.P.U.C. Comments at 6-7; Qwest Pet. at 32; Cbeyond Pet. at 33 & n.106.

The fact that most ILECs have not yet offered "naked DSL" or are only beginning to do so has not deterred the growth of VoIP: there were more than a million VoIP subscribers in the United States at the end of 2004, and that number was growing rapidly.[323] Thus, while still nascent, VoIP clearly is a growing source of competition for SBC's and other wireline carriers' circuit switched telephony. And significantly, a growing source of VoIP competition is the cable companies. All of the major cable operators have either begun to offer or are rolling out their own VoIP services.[324] Cable VoIP, which is an obvious and robust alternative to wireline circuit-switched telephony, is of course not dependent on the ILECs' provision of "naked DSL".

Moreover, even if cable operators were not offering their own VoIP services, the availability of their *broadband* service belies the contention that the absence of DSL

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[323] Stephen Lawson, *What's Next for Net Phones*, PC World, Mar. 7, 2005, *at* http://www.pcworld.com/resource/article/0,aid,119911,pg,1,RSS,RSS,00.asp ("[B]y the end of 2004 there were more than 1 million VoIP subscribers in the U.S. alone."); Press Release, *'Wave of the future' - Businesses invest in telephone service via the Internet*, Halpern Capital, Mar, 22, 2005, *at* http://www.halperncapital.com/press.php?id=21 ("over 1 million VoIP subscribers in the United States at the end of 2004"). As noted, Vonage alone now has over *half a million subscribers* and is growing at 3% *per week*, Vonage's subscriber base could easily triple in a year. *See* Press Release, *Vonage Becomes First Broadband Telephony Provider To Activate Over 500,000 Lines*, Vonage web site, Mar. 7, 2005, *at* http://www.vonage.com/corporate/press_index.php?PR=2005_03_07_1 (noting the company is adding 15,000 lines per week). Analysts expect VoIP to serve 17 million U.S. households by the end of 2008. Press Release, *The Yankee Group Expects the Consumer Local VoIP Industry to Grow More Than 100 Times Its 2003 Size*, Aug. 30, 2004 *at* http://www.yankeegroup.com/public/news_releases/news_release_detail.jsp?ID=PressReleases/news_08302004_cts.htm.

[324] *See* Peter Grant, *Here Comes Cable ... And It Wants A Big Piece of the Residential Phone Market*, Wall St. J. at R4, Sept. 13, 2004; *Comcast To Challenge Phone Companies with National Rollout*, 24 Comm. Daily 103, May 27, 2004, *available at* 2004 WL 60706138; *Cable MSOs Pick Up VoIP Pace, Shrug Off Vonage*, 24 Comm. Daily 100, May 24, 2004, *available at* 2004 WL 60706097; *see also Cable Groups See VoIP Services Take Off*, Fin. Times, Apr. 12, 2005 ("The rate at which telephone users in the US are switching from traditional operators to services provided by cable companies is higher than previously envisaged.").

moots the significance of VoIP competition. Cable companies are the dominant providers of broadband today.[325] Roughly 52.7 percent of customers with high-speed lines take cable modem service in SBC's states while only about 43.3 percent take ADSL service.[326] Moreover, the vast majority of residential consumers in SBC's region have access to cable modem services.[327] In addition, other technologies such as fixed wireless solutions including Wi-Fi and Wi-Max, 3G CMRS, personal area networks, fiber-to-the-

[325] *Availability of Advanced Telecomms. Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd. 20540, 20568 (2004) (as of December 2003, cable modem service represented 75.3% of advanced service lines and 58% of high-speed lines); *see also* Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21506-07 ¶ 22 (2004) ("cable modem providers control a majority of all residential and small-business high-speed lines"); *id.* at 21510-11 ¶ 30 ("[T]he BOCs have limited competitive advantages with regard to the broadband elements, given their position with respect to cable modem providers and others in the emerging broadband market.").

[326] Indus. Anal. & Tech. Div., FCC, *High-Speed Services for Internet Access: Status as of June 30, 2004*, Tbl. 7 (2004) (reporting 5,414,071 ADSL high-speed lines; 6,592,712 cable modem service high-speed lines; and 12,498,476 total high-speed lines). The FCC staff withheld data for high-speed cable modem lines in Nevada and Oklahoma from the report to maintain firm confidentiality. To provide a meaningful comparison, we likewise omitted the ADSL and total high-speed line counts for those two states from the statistics reported in the parenthetical at the beginning of this footnote and the percentages appearing in the text above. However, the FCC reports a total of 204,875 ADSL high-speed lines in Nevada and Oklahoma, *id.*, which is smaller than the difference between ADSL and cable modem service for the other 11 states. Therefore, excluding the two states from the calculation does not alter the result that there are more cable modem service lines than ADSL lines throughout SBC's 13-state region. Moreover, the ADSL numbers overstate SBC's market share because SBC is not the only ADSL provider in these states.

[327] Data reported by cable companies to Nielsen Communications suggests using 2000 census data, adjusted by a demographics program of Claritas Production Systems, to update the data, that at least 71%, and possibly more, of households in SBC's footprint have access to cable modem service. Furthermore, cable companies can provide broadband service to over 105 million homes nationwide, Nat'l Cable & Telecomms. Ass'n, Broadband Services (May 2005), *at* http://www.NCTA.com/Docs/Page Contest./cfm?page ID = 37 out of the over 111 million homes, Jason Fields, *America's Families and Living Arrangements: 2003* (2004) *at* http://www.census.gov/prod/2004 pubs/p 20-553.pdf.. Nationwide, over 60% of all zip codes have more than two broadband providers today, and over 80% of all zip codes have at least two. Press Release, High Speech Connections to the Internet Increased 15% During the First Half of 2004 for a Total of 32 Million Lines in Service (Dec. 2004) at http://www.fcc.gov/ Bureaus/Common_Carrier/Reports/FCC-state_link/IAD/hspd/204.pdf.

home, and broadband over power lines do and increasingly will provide competitive alternatives.[328] Consumers who want to abandon their circuit-switched telephony service altogether for VoIP therefore have an option to do so almost everywhere. There accordingly is little risk that refusing to offer "naked DSL" could somehow squelch VoIP competition.

Likewise, the widespread availability of competitive alternatives to DSL including cable modem service answers CFA's complaint that customers who want to cut the cord need to maintain wireline voice services even if they want just broadband access.[329] The picture CFA paints does not describe the vast majority of households. And, before mandating that SBC – or any other company – satisfy the demands of the small minority of households that want broadband access without either wireline voice or cable television services, the Commission must ask itself one crucial question: Can it justify command-and-control regulatory interference in a still immature and increasingly competitive market to prevent providers from capitalizing on what – based on the frequency with which providers bundle services – appear to be significant economies of scope? The answer is obvious.

In all events, the issue of whether ILECs should be required to offer "naked DSL" has been squarely raised in the Commission's *Notice of Inquiry*.[330] NASUCA, Vonage,

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[328] *See, e.g.*, Wireless Broadband Access Task Force, FCC, *Connected on the Go: Broadband Goes Wireless* 73-76 (Feb. 2005); *Availability of Adv. Telecomms. Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at 8 (rel. Sept. 9, 2004).

[329] *See* CFA Pet. at 16-17.

[330] *In re BellSouth Telecomms., Inc. Request for Declaratory Ruling That State Comm'ns May Not Regulate Broadband Internet Access Servs. by Requiring BellSouth to Provide Wholesale or Retail Broadband Servs. to Competitive LEC UNE Voice Customers*,

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and the New Jersey Division of the Ratepayer Advocate even expressly suggest that the Commission impose a "naked DSL" requirement as a condition of the merger.[331] But the "naked DSL" dispute is not a function of or affected by this merger in any way. Indeed, for this very reason, the Alliance for Public Technology specifically recommends that the Commission *not* insert the "naked DSL" issue into this proceeding, suggesting that the Commission should instead "follow its practice of declining to consider matters in merger proceedings that are not unique to a specific merger."[332]

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Memorandum Opinion and Order and Notice of Inquiry, WC Dkt No. 03-251, FCC 05-78 (rel. Mar. 25, 2005).

[331] *See* NASUCA Comments, Attach. A, at 52; New Jersey DRA Comments at 29 & n.71; *see also* Vonage Opp. at 19-22. Vonage's assertion that "DSL tying represents a classic violation of the antitrust laws," Vonage Opp. at 20, 22, is plain wrong. Vonage actually accuses SBC of reverse tying – sacrificing its competitive position in the highly contested and growing market for broadband services in order to advantage itself in the less-contested and shrinking market for POTS. Broadband competition, and the merged company's motivation to earn broadband revenues, provides ample protection against such a strategy. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 1734c2 (2d ed. 2004) ("*Areeda & Hovenkamp*") (noting that reverse tying will work only if consumers are "foolish"); *see No. Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 6 (1958). Because reverse tying is irrational as a strategy, "[i]n no recent case . . . has a court condemned a tie in where there was an express finding that the defendant had no market power in the tying product," Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 8.3, at 218 (1985); *see Areeda & Hovenkamp* § 1700d3 ("By definition, a tie is not present . . . when the buyer can obtain the tying product on equally advantageous terms from other sources."). The Commission has no basis for reaching a contrary decision here. To the contrary, broadband competition may create an incentive for ILECs to offer "naked DSL", without the need for Commission rules or requirements. *See, e.g.*, Lynn Stanton and Paul Coe Clark III, *Verizon Offering 'Naked DSL' After Voice Provider Switches*, TR Daily, Apr. 18, 2005; *SBC/ATT and Verizon/MCI Mergers – Remaking of the Telecommunications Industry: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. 14-15 (Mar. 15, 2005) (Fed. News Serv. Transcript) (testimony of Edward E. Whitacre Jr., Chairman and CEO, SBC Communications Inc.).

[332] Alliance for Public Technology Comments at 6.

G. The Merger Will Not Decrease Competition in the Provision of Telecommunications Services to Business Customers.

Aside from unfounded claims of discrimination with regard to special access, the merger opponents point to no structural barriers to competition in the retail business marketplace. In the absence of such barriers, there is no realistic chance that the merger will produce any anticompetitive effects. The merger opponents do not dispute the following facts established in the Public Interest Statement:

- A host of new competitors, relying on both traditional and new technologies, are present and will remain present across the business marketplace.
- The Commission has repeatedly found in its merger orders that markets for both "local" and "long distance" services provided to larger businesses are "increasingly competitive."[333]
- Many CLECs other than AT&T can and do provide vigorous and effective competition for business customers in SBC territory.
- SBC and AT&T are not each other's closest substitutes, but rather are largely complementary, with respect to the services they provide business customers.
- Business customers' service needs are heterogeneous, making coordination or collusion difficult.
- The business telecommunications marketplace has strong bid market characteristics, in which large, long-term contracts make coordination unlikely.

Indeed, the intense competition in this segment resulting from factors the merger cannot remotely affect is illustrated by the words of the merger opponents themselves – virtually all competitors of SBC or AT&T. For example, in its 2004 Form 10-K, SAVVIS Communications states:

> We have experienced and expect to continue to experience pricing pressure in the markets we serve. *Prices for IP VPNs and Internet access and services have decreased significantly in recent years, and we expect significant price declines in the future.*[334]

Similarly, Qwest states in its 2004 Form 10-K:

> With increased levels of competition in the telecommunications industry resulting from statutory and regulatory developments and technology advancements, *we believe competitive providers are no longer hindered by historical barriers to entry.*[335]

In contrast with these statements, and in the absence of complaints or evidence of structural barriers to competition in the business marketplace, these opponents now complain about the specter of "mutual forbearance" or "tacit collusion" between a combined SBC/AT&T and a combined Verizon/MCI. However, these complaints fly in the face of the simple economic facts surrounding the transaction and ignore the fundamental characteristics of this transaction and of the marketplace changes that drive it: (1) rather than trigger forbearance, the merger will advance direct and substantial competition outside SBC territory and beyond SBC's existing out-of-region MSAs; (2) whole sets of new competitors have emerged as a result of the rapid development of new technologies; and (3) sophisticated customers demand new, efficient end-to-end services that the merged company will be able to provide.

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[333] *See, e.g., Bell Atlantic/GTE,* 15 FCC Rcd. at 14768, ¶ 120; *SBC/Ameritech,* 14 FCC Rcd. at 14760, ¶ 100 n.212; *WorldCom/MCI,* 13 FCC Rcd. at 18064, ¶ 65; *AT&T/TCG,* 13 FCC Rcd. at 15247, 15256, 15257, ¶¶ 28, 37, 40.

[334] SAVVIS Communications, SEC Form 10-K Statement (filed March 4, 2005) at 20 (providing information for year ending Dec. 31, 2004) (emphasis added).

[335] Qwest Communications International Inc., SEC Form 10-K Statement (filed March 1, 2005) at 8 (providing information for year ending December 31, 2004) (emphasis added).

The competitor opponents of this transaction point to *nothing* (other than their unfounded discrimination allegations) that impedes the ability of competitors to compete in the business marketplace. They hardly mention MCI, except to make the nonsensical assumption that it will stop competing if acquired by Verizon; they virtually never mention Sprint; they ignore their own emphasis on Qwest as an aggressive nationwide competitor; they pretend Time Warner, Comcast, and other cable companies, with new capabilities not dependent on the copper-based telephone network, do not and will not exist in the business marketplace; and they belittle the strength and expertise of systems integrators such as EDS and IBM. It is noteworthy that the complaining CLECs do not claim an inability to compete just as successfully as AT&T does when it operates as a CLEC. Thus, it is plain that there is plenty of competition from CLECs other than AT&T to satisfy customer demand in SBC's territory.

At heart, the competitor opponents of the transaction do not speak for, and do not represent, the interest of the ultimate arbiters of whether the proposed transaction is in the public interest: customers. In fact, as discussed *infra*, business customers of all sizes and types support the merger of SBC and AT&T. They do so for two fundamental reasons: (1) given the recent rapid technological development of the telecommunications marketplace, the wealth of qualified competitors, and the largely complementary nature of SBC and AT&T offerings, the transaction will not reduce competition; and (2) the combined company will be able to respond to core customer needs (end-to-end services, consolidated networks over which a single company will be able to maintain control and provide high quality, uninterrupted service, a complete package of well-integrated services, and efficient billing and other customer service mechanisms) in a way that

neither SBC nor AT&T could on its own. No opponent of the transaction provides any evidence to suggest that the customers are incorrect in these real-world judgments.

1. Contrary to Opponents' Suggestion of Concentration, Rapid Technological Change Will Continue To Increase the Quantity and Quality of Competition.

Several opponents cite general share data to suggest that competition for business telecommunications services is concentrated and subject to the risk of anticompetitive effects, and complain that SBC and AT&T have not defined markets or quantified concentration.[336] They ignore, however, that, as an economic matter, shares may misstate the competitive significance of existing firms and new entrants. Historical and current market shares obviously overstate SBC's local "market power" because they reflect its historical position in local markets prior to the 1996 Act. They also do not fully reflect the dramatic increase in the importance of data services, the advent of cable and VoIP competition, and the dramatic increase in wireless usage. Since 1996, SBC and other ILECs have been losing the local business of commercial customers to many competitive providers.[337] Indeed, the Commission has repeatedly recognized that numerous CLECs are quite successfully competing to provide local services to business customers.[338]

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[336] *See* ACN Comments at 8, 27, 49; CompTel-ALTS Pet. at 7, 23-26; CFA Pet. at 22; Qwest Pet. at 2-3, 15, Bernheim Decl. at ¶¶ 59, 69-73 [redacted].

[337] *See, e.g.*, Eschelon Telecommunications SEC Form 10-K Statement (filed March 31, 2005) at 2 (providing information for year ending December 31, 2004) ("Competitive service providers such as us continue to gain market share from the ILECs. According to the FCC, as of December 31, 2003 competitive service providers served 29.6 million, or 16%, of the switched access lines in the United States, an increase of 19% over the prior year."). *See also, Broadwing Communications Names John McLeod Chief Operating Officer*, Wall St. J. May 4, 2005, *available at* http://online.wsj.com/article/0,,PR_CO_20050504_003550-email,00.html ("We are fortunate to have an industry leader like John assume the role of COO for Broadwing. Under his leadership the network and customer operations of Broadwing have flourished and we look forward to new and even greater successes for Broadwing, our customers and investors, through this new and expanded role,' said Dr. David R. Huber, Chairman and CEO of Broadwing

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Thus, the issue is not whether SBC has had a large static share of the market, but whether it could retain that share if it were to raise prices following the merger. In arguing that the merger poses that risk, the merger opponents ironically largely ignore the new entrants and the changing technological paradigm of business competition. This is particularly odd inasmuch as they themselves are among the firms that have entered with landscape-changing IP-based solutions.

For example, on March 7, 2005 Global Crossing announced it was launching a VoIP product called Local Digital Service, which is aimed at enterprise customers, and allows customers using Global Crossing's VoIP service to have local phone numbers across Global Crossing's footprint.[339] Similarly, XO Communications recently launched "its industry-leading Voice over Internet Protocol (VoIP) services bundle for businesses . . . in 45 major metropolitan markets, which includes more than 1,000 cities nationwide. XOptions Flex . . . gives business customers enhanced features, functionality and value for their voice in Internet services, all in one simple package."[340]

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Corporation. 'I am very excited to have the opportunity to lead the operating units of a company as well positioned and with as much potential as Broadwing,' said McLeod. 'Our people, network, services and customer experience are powerful forces that come together to make Broadwing the most compelling choice for large enterprises and carriers seeking an integrated communications partner committed to meeting their needs and exceeding their expectations.'").

[338] *See, e.g.*, *Bell Atlantic/GTE*, 15 FCC Rcd. at 14768, ¶ 120; *SBC/SNET*, 13 FCC Rcd. at 21301, ¶ 20; *AT&T/TCG*, 13 FCC Rcd. at 15250, ¶ 27; *WorldCom/MCI*, 13 FCC Rcd. at 18073-18074, ¶ 85-87.

[339] *See* Press Release, Global Crossing Announces New VoIP LDS Service Offering Enterprises Extended Local Presence, *at* http://www.globalcrossing.com/xml/news /2005/march/07.xml (Mar. 7, 2005).

[340] Press Release, XO Communications, Inc., XO Communications Launches Business VoIP Services Bundle Nationwide (Apr. 18, 2005), *available at* http://www.xo.com/news/227.html.

As the Chairman of XO recently testified: "IP-Enabled services are, indeed, changing the voice and data marketplace."[341] Qwest's Chairman made a similar point over a year ago:

> At this point, the Bells' phone-line monopolies are gone. It's history. It's over. Phone service has become a commodity because I can get dial tone in Denver or Atlanta or New York or Los Angeles from seven to 10 different companies, without any problem. I can get five or six wireless companies. I can get the [local] telephone company, the incumbent local exchange carrier. Or I can get it from a small company or a large company like MCI or Sprint. Or I can get telephony over the Internet as an information service. Now, if you are going to compete, you have to compete with a commodity mind-set.[342]

The competitive opponents seek to dismiss all this competition out of hand by suggesting it is subject to a special access bottleneck. This argument not only fails for all the reasons discussed above;[343] it flies in the face of the competition which has already intensified over the past nine years notwithstanding the same alleged special access barriers. It completely ignores the extent to which this competition includes offerings from cable providers, equipment vendors and other companies emphasizing reduced reliance on the public telephone network.[344]

The merger opponents who assert that cable companies provide telecommunications services only to those business customers who are located in

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[341] Grivner Testimony at 3.

[342] *See* Almar Latour, *Boss Talk: Now Comes the Hard Part – Having Rescued Qwest, Notebaert Sees Bells' Future Depending On Service, Internet* Wall ST. J. at B1, Jan. 19, 2004 (quoting Qwest Chairman Richard Notebaert).

[343] *See* Section III.B *supra.*

[344] Contrary to the suggestion of opponents of the transaction (*see*, *e.g.*, ACN Comments at 14; CBeyond Pet. at 28; Qwest Pet. at 29-30), IP-based services offered by cable companies – involving both use *and* non-use of SBC facilities – have become a significant factor in the business marketplace. This was true even for the largest business customers. SBC, *2004 DS-1/T-1 Disconnect Study* at 16; Carlton & Sider Reply Decl. ¶ 29.

primarily residential areas[345] ignore how rapidly the marketplace is evolving. Cable companies are rapidly looking to provide telecom services to businesses in all areas, expanding beyond residential areas. For example, Comcast has formed an agreement with Level 3 to extend Comcast's fiber footprint via inter-city and metro dark fiber, which will better enable Comcast to provide voice, data and video services to business customers.[346] With expanded fiber networks capable of reaching small and medium businesses in all areas, cable companies are poised to be a significant competitive threat in the provision of voice and data services to businesses of all sizes.

Indeed, business customers of all sizes report rapidly increasing adoption of IP data services and VoIP, whether through cable companies or otherwise, and repeatedly note that their interest in these technologies opens new competition for traditional carriers.[347] For example, the Chief Information Officer of Fremont Bank, a community bank in northern California that uses SBC for many of its telecom services, states:

> I firmly believe we have options for our telecommunications solutions, and indeed we keep those options open by welcoming quotes from other providers. In the most recent past we have received quotes from

[345] *See* Qwest Pet. at 29-30 & Bernheim Decl. ¶ 65; ACN Comments at 14.

[346] Press Release, Comcast Extends National Fiber Infrastructure (Dec. 7, 2004), *at* http://www.telephonyworld.com/cgi-bin/news/viewnews.cgi?category=all&id =1102475813.

[347] *See*, *e.g.*, Statement of William S. Johnson, Chief of Staff, ORCO Construction, Apr. 13, 2005 ¶¶ 4, 7 ("Johnson Statement") (ORCO is implementing a new Avaya-based VoIP service, and "has solutions – including, for example, VoIP, IP-based data solutions, and wireless capabilities – that can be run over other broadband networks, whether telecom or not."); *see also* Carlton & Sider Reply Decl. ¶ 72 (discussing customers that have adopted IP-based technology, including a Wisconsin-based insurance company that has adopted VoIP and ISP services through cable companies and others, and an Oklahoma bank that uses Cox for data connectivity, using a cable that "physically enters the building at a different point and through a different method than SBC's DS3 frame connection").

> companies new to the industry. For example Time Warner has laid extensive fiber throughout our region, and can offer equivalent data and voice services that we currently get from SBC. Comcast is also laying fiber. VoIP providers like Cisco and Skype abound. Fiber has become an effective way for businesses in our region to leverage their existing telecommunications services.
>
> In this light, I do not believe that the proposed SBC and AT&T will result in an increase in pricing. The fight is really no longer about copper-based services, but about fiber and satellite infrastructures. The number of vendors out there that have appeared on the scene with fiber and Internet connectivity for VoIP should prevent any anticompetitive effect from this merger. If anything, you could make the argument that the newer players have the advantage. They have more mobility. They do not have to deal with the fiscal constraints of an extensive copper, analog, non-switched legacy environment.[348]

Mazzio's Corporation, which operates eighty restaurants in four states, notes that:

> Cox Cable is a primary provider of voice and data services to Mazzio's. We recently converted our data services from SBC to Cox. In addition, Mazzio's uses Cox for local voice service in the areas where Cox provides those services. Where Cox does not offer local voice service, Mazzio's uses SBC and others, including Charter Cable.[349]

Similarly, the Milwaukee Journal-Sentinel reports adoption of Time Warner VoIP service at various locations in Wisconsin.[350] Industry-wide, the portion of telecommunications spending allocated to IP technologies has increased dramatically, and is still growing.[351] As customers attest, competition from new technology is thriving. For example, the Director of IT at National University in California notes, "[n]ew technologies have opened up many opportunities for the University and we anticipate that

[348] Statement of Michael Moran, Vice President and Chief Information Officer, Fremont Bank, May 3, 2005, ¶¶ 4-5 ("Moran Statement").

[349] Statement of Pat Patterson, Vice President of Information Systems, Mazzio's Corporation, ¶¶ 1, 3 ("Patterson Statement").

[350] Statement of Tom Kress, Director of Information of Technology, Milwaukee Journal Sentinel, April 14, 2005, ¶ 3 ("Kress Statement").

[351] Reply Declaration of Walid Bazzi ("Bazzi Reply Decl.") ¶ 27.

our options will increase in the future."[352] And as the Vice President for Accounting and Information Systems of the Dairy Farmers of America, based in Missouri, concludes:

> My own view is also that the telecom market will remain extremely competitive even with consolidation between local service providers and long distance providers. There are so many different technology options for consumers now such as VoIP and wireless, which phone companies will have to continue to compete with other types of companies.[353]

2. The Business Marketplace Is Not Captive to a Highly Concentrated Set of Providers.

The marketplace trends towards use of new technology and outsourcing – both of which are in addition to the presence of other IXCs, ILECs, network providers, and CLECs – directly translate into increased competition in large and medium-sized business telecom procurements. As discussed in the Public Interest Statement, a wide and heterogeneous array of competitors, including not only IXCs and ILECs, but also systems integrators, nationwide network providers, CLECs, cable companies, and equipment vendors, provide substantial competition on every permutation of customer demand.

Statements submitted by SBC's and AT&T's customers illustrate that there is vibrant competition from a growing array of sources that would render post-merger coordination or unilateral effects a fruitless exercise. This is true across the board: regardless of whether customers are national, regional or local; whether they are large or small; whether they use only one of the companies or both as a supplier of

[352] Statement of Eileen D. Heveron, PhD, Director of IT, National University, May 4, 2005 at 1 ("Heveron Statement").

[353] Statement of Joel Clark, Vice President of Accounting and Information Systems, Dairy Farmers of America, April 29, 2005, at 1 ("Clark Statement").

telecommunications services; where they are located, or what they sell, they overwhelmingly tell the same story: the merger of SBC and AT&T will not undermine competition.

For example, Gregg Appliances is a high-end consumer electronics and appliance retailer that operates stores in eight southeastern states.[354] Similar to many business customers, it uses a wide range of vendors for its various telecommunications needs: SBC for data and local voice services; AT&T and "various mom and pop operators" for voice and some data services outside of SBC's territory; and Qwest for all its long-distance and toll-free service.[355] Gregg's Chief Information Officer states as follows:

> I believe that the merger between SBC and AT&T will be great for the industry and great for enterprise customers like Gregg Appliances. First, the two companies complement each other in the services and products they provide. SBC's core competencies are local service and hosting, while AT&T has the best data network and national voice service. The companies are a perfect fit for each other. . . . [T]here will continue to be competition in the telecommunications industry, and this competition will come from both the firms discussed above and from non-traditional sources. For example, Gregg Appliances currently uses VoIP in its company headquarters and in about 20% of its remote facilities, which runs on Cisco's system. . . . I believe that prices will continue to decrease after the merger. The last competitor will always force price competition. Right now, a carrier called Vonage runs its telecommunications over the Internet. It is 25% cheaper to use that than traditional voice services. Gregg Appliances has not switched yet because it is a big company and has some concerns about quality and reliability of a new solution. As the quality of the services improves, however, there will be nothing to prevent Gregg Appliances from switching to Vonage or any other low-price carrier, as many small businesses have done.[356]

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[354] Statement of Bob Ellison, Chief Information Officer, Gregg Appliances, Inc., April 13, 2005, ¶ 1 ("Ellison Statement").

[355] *Id.* ¶ 2.

[356] *Id.* ¶¶ 3, 5-6.

Similarly, Servicemaster, an Illinois-based national provider of outsourced residential services, uses primarily SBC and AT&T for its voice and data needs.[357] It is one of the relatively few SBC customers that spends over $5 million per year with SBC. Servicemaster most recently sought competitive bids for long-distance and toll-free service, using a formal request for proposals ("RFP"), in late 2004.[358] It sent the RFP to six different carriers, and, according to its Vice President of IT Infrastructure Engineering, "could have sent the RFP to 15-20 more carriers, carries [sic] that would include Broadwing, Global Crossing and Level 3, however we limited the bidding to 6 carriers to minimize the workload involved in analyzing the responses."[359] With regard to SBC's acquisition of AT&T, Servicemaster makes clear:

> Currently in the marketplace there are more than a sufficient number of alternative telecommunication providers for all types of services. This competitive environment will not be endangered by the proposed merger of SBC and AT&T. We view these two companies as complementary in the provisioning of IXC and local services. Today, there is excess capacity in the industry that consolidating two companies which provide complementary services would benefit both suppliers and consumers. Following the proposed merger, there will continue to be more than a sufficient number of competitors in the telecommunications market even with additional M&A activities within this industry.[360]

Like many other business customers, Credit Bureau Collection Services (CBCS), an Ohio-based provider of collection and call center services, uses a formal bidding

[357] Statement of Todd Willinger, Vice President of Information Technology Infrastructure Engineering, Servicemaster, ¶ 2 ("Willinger Statement").

[358] *Id.* ¶ 3.

[359] *Id.*

[360] *Id.* ¶ 4.

process and enlists the assistance of an outside consultant to maximize competition.[361] Unlike Gregg and Servicemaster, however, it primarily uses MCI, as well as Qwest and Verizon (and SBC for a variety of voice and data services), for its telecommunications needs.[362] But its President makes the same point as other customers:

> I have no concerns about the SBC and AT&T merger. I do not think that it is going to make a difference in our ability to get competitive bids. There are numerous competitors who continuously let us know they want our business.[363]

Other customers use still other permutations of telecommunications service providers (including cable companies,[364] CLECs, and others[365]), but whatever the combination, they refute the notion that the merger of SBC and AT&T will harm competition. For example:

- NIBCO, an Indiana-based manufacturer of flow control products that uses AT&T for most of its telecom services, makes clear that there is "significant competition among telecommunications providers for NIBCO's business,"[366] and that, given the complementarity of the

[361] Statement of Larry Ebert, President, Credit Bureau Collection Services, at 1 ("Ebert Statement").

[362] *Id.* at 1.

[363] *Id.* at 2.

[364] *See supra*, nn. 350-51.

[365] *See, e.g.*, Statement of Gene Kincy, D.R. Partners/Southwest Times ("Kincy Statement"), ¶ 5 ("[B]oth Sprint and ALLTEL provide services in my territory, and I could turn to them if I began experiencing problems with SBC."); *see also* Carlton & Sider Reply Decl. ¶ 72 (discussing Oklahoma bank customer of SBC that also uses Sprint, AT&T, Worldcom, Pioneer Telephone, Chickasaw Telecommunications, Cox Communications (for data connectivity over non-DSn connection), OpticTel (for voice long-distance service) and Catalog.com (which it uses, drawing on "a point of presence in the basement of our corporate headquarters," for Internet service)).

[366] Statement of Rod Masney, Director of Information Technology, NIBCO INC., April 15, 2005, ¶ 3 ("Masney Statement").

companies and the existence of currently "fierce" price competition, "an AT&T-SBC merger would be a good marriage."[367]

- SageNet, an Oklahoma-based reseller of WAN services used in credit-card processing transactions to customers located overwhelmingly in SBC's ILEC region, states that "there are competitors capable of providing services to SageNet, including BellSouth, Qwest, and Verizon, as well as CLECs both in and out of SBC's region,"[368] and that "I believe the merger will be nothing but a good thing for SageNet."[369]

- Orco Construction Supply, a California-based wholesale distributor of construction supplies in three western states that has used carriers including SBC, AT&T, XO, Sprint, and other ILECs in recent years,[370] makes clear that "I am not concerned about SBC's acquisition of AT&T because the merger does not currently change the competitive situation in any significant respect. Although SBC is by far our preferred provider of local service, competition from other providers still keeps SBC honest. ORCO has solutions – including, for example, VoIP, IP-based data solutions, and wireless capabilities – that can be run over other broadband networks, whether telecom or not."[371]

- Baldor Electric, an Arkansas-based manufacturer of industrial electric motors and generators in twelve states and overseas, uses MCI and SBC as its primary telecom providers, and is a former customer of AT&T. Baldor's Systems and Operations Manager states: "The telecommunications market is much more competitive today than it was five years ago. At that time, customers wanting reliable service only had a few choices. Today, that is no longer the case. Baldor believes that the current market for telecommunications services is very competitive in terms of the number of companies providing services, the range of services being provided, and cost. We have lots of options for meeting our needs. We do not believe the merger between AT&T and SBC will change this."[372]

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[367] *Id.* ¶ 4.

[368] Statement of Daryl Woodard, President, SageNet/Woodard Technology & Investments LLC, ¶ 3 ("Woodard Statement").

[369] *Id.* ¶ 4.

[370] Johnson Statement ¶ 2.

[371] *Id.* ¶¶ 6-7.

[372] Statement of Rob Cates, Systems and Operations Manager, Baldor Electric, ¶ 5 ("Cates Statement").

Numerous other customers express similar sentiments.[373] Regardless of size, geography, current usage, or any other factor, customers repeatedly make clear that the proposed transaction will not harm competition for business telecommunications services. The contrast is very clear: whereas competitor opponents claim the marketplace is concentrated,[374] customers see an abundance of traditional and new competitors; and whereas competitor opponents claim without substantiation that the merger might increase prices,[375] customers observe that prices are likely to fall.

Customers' perspectives are corroborated by Deloitte Consulting, which is regularly engaged by business customers (as well as SBC and other telecommunications providers) to assist in purchasing of telecommunications services and which has prepared

[373] *See, e.g.*, Statement of Todd Thielbar, Information Technology Manager, KCG, Inc., ¶ 10 ("Thielbar Statement") ("KCG has no concerns about the merger. Even after the merger occurs, KCG will still have a number of competitive alternatives available for the provision of the services that AT&T is currently providing."); Statement of Gary M. Devan, Senior Vice President for Enterprise Information Management, Mission Federal Credit Union, ¶ 4 ("Devan Statement") ("I feel very confident that competition is strong in the telecommunications marketplace. It was about six years ago when we went through our last RFP process and chose SBC. I recall that we went through an extensive review of several alternatives. We had a lot of options for service providers then, and I believe we have just as many now, and even more when one considers the opportunities that cable, VoIP, and other new technologies have brought to the marketplace."); Kress Statement ¶ 5 ("We do not think that the planned merger of SBC and AT&T will have a major impact on our existing telecommunications services, or for that matter will change the competitive landscape in our area."); Statement of David S. Corwin, Vice President of Infrastructure Services, Yellow Roadway Technologies, May 2, 2005, ¶ 5 ("Corwin Statement") ("For customers wanting to utilize multiple contracts, a sufficient number of viable alternatives will still exist."); Statement of Mitchell Swindell, Senior Vice President of Information Technology, NOVO 1, Inc., ¶ 4 ("Swindell Statement") ("There is strong pricing competition in the telecommunications industry. It is our further experience that there is currently a sufficient level of competition in the market for the full range of telecommunication services. Moreover, we have found that there are a number of viable options to meet our needs. We believe this will continue to be the case following the merger of AT&T and SBC."); *see also* Carlton & Sider Reply Decl. ¶ 72.

[374] *See, e.g.*, ACN Comments at 27, 49; Broadwing & SAVVIS Opp. at 23; CompTel-ALTS Pet. at 23-26; Qwest Pet. at 2-3.

[375] *See, e.g.*, CompTel-ALTS Pet. at 7.

an analysis of nearly two dozen procurements for which it has data available from the past seven years.[376] Deloitte reports that the number of bidders invited to participate in business telecommunications RFPs has increased significantly over time, from an average of four providers in bids conducted prior to 2000, to an average of over six during 2003-2005.[377] The number of bidders making the final round of RFPs has similarly increased over time.[378] At the same time, the identity and diversity of these bidders has expanded significantly. Whereas prior to 2003 only three different non-traditional (non-ILEC, non-IXC) bidders showed up once each in procurements on which Deloitte consulted (*i.e.*, non-traditional providers showed up a total of three times in eight procurements analyzed), by 2003-2005 the number had increased to seven different such bidders showing up an average of twice each (*i.e.*, a total of fourteen times in thirteen procurements analyzed).[379] These bidders included CLECs, national and regional network providers, IP-centric equipment vendors, and systems integrators.[380]

In anticipation of switching between telecommunications suppliers and technologies, businesses routinely use "benchmarking" clauses in their contracts to allow them to renegotiate based on competitive telecommunications deals.[381] Similarly, businesses also routinely include clauses that allow them to terminate telecommunications contracts when migrating to a new technology. As Deloitte has

[376] Bazzi Reply Decl. ¶ 4.
[377] *Id.* ¶ 31.
[378] *Id.* ¶ 31.
[379] *Id.* ¶ 25.
[380] *Id.* ¶ 25.
[381] *Id.* ¶ 18.

discovered, business customers have been increasingly inclined to seek, *and have commonly received*, both significant cost savings compared to prior contracts and added flexibility – including flexibility to terminate early and renegotiate – through RFPs and contract negotiations over the past two years.[382] Both the pursuit and the satisfaction of the desire for such flexibility are clear indicia of the competitiveness of the telecommunications marketplace. The merger of SBC and AT&T will not, and cannot, change this.[383]

[382] *Id.* ¶¶ 15-17.

[383] Similarly, the transaction will not reduce competition to provide voice and data services to small and medium-sized businesses. As various commenters acknowledge, businesses at the smallest end of the spectrum are essentially considered to be in the mass market along with residential customers. *See* Cbeyond Pet. at 31; Tex. O.P.U.C. Comments at 9; CompTel-ALTS Pet. at 55; Broadwing & SAVVIS Opp. at 37. As discussed above, *see supra*, Section III.F, competition for mass market customers is expanding rapidly, pitting traditional service providers against such aggressive competitors as cable MSOs, other CLECs, wireless companies, and VoIP providers; and AT&T's withdrawal from marketing mass market services obviates any anticompetitive concerns that the transaction might raise for that sector. Competition is also robust in the lower end of the medium business segment. CLECs, cable MSOs (with their VoIP offerings), wireless companies, and equipment vendors and their value-added resellers all have increased their focus on the small to medium business sector, with strong penetration. As Frost & Sullivan recently reported, "the small and medium business is proving to be a lucrative market for IP telephony growth opportunities in the long run." Frost & Sullivan, North American Enterprise IP Telephony Systems Markets, 5-1 (2005). Several manufacturers, including Avaya, Cisco, Siemens, Mitel, Alcatel, and Alitgen, have recently introduced products aimed specifically at small and medium businesses. *Id.* at 5-1, 4-5 – 5-9. For example, "Cisco is addressing the requirement of the SMB market with the introduction of the Integrated Services Routers which have embedded telephony, security, conferencing, and voice mail features. This enables Cisco to offer this routers [sic] with telephony functionality at a low cost to small offices and branch offices. With the SMB market showing more growth opportunities than other markets, this product launch should enable Cisco to better penetrate this market and also target the installed base of key system and small PBX users who will be looking to migrate to IP." *Id.* at 5-5.

3. There Is No Risk of Unilateral Effects Because SBC and AT&T Are Not Unique Substitutes for Each Other.

There is no economic basis on which to fear the unilateral exercise of power if SBC acquires AT&T. The merger opponents largely acknowledge the fact that the companies overlap far less than they complement each other. As Global Crossing notes in its comments: "SBC currently is not a major competitor of Global Crossing, but AT&T is."[384] This fact not only highlights the procompetitive benefits and efficiencies of the transaction, as discussed below, but it also means that, because the marketplace for business telecommunications services indisputably has strong bid market characteristics, the transaction cannot have significant unilateral anticompetitive effects. Even to the extent that AT&T and SBC do provide some of the same services to the same customers (which is undisputed), there is no reason to believe that the loss of AT&T will leave business customers without sufficient competitive choices because AT&T is not uniquely situated to provide competition to SBC or to any of the other competitors that provide service to business customers.

The various customer letters attached further demonstrate that no such concern is warranted. As Yellow Roadway observes: "It has been our experience that the two companies offer different services. As a result, Yellow Roadway believes the merger will be of complementary, not competitive, services."[385] Similarly, the Chief Financial Officer of Nix Check Cashing notes that "I do not believe this merger would reduce competition in the overall marketplace, as I believe that for the most part SBC and AT&T

[384]Global Crossing Comments at 18; *see also* Cbeyond Pet., Bernheim Decl. ¶ 59 (SBC's share of local business service is high while AT&T's is low).

[385] Corwin Statement ¶ 5.

provide different services and there will still remain many players and options to choose from at all levels."[386] Many others say fundamentally the same thing.[387]

The complementarity of the companies is also generally reflected by the fact that retail business customers generating AT&T revenue of $5 million or more in 2004 accounted for 41% of AT&T's total revenue for the year, while the same class of customers generated only 6% of SBC revenue.[388] Deloitte's consulting experience confirms this conclusion. In the twenty-one procurements for which Deloitte has data, SBC and AT&T bid against each other only three times and were both finalists in only one procurement.[389]

To be sure, there are instances in which SBC and AT&T are both "finalists" in competition to provide service to in-region business customers, but customers view a much larger number of firms as viable competitors for that business and, as discussed above, often include many of those firms, in ever-shifting permutations, as part of the competitive process.[390] AT&T is not uniquely situated to challenge SBC in SBC's strong

[386] Statement of Randy Dotemoto, Senior Vice President, Chief Financial Officer and General Manager, Nix Check Cashing, May 5, 2005, ¶ 4 ("Dotemoto Statement").

[387] Statement of David Watts, Director of Information Technology, Granite Construction, May 5, 2005, ¶ 6 ("Watts Statement") ("I see SBC and AT&T as complementary – with SBC providing mostly local services and AT&T long distance."); Moran Statement ¶ 6 ("I see SBC and AT&T as complementary companies."); Willinger Statement ¶ 4 ("We view these two companies as complementary in the provisioning of IXC and local services."); Ellison Statement ¶ 3 ("the two companies complement each other in the services and products they provide"); Clark Statement at 1 ("I think that AT&T and SBC are not really offering the same services.").

[388] *See* SBC Responses to FCC Information Request, Specification 1(c).

[389] Bazzi Reply Decl. ¶ 23.

[390] With regard to commenters' complaint that SBC and AT&T have not provided market data relating to concentration in the provision of business telecom services, it bears noting that this competitive dynamic is beyond capture in any systematic and accurate way in any database. Reporting with regard to who competes on any given procurement on which SBC bids is not only susceptible to incomplete information, but it is also

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areas (*e.g.*, local services, simple/traditional voice and data) because it operates largely as a CLEC in those areas in a way indistinguishable from other firms. Similarly, SBC is not uniquely or particularly well-situated to challenge AT&T in its strong areas (*e.g.*, long-distance and complex/managed services) because of limits to its network, product set and experience. When looked at in the context of what business customers actually purchase, how they purchase it, and which suppliers they view as the closest substitutes, there can be no concern that the merger of SBC and AT&T will adversely affect competition.

4. The Merger Will Enhance Competition in the Business Marketplace.

The merger will also enhance the competitiveness of the business telecommunications marketplace through distinct and merger-specific efficiencies.[391] As Broadwing, one of the transaction's opponents, stated in its 2003 Form 10-K:

> A continuing trend toward business combinations and alliances in the communications industry also may create stronger competition for Broadwing. In addition, a substantial number of customers seek to purchase local, interexchange and other services from a single carrier as part of a combined or full service package. Thus, the simultaneous entrance of numerous new competitors for combined service packages is

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susceptible to misleading implications where, for example, customers issue RFPs for multiple services, for some of which SBC is a strong competitor and for others of which AT&T is a leading contender. *See generally* SBC Response to FCC Information Request, Specification 4; *see also*, *e.g.*, Clark Statement at 1 ("The three finalists for this contract were AT&T, Qwest and SBC. However, I do not believe that the merger between AT&T and SBC will limit DFA's options or result in an increase in future prices to DFA for many reasons. Most importantly, I think that AT&T and SBC are not really offering the same services.").

[391] As discussed elsewhere in this Joint Opposition, opponents of the proposed transaction largely concede that the merger will create a number of efficiencies; they simply suggest that these efficiencies are not merger-specific. *See, e.g.*, ACN Comments at 27-28, 53-54.

> likely to materially adversely affect Broadwing's future revenue and earnings.[392]

Similarly, as the Chairman of another of the opponents was quoted in April 2004 as saying:

> The industry badly needs to consolidate, says Carl Grivner, chief executive of XO Communications, which sells phone and Internet service to businesses, and which is a year out of a bankruptcy that wiped out $4.5 billion in debt. "I don't think the industry is well structured to move forward," he worries.[393]

Regardless of size, geography and purchasing preferences, SBC's and AT&T's customers overwhelmingly recognize that the merger of SBC and AT&T will provide them numerous benefits. Many of these benefits rest on customers' ardent desire for unified, integrated services offerings that will enable them to reduce price, eliminate costly inefficiencies and improve quality of service. For example, customers testify that the merger will:

- ***Expand competition outside SBC's region***

Contrary to opponents' suggestion, as discussed above, that the merger will somehow result in the retrenchment of SBC's competitive activities outside its ILEC territories, customers naturally see it as likely to have precisely the opposite – and pro-competitive – effect. For example, as the CIO of Fremont Bank, which currently has offices largely in California but is planning to expand, notes: "[w]e have been happy with

[392] Corvis Corp., SEC Form 10-K Statement (filed March 15, 2004) at 8 (providing information for the year ending December 31, 2003).

[393] Scott Woolley & Quentin Hardy, *Into Thin Air*, Forbes, Apr. 26, 2004, *available at* http://www.forbes.com/forbes/2004/0426/098.

SBC's services, and we look favorably upon AT&T's broader network as we anticipate more expansion in the western states."[394] Similarly, the president of SageNet states:

> Among other things, I hope the merger will permit SageNet to obtain more services from SBC out-of-region. In particular, I anticipate that it will permit SBC to provide local DSL services outside its current territories, and that SBC will have better backhaul capabilities using AT&T's network.[395]

- ***Provide an increased ability to make investments in research and development, roll out advanced technologies to a broader range of customers, and create a broader, unified, more efficient network that will allow the merged companies to provide better service at a lower cost***

Customers also observe that the combined company will have an improved ability to compete with new technologies by itself combining the best of both firms' networks, services and strengths. As the director of information technologies at the Milwaukee Journal-Sentinel points out:

> One aspect about this merger that we find particularly exciting and interesting is the opportunity for SBC and AT&T together to improve their VOIP technology. From our perspective, currently only the cable companies have provided this service effectively, and in our region our options are limited to Time Warner. We will be keeping a very close eye on our options for VOIP services, and hope that this merger will bring more competition in the area.[396]

Similarly, NIBCO's Director of Information Technology notes that:

> At the products and services level, each of the companies brings something to the table. AT&T has a strong global presence for voice and data services. SBC has a strong local presence for voice and data services, and also provides wireless services. NIBCO wants to partner with a

[394] Moran Statement ¶¶ 2, 6.

[395] Woodard Statement ¶ 4.

[396] Kress Statement ¶ 5.

> company that can provide a wide range of services. In addition, from a resource perspective, there is a great synergy between the two companies that will enable the combined company to take advantage of efficiencies and a favorable cost structure.[397]

The Vice President, CFO, and General Manager of California-based Nix Check Cashing emphasizes the significance of these benefits for medium-sized business customers:

> We are a midsized company, and we have proven that it is more cost-advantageous for us to go with a single provider than can offer a total package. . . . I think that the planned merger between SBC and AT&T will be favorable to us. In particular, I believe that it will allow SBC to expand its service offerings, which I believe can then be incorporated into our total package at a better price. I think the merger will therefore have a positive impact on pricing and quality of service for our business.[398]

Other customers, large and small, make the same point: the merger will expand services, increase innovation and reduce prices.[399]

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[397] Masney Statement ¶ 4; *see also* Carlton & Sider Reply Decl. ¶ 72 (discussing Iowa-based insurance company comment that "[w]ith the pooled resources of the combined companies, they should be able to offer more and better product offerings.").

[398] Dotemoto Statement ¶¶ 3-4.

[399] *See, e.g.*, Thielbar Statement ¶ 8 ("KCG favors the proposed merger between SBC and AT&T. I believe that, if SBC and AT&T are permitted to combine their technology and the services that each of them provides, the merged SBC and AT&T will be able to offer a wider range of products and services to customers. In addition, I believe that the merged SBC and AT&T would be able to develop and offer new, and improved, products and services."); Watts Statement at ¶ 6 ("I believe that the proposed merger between SBC and AT&T would be positive for Granite. I see SBC and AT&T as complementary – with SBC providing mostly local services and AT&T long distance. Therefore, the combined entity would better enable us to leverage our economies of scale. I am also keeping a close eye on IP telephony and believe that the merger has the potential of providing us more opportunities in that regard."); Clark Statement at 1 ("I think that the combined company will be able to offer us a better package of services with better prices."); Swindell Statement ¶ 5 ("We believe that the merger of AT&T and SBC will create a number of benefits for customers: economies of scale savings; a larger organization to work on enhancements to existing technologies; and an increased range of service offerings."); Ellison Statement ¶ 7 ("The merger is a good thing in my opinion. An integrated network will lead to reduced costs and better services, and competition will continue to exist."); Devan (Mission Federal Credit Union) Statement at ¶ 5 ("I look forward to the benefits that the synergy between the two companies will bring, which

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- ***Create a financially stronger competitor***

Customers see the merger as a desirable development because it ensures that both companies' network assets will remain a significant competitive force. For example, NIBCO's IT Director states: "NIBCO wants a partner that is healthy and strong, and will continue to be around. I believe the merger will be beneficial in this regard."[400]

- ***Enable a single point of contact for a broader range of services, reduce "finger-pointing" between carriers providing complementary services over different networks, and therefore reduce network downtime and administrative costs***

Customers recurrently bemoan the inefficiency inherent in using multiple providers for complementary telecom services.[401] Consequently, they look forward to the extent to which SBC's acquisition of AT&T will enable them to standardize on a smaller number of providers, both within and across geographic lines, while still benefiting from

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includes broader networks as well as consolidated billing. In this regard, the merger will help us better serve our customers.").

[400] Masney Statement ¶ 6.

[401] *See, e.g.*, Johnson Statement ¶¶ 2-3 ("When I came to ORCO in 2003, it was clear that among ORCO's pressing IT infrastructure issues that were important for the company to address was the fact that it used at least seven different vendors to supply its voice and data telecommunications needs. These vendors included XO Communications, which ORCO used for data connectivity (using point-to-point T1 lines) between its store locations and its California headquarters; SBC/Nevada Bell, which ORCO used for local voice service and 'last-mile' data traffic in some locations in California and Nevada; Qwest/US West, which it used for local access in Arizona; AT&T, which ORCO used for long-distance and 1-800 service; Sprint, which ORCO used on an incidental basis for long-distance service; and Verizon, which ORCO used for local access in Verizon territories in California. The main problem involved in using this variety of vendors was that when an ORCO store lost telecommunications service – something that happened approximately 3-5 times per week across ORCO's locations – the different vendors would engage in finger-pointing. Indeed, it was difficult to figure out which vendor to contact and hold responsible for the problems causing outages, and consequently it was time-consuming to resolve the outages. The time taken to fix outages was a significant cost for ORCO."); Swindell Statement ¶ 3 ("In contracting for telecommunications services, NOVO 1 prefers using single source contracting for its primary needs because of economies of scale and reliability issues.").

extensive competition, as discussed above.[402] For example, Yellow Roadway's Vice President of Infrastructure Services notes that "Yellow Roadway's approach to securing telecommunications services is increasingly to partner with large vendors who can fulfill as many of our needs as possible in a one-stop-shopping model. In that way, we can obtain the best possible pricing and operational efficiency. . . . For customers wanting to have a single company provide all, or the majority of their telecommunications services, the merger will be of significant benefit."[403]

The CIO of Oak Street Mortgage, an Indiana-based mortgage services company that operates in twenty-seven states and primarily uses AT&T for its telecommunications services,[404] states that:

> I support the proposed acquisition of AT&T by SBC Communications Inc. ("SBC") because I believe it would allow the resulting company to leverage AT&T's and SBC's respective strengths. SBC's strength is in providing local service but it lacks the "breadth and depth" to manage a national network. AT&T is not as good as SBC in providing local service but is good at managing a national network. In my view, the company resulting from the merger would provide better value by permitting Oak Street to partner with a single company that can provide a wide range of services and support.[405]

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[402] *See, e.g.*, Carlton & Sider Reply Decl. ¶ 72 (discussing Wisconsin-based customer statement that "[a]s it stands, SBC and other LECs control a portion of the network, and AT&T and other IXCs control another portion. Consequently communication breakdowns and construction delays are commonplace, and I have little to no control over how or when they are resolved. I am hopeful that in dealing with a combined SBC and AT&T company, I will have more control over how my services are implemented. . . ."; a Kansas engineering firm comment that "The merger will make the combined company more competitive and better able to provide a broader range of services in the marketplace and an Iowa-based insurance company comment that "I hope that the merger will allow the combined company to move closer to being able to provide a single point of contact, which would be a good thing.").

[403] Corwin Statement ¶¶ 4-5.

[404] Statement of Rick Mahoney, Chief Information Offering, Oak Street Mortgage LLC, April 22, 2005 ¶ 2 ("Mahoney Statement").

[405] Mahoney Statement ¶ 4.

As with the other efficiencies and customer benefits of the merger, numerous other customers emphasize the same themes.[406]

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Business customers of all shapes and sizes recognize both that the merger will provide significant efficiencies which, alone and together, are not readily achievable in the absence of the merger, and that substantial competition will continue to exist. The combination of these two facts – and the clear fact that customers recognize them – render inescapable the conclusion that, whatever SBC's and AT&T's competitors may fear and however much they may protest, the proposed merger is in the public interest.

H. There Is No Basis in Fact or Economics To Fear that the Combined SBC/AT&T Will Forbear from Competition or Tacitly Collude with Its Competitors.

The N.J. Ratepayer Advocate and other merger opponents' suggestions that SBC has not made a genuine effort to compete outside its region[407] (whether with regard to

[406] *See, e.g.*, Ellison Statement at ¶ 4 ("Gregg Appliances, like most enterprise customers, prefers to work with one telecommunications vendor. This allows us to allocate our money effectively and increases our vendors' ability to respond through ownership of any issues, like the interconnectivity problems that frequently occur in connecting the last mile of communications."); Moran Statement ¶ 6 ("Overall, I think this merger puts the bank in a better position, as it gives SBC that many more arrows in its quiver that we can tap into. What it comes down to for us is the ability to leverage the services that our telecom provider can give us. I do not want to manage a number of different vendors. That only complicates our ability to secure seamless telecommunications solutions to serve our customers. I see SBC and AT&T as complementary companies."); Clark Statement at 1 ("I think that the ability of companies to have a one-stop shop that offers all of the voice and data services than organization needs through a single account service team is a big benefit for customers."); Thielbar Statement ¶ 9 ("[T]he merger would produce, for KCG, the major benefit of consolidated billing. By receiving a single bill, rather than two bills, for the various services provided by SBC and AT&T KCG will be able to save administrative costs.").

[407] *See, e.g.*, N.J. Ratepayer Advocate Comments at 16; ACN Comments at 9, 37, 47; Broadwing & SAVVIS Opp. at 18-26; Cbeyond Pet. at 18, 48-51, 54-56.

business or residential customers) are simply inconsistent with the facts; and opponents' argument that a combined SBC/AT&T will not expand this effort (and instead engage in "tacit collusion" or "mutual forbearance" with Verizon and other ILECs)[408] makes no economic sense. However much these opponents may try to make it sound like there is some sort of historical basis for believing there will be no out-of-region competition, both the historical record and economic common sense make plain that SBC's acquisition of AT&T will be procompetitive precisely, among other reasons, because it will spur even greater out-of-region competition.

The available evidence, set forth both in the Public Interest Statement (and the Kahan Declaration) and below, makes plain that SBC has tried mightily to win business outside of its traditional ILEC territory, in competition with both Verizon and many other players. It would be perverse to conclude that the fact that SBC has largely not succeeded beyond the boundaries of its ILEC territory – despite investing over a billion dollars in the effort to do so on its own and despite bidding on numerous out-of-region opportunities – means that the very transaction intended in large measure to correct the problem is likely to lead to a loss of competition. The contrary is the case. SBC is investing $16 billion to acquire AT&T precisely in order to be able to compete outside its traditional territory.

It is particularly ironic that Qwest, among others, suggests that the combined SBC/AT&T will decline to engage in out-of-region competition.[409] In its Comments,

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[408] *See, e.g.*, ACN Comments at 29, 37, 49-51; Broadwing & SAVVIS Opp. at 18-20; Cbeyond Pet. at 4, 44-46, 57; CompTel-ALTS Pet. at 6; Qwest Pet. at 39-44.

[409] *See* Qwest Pet. at 39-44.

Qwest repeatedly emphasizes that it is "the only RBOC that has competed aggressively out of region."[410] Even accepting *arguendo* that this is the case – and putting aside the fact that Qwest makes no effort to explain or analyze how its out-of-region efforts are materially greater than over a billion dollars or thousands of network elements deployed out of region by SBC – Qwest's argument founders on the facts of its own history.

As its expert notes, Qwest is the corporate product of the merger of a traditional IXC (Qwest) and a traditional RBOC (US West), and its trumpeted out-of-region efforts revolve around this fact.[411] Qwest's speculative theory that SBC and Verizon will engage in "mutual forbearance" after themselves acquiring IXCs is both remarkable and inconsistent with its own historical experience – *and* its own past statements about its own merger, which both Qwest and US West defended at the time on the grounds, *inter alia*, that it would "strengthen the resources and ability of the combined company to enter local markets outside the US West region" and would "accelerate" Qwest's preexisting activity outside US West's region.[412] Just as Qwest found it profitable to continue its out-of-region competitive activities after acquiring US West, economic realities will compel the combined SBC/AT&T to take advantage of the acquired out-of-region assets. In fact, the incentive to do so is even more pronounced in the present case.

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[410] Qwest Pet. at 5, 40, 41, 44.

[411] Qwest Pet., Bernheim Decl. ¶¶ 24, 30 ("*Since acquiring USWest in 2000*, Qwest has distinguished itself from SBC and Verizon by competing outside it regional local service footprint. . . . Qwest owns significant out-of-region assets, *in particular its interexchange network*.") (emphasis added).

[412] *See* Qwest and US West *Response to Comments on Applications for Transfer of Control, In the Matter of Merger of Qwest Communications and US West, Inc.*, CC Docket No. 99-272, October 19, 1999, pp. 15-16.

1. The Merger Is Fundamentally Intended To Enable SBC To Compete Out of Region.

As discussed above and in the Public Interest Statement, AT&T is focused on serving large and far-flung multi-location businesses; SBC has been largely successful with customers located predominantly (although not exclusively) inside SBC's territory. Competition for the national and international customers on which AT&T heavily focuses – including customers which generated over $5 million each for AT&T in 2004, accounting for the nearly half of AT&T's revenues in 2004 – is intense.[413] Thus, the combined company cannot expect to retain these large and far-flung multi-location businesses as customers unless it competes vigorously nationwide, including serving every location operated by each customer, regardless of ILEC region. If the combined company were to redirect its focus to SBC's region and serve only a portion of these customers' locations – which it can already do today – it could expect to lose these customers to the multitude of competitors, including traditional IXCs, new long distance network operators, CLECs, and system integrators, among others.[414] The opponents' suggestion that SBC will spend $16 billion simply to continue to operate as it does today is fanciful and inconsistent with simple economics.[415]

The very purpose of this transaction would be thwarted if the combined company were to limit its focus to SBC's region. SBC is acquiring AT&T in order to become a major provider of communications services to national and global enterprise customers with sophisticated needs. This purpose would be defeated, and much of the $16 billion

[413] Carlton & Sider Decl. ¶ 65.

[414] *Id.* ¶ 79.

[415] *See* Carlton & Sider Reply Decl. ¶¶ 78-80.

investment squandered, if the combined company were not to compete everywhere, including outside of SBC's region. As the merger opponents themselves point out,[416] SBC is *already* successful in competing for the telecommunications needs of customers with locations wholly or largely in SBC's region. Were it SBC's intent to forbear from competing for customers beyond this geographic scope, it would not be seeking to acquire AT&T, whose primary assets are its national and international customer base and the network assets needed to serve them – including in Verizon's regions. Large and small customers alike located outside SBC's region constitute profitable customer segments, and SBC will aggressively pursue them. Indeed, customers expect the merger to have precisely this result.[417]

2. SBC Has Not Hesitated To Compete Outside of Its Region in the Past.

Not only is the economic rationale for the proposed acquisition inconsistent with a strategy of "forbearance" from out-of-region competition; the historical facts also are inconsistent with the theory. The merger opponents simply mischaracterize SBC's history of seeking to compete outside its region. Among other things, as discussed below, SBC invested billions of dollars in out-of-region facilities and marketing efforts; it was a leader among the BOCs in acquiring out-of-region wireless capabilities; and to this day it competes – unfortunately, with decidedly mixed results – for customers outside its territory.

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[416] *See, e.g.*, Qwest Pet. at 24; Bernheim Decl. ¶¶ 59, 69 (suggesting that SBC's in-region share of local business service is high, and that its share of long-distance service to small and medium businesses in its region is increasing).

[417] *See supra* Woodard Statement ¶ 4; Moran Statement ¶¶ 2, 6; Dotemoto Statement ¶¶ 3-4.

By the beginning of 1998, SBC had cellular systems in numerous major out-of-region markets, including Chicago, Boston, Washington, Baltimore, Buffalo, Rochester, Albany, Worcester, and Syracuse. These out-of-region systems put SBC in direct competition with the BOCs that operated the competing cellular systems in these markets. Since then, SBC's commitment to providing wireless services outside its own region has expanded dramatically. SBC now holds a 60% interest in Cingular, which serves most of the country, including all 100 of the largest MSAs. Cingular competes directly with Verizon Wireless and the other national carriers in most of these MSAs, as well as with numerous regional wireless carriers and the wireline carriers. Cingular's success is now crucial to SBC, with SBC having contributed $24 billion in cash to Cingular to finance its purchase of AT&T Wireless and with SBC's share of Cingular's revenue making up nearly one-third of SBC's total revenue.

SBC also has devoted substantial resources to out-of-region wireline competition through its national-local strategy, which opponents of the transaction may malign but cannot undo. SBC has spent well over *$1 billion* to date for facilities, start-up sales and marketing costs, and product introduction.[418] SBC serves all 30 out-of-region MSAs described in its national/local business plans, with collocation facilities in at least 10 central offices in each MSA. The national-local strategy has brought SBC into direct competition with the wireline operations of the other ILECs.[419]

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[418] Kahan Decl. ¶ 24.

[419] Residential customers in the 30 MSAs can obtain local and long distance phone services with such features as anonymous call rejection, auto redial, call blocker, call forwarding, call return, call trace, call waiting ID, caller ID, message waiting indicator priority call, speed calling, and three way calling. *See* http://www.sbc.com/gen/telecom?pid=5339&pl_code=MSBC245C11613P204783B204787S0. For business customers, available services include ATM, frame relay, private

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It is undisputed that results have fallen short of expectations. Seventeen months passed after the announcement of the national-local strategy before implementation could begin, and another four years passed before the last Section 271 proceedings were completed and SBC was finally free to offer interLATA services everywhere. Moreover, a significant economic downturn, which particularly affected telecommunications, began just as SBC was beginning to implement the national-local strategy, ushering in an era of massive overcapacity, falling demand, and collapsing prices.[420] Thus, SBC's national-local strategy has been most successful with business customers that are predominantly within its region and have a limited number of other locations. Such customers, which are SBC's "sweet spot," are less concerned than others are by SBC's limited out-of-region facilities, and they often have less need for the most advanced services.[421] By contrast, SBC typically does not compete (and does not dispute that it does not compete) for business where more than half of the customer's locations are out of its footprint (including both its traditional service territory and the 30 MSAs)[422] or where more than 20% of the traffic is international.[423] SBC thus finds both that the customer base that is

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lines, ISDN, T1s, dedicated Internet access, WiFi, network integration services, network support services, managed optical CPE solutions, IP-VPN, NVPN, and security services. *See* http://www.sbc.com/gen/telecom?pid=5322&pl_code=MSBC245C11613P204783B204784S0.

[420] Kahan Decl. ¶¶ 15-16.

[421] *Id*. ¶ 27.

[422] Opponents misconstrue the competitive thresholds identified by SBC to indicate that SBC does not try to compete outside its traditional region. Because, in fact, these thresholds place the 30 MSAs *within* the SBC "footprint," they do not cast any doubt on SBC's effort to compete out of region.

[423] Kahan Decl. ¶ 27.

potentially addressable with its current owned resources is limited, and that its efficiency and cost-effectiveness in serving such customers is marginal.[424]

The fact that the limitations on SBC's out-of-region success have not been for lack of trying is indicated not only by the magnitude of SBC's investment in the national-local strategy and its deployment of facilities in the 30 MSAs, but also by its sales activity. For example, within the past month, SBC (after almost a year and one half of effort) won a contract to provide the American Red Cross an array of wide-area network and long-distance voice services.[425] Among the locations SBC will serve is the Red Cross' corporate headquarters in Washington, DC[426] – precisely the Verizon territory that opponents claim SBC is somehow not interested in penetrating. As discussed above, the SBC/AT&T merger will intensify this out-of-region wireline competition, as AT&T brings to SBC crucial capabilities that SBC has to date lacked, such as its own nationwide network and a full set of advanced services.

3. Opponents Ignore the Marketplace Factors That Preclude Tacit Collusion or Mutual Forbearance in the Business Marketplace.

In addition to the factors discussed above, each of which applies across all of the retail and wholesale customer segments, no opponent disputes that, as discussed in the Public Interest Statement, numerous characteristics of the business marketplace make coordination or collusion highly unlikely.[427] First, the needs of customers are

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[424] *Id.* ¶ 27.

[425] *See* Press Release, *SBC Communications Announces Five-Year, $59.7 Million Contract with the American Red Cross* (Apr. 18, 2005), *available at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21645.

[426] *Id.*

[427] Carlton & Sider Reply Decl. ¶¶ 83-84.

heterogeneous.[428] For example, Deloitte notes that it is common for business customers to combine the procurement of multiple types of telecommunications services within a single contract agreement, for example long-distance voice and data services together with network installation and maintenance services.[429] Deloitte's survey of business customers found that the ability of telecommunications providers to offer "customized solutions" was second only to price as of top importance to business customers as a selection criterion.[430]

Second, the stakes are high on each bid, with customers making the most of competition by combining or dividing requirements and using long contract terms (with reopeners, benchmarking, or other clauses).[431] As Deloitte explains, business customers typically enter into long-term contracts with telecommunications suppliers (*i.e.*, from one to five years in duration), that include both price and service guarantees.[432]

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[428] *See generally*, Horizontal Merger Guidelines, Section 2.11 ("[R]eaching terms of coordination may be limited or impeded by product heterogeneity or by firms having substantially incomplete information about the conditions and prospects of their rivals' businesses, perhaps because of important differences among their current business operations. In addition, reaching terms of coordination may be limited or impeded by firm heterogeneity, for example, differences in vertical integration or the production of another product that tends to be used together with the relevant product.").

[429] Bazzi Reply Decl. ¶ 8.

[430] *Id.* ¶ 10.

[431] *See* Horizontal Merger Guidelines, Section 2.12 ("If orders for the relevant product are frequent, regular and small relative to the total output of firm in a market, it may be difficult for the firm to deviate in a substantial way without the knowledge of rivals and without the opportunity for rivals to react. If demand or cost fluctuations are relatively infrequent and small, deviations may be relatively easy to deter. . . . Where large buyers likely would engage in long-term contracting, so that the sales covered by such contracts can be large relative to the total output of a firm in the market, firms may have the incentive to deviate.").

[432] Bazzi Reply Decl. ¶ 8.

Third, different customers use and prefer different sets of competitors. The customer statements discussed above alone illustrate this point; Deloitte's analysis of the procurements in which it has been involved confirms it.[433] Virtually every customer is different with respect to its preference for providers and technologies to meet its unique needs.

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As the foregoing discussion indicates, there is no basis for opponents' fear that the combined SBC/AT&T will engage in "tacit collusion" or "mutual forbearance" with respect to any customers, whether retail or wholesale, business or residential. SBC does not have a history of mutual forbearance, as the merger opponents charge, and the very facts of the acquisition of AT&T are inconsistent with the notion that the combined company will engage in tacit collusion. Finally, with respect to the business marketplace which forms the core of AT&T's business, significant marketplace factors render multi-firm coordination highly unlikely and extraordinarily difficult.

IV. THE MERGER IS CONSISTENT WITH THE COMMUNICATIONS ACT.

A. The Merger Will Not Impair the Ability of the Commission or State Regulators To Regulate Effectively.

Several merger opponents argue that, by eliminating AT&T as an independent CLEC, the merger will "diminish the diversity of voices in the telecommunications public policy arena"[434] and, thereby, in CFA's words, impair the "comprehensiveness of

[433] *Id.* ¶ 7, 8.

[434] Global Crossing Comments at 25; *see also* Tex. O.P.U.C. Comments at 7; U.S. Cellular Comments at 2; CFA Pet., Attachment A., at 46-47; CompTel-ALTS Pet. at 41-47; NASUCA Comments at 16-17; N.J. Ratepayer Advocate Comments at 23-34.

state and federal investigations of telecommunications policy."[435] There is no basis for these concerns, and no precedent for denying a merger on such curious grounds.

At bottom, these commenters are claiming that the Commission (and state regulators) cannot make sound decisions in the public interest unless AT&T, and only AT&T, continues exercising its lobbying and litigation acumen in the service of pure CLEC interests. That is nonsense. After this merger, the United States will still have scores of CLECs, each of which will remain free to express its position on any regulatory issue, and several high-profile trade associations that speak for CLECs in legislative and regulatory forums across the nation.[436] As before, the Commission (and state regulators) will be more than capable of deciding those CLEC arguments on the merits. Likewise, the merger will leave intact the existing CLECs' ongoing commitment to supply full and accurate information to regulators about their own operations.

Indeed, the merger will increase rather than decrease the range of regulatory voices on issues of industry-wide significance. The combined company, with its substantial out-of-region operations, will have every incentive to develop creative "third way" solutions to the regulatory impasses that have divided the industry since before the

[435] N.J. Ratepayer Advocate Comments at 23.

[436] For evidence of the CLECs' continuing prominence as regulatory advocates, the Commission need look no further than this very proceeding, where several coalitions of CLECs have enlisted the help of counsel and economists in opposing this merger. *See generally* Cbeyond Pet.; ACN Comments; Broadwing & SAVVIS Opp. These and other CLECs will be similarly capable of mounting aggressive lobbying campaigns in other regulatory proceedings as well.

passage of the 1996 Act.[437] This new voice will join existing voices already well-represented in policy debates, including pure ILECs and pure CLECs.

In any event, the terms of the debate have begun to shift from conventional ILEC-CLEC disputes. The growth of broadband Internet access and IP-enabled services has produced a new generation of regulatory policy challenges, which increasingly transcend the usual ILEC-CLEC divide concerning physical access by telecommunications carriers to traditional wireline networks.[438]

Finally, any decision to deny the Application because the Commission might lose an advocate for a specific industry or position would raise serious questions under the First Amendment. Regulatory advocacy, whether by individuals or corporations, is core political speech protected by the First Amendment,[439] and Commission actions that

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[437] Indeed, even before they agreed to this merger, the two companies had worked together (along with the other members of the Intercarrier Compensation Forum) to propose a creative compromise solution for intercarrier compensation problems. *See* Intercarrier Compensation and Universal Service Reform Proposal of the Intercarrier Compensation Forum, October 5, 2004 (ICF Proposal), attached to Letter from Gary M. Epstein and Richard R. Cameron, Counsel for the Intercarrier Compensation Forum, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, Tab A (filed Oct. 5, 2004). The post-merger company's multiple roles in the market, both in and out of SBC's traditional region, will produce similar innovation in regulatory advocacy.

[438] *See, e.g., In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *vacated on other grounds*, *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *cert. granted*, 125 S. Ct. 655 (2004); Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 FCC Rcd 3019 (2002); Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863 (2004).

[439] *See, e.g., Santana Prods. Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123 n.13, 2005 WL 293473 (3d Cir. 2005) ("The *Noerr/Pennington* doctrine protects 'the right of the people . . . to petition the government for a redress of grievances[,]' U.S. Const. amend. I. . . . [and] extends beyond attempts to influence the passage and enforcement of laws and applies equally to efforts to influence administrative agency action[.]"); *Knology, Inc. v. Insight Communications Co.*, 393 F.3d 656, 658 (6th Cir. 2005) ("The *Noerr-Pennington* doctrine allows businesses to combine and lobby to influence . . .

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adversely affect the exercise of that type of speech can be justified only under very limited circumstances, none of which applies here. While the loss of AT&T as an independent voice in Commission proceedings may appear similar to concerns that the Commission has expressed about the loss of benchmarking data, the issues are fundamentally different. One goes to the Commission's ability to engage in economic regulation; the other denies an applicant the opportunity to pursue its economic goals on the basis of speech. Under established First Amendment principles, the Commission must exercise its statutory authority "[t]o avoid potential First Amendment issues."[440]

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administrative agencies without antitrust or § 1983 liability, because the First Amendment's right of petition protects such activities.").

[440] *See Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002). NASUCA similarly argues that, as a condition of the merger, the combined company should be prohibited from participating in "efforts to restrict municipalities and other governmental entities from investing in broadband networks that will be made available to consumers." NASUCA Comments at 28; *see also* CFA Comments at 18-19 (criticizing SBC's local and state advocacy regarding municipal broadband). For the reasons discussed above, NASUCA's proposed condition should be rejected as an unconstitutional restriction on the combined company's First Amendment rights. While SBC's affiliates have participated in lobbying efforts to restrict the provision of broadband by municipalities, such activities are constitutionally protected. The Commission rejected arguments in a previous merger proceeding that lobbying, political and regulatory activity by SBC against the entry of competitors amount to "regulatory abuse." *SBC/PacTel*, 12 FCC Rcd. at 2641-42, ¶¶ 36-37. In a separate merger proceeding, the Commission summarily rejected as "inappropriate" an attempt to impose a lobbying restriction on SBC as a condition of approval of the merger. *SBC/Ameritech*, 14 FCC Rcd. at 14925, ¶ 518. While the Commission in the Ameritech proceeding rejected an affirmative *obligation* to lobby, a *prohibition* on lobbying is equally "inappropriate" since the First Amendment protects the right of a person both to speak or not to speak. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). NASUCA's request for a condition on SBC's "efforts" to restrict municipal broadband is similarly inappropriate and unconstitutional and must be rejected.

B. The Merger Will Not Impair the Efficacy of the Commission's Section 208 Complaint Process.

Nor is there any basis for Global Crossing's argument that the merger creates a need for the Commission to "reinvigorate" its accelerated docket process for Section 208 complaint proceedings.[441] According to Global Crossing, because the merger removes AT&T from the field, it will "dramatically widen the resource gap between SBC and its competitors," thus somehow creating a need for the Commission to devise a new complaint process that makes it easier, faster, and less expensive for carriers to resolve disputes with SBC (and, presumably, other carriers).[442] But Global Crossing's attempt to make this a merger issue is unpersuasive. The time and expense associated with litigating intercarrier disputes plainly falls within the category of "pre-existing harms or harms . . . unrelated to the transaction"[443] that have no place in merger proceedings.[444]

To begin with, AT&T never had any obligation to wage other carriers' battles with SBC. And in any event, nothing about the merger eliminates other carriers' ability to use the Commission's existing complaint processes to obtain resolution of any disputes they may have with SBC and other ILECs. The normal Section 208 process will remain available to carriers following the merger, and it has been used by small and large carriers alike for decades to resolve intercarrier disputes. That process provides ample opportunity to resolve disputes quickly and efficiently: the Staff promotes settlement of

[441] Global Crossing Comments at 25-26.

[442] *See id.* 25-26.

[443] *Cingular/AWS*, 19 FCC Rcd. at 21546 ¶ 43.

[444] *See supra* note 19.

litigation early in the proceeding,[445] and the Commission *already* has a relatively new accelerated docket proceeding (60-days) for complaints warranting expedited review.[446] Furthermore, the rules provide for 90-day proceedings for complaints brought under Section 271(d)(6),[447] and five-month proceedings for Section 208 complaints involving tariff issues.[448] Thus, there are ample alternatives available to complainants that require quick resolution of intercarrier disputes, and Global Crossing has failed to identify any reason why the merger would render these options any less effective.

To be sure, Global Crossing asserts that CLECs that are more resource-constrained than AT&T might sometimes choose to forego bringing complaints where the costs of litigation would outweigh the value of the dispute.[449] But *all* potential claimants — in whatever forum they are in — *always* must decide whether litigation is worth the cost. That cost/benefit analysis is not unique to CLECs and in no way caused by this merger. And leaving aside the question of how the Commission could revamp its entire Section 208 process in this proceeding and create an entirely new procedural vehicle for intercarrier disputes, it is not even clear that the "baseball arbitration" rules

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[445] *In re Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Order on Reconsideration, 16 F.C.C. Rcd 5681, 5689 ¶ 17 (2001); First Report and Order, *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 F.C.C. Rcd. 22497 ¶ 42 (1997).

[446] 47 C.F.R. §§ 1.721(f), 1.724(k), 1.726(g), 1.729(i), 1.730.

[447] 47 C.F.R. § 1.736.

[448] 47 U.S.C. § 208(b)(1); First Report and Order, *Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 F.C.C. Rcd. 22497 ¶ 34-37 (1997).

[449] Global Crossing Comments at 25-26.

Global Crossing proposes would result in quicker or less costly resolution of intercarrier disputes.[450] The Commission generally relied on "baseball arbitration" in the Verizon Virginia Section 252(e)(5) arbitrations, for example, and those took the better part of a year and involved thousands of discovery requests, scores of experts and consultants, and multiple rounds of written testimony and briefing.[451] Indeed, those proceedings were among the most protracted Commission adjudications in recent years.

C. The Merged Company Will Comply Fully with Sections 271 and 272 of the Act to the Extent They Are Applicable.

NASUCA argues that SBC "should be required to operate in accordance with all of the provisions of Section 272 of the Act."[452] In fact, AT&T will become a subsidiary of SBC, organized as a Section 272 affiliate throughout SBC's region upon the closing of the merger.[453] And AT&T's in-region operating subsidiaries will continue as wholly

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[450] Nor is it clear that "baseball arbitration" would even make sense in the liability phase of a traditional Section 208 complaint, where the carriers' positions may be diametrically opposed and the question is not which party's position is more "reasonable" but whether the defendant has violated the Act in the first place. *Cf.* JAMS Streamlined Arbitration Rules and Procedures, Rule 28 *available at* www.jamsadr.com/rules/streamlined.asp (in baseball arbitration "the Parties shall exchange and provide to JAMS written proposals for the *amount of money damages* they would offer or demand, as applicable") (emphasis added).

[451] *In re Petitions of WorldCom, Inc., and AT&T Communications of Virginia Inc., Pursuant to Section 252 (e) (5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd 27039 (2002) (order on non-cost issues; petitions filed in 2000); *In re Petitions of WorldCom, Inc., and AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration*, Memorandum Opinion and Order, 18 FCC Rcd 17722 (2003) (UNE cost order; petitions filed in 2000).

[452] NASUCA Comments, ETI Report at 51.

[453] SBC's Section 272 obligations (other than Section 272(e)) have sunset in Texas, Kansas, and Oklahoma. *See In re Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, As Amended, and Request for Relief to Provide International Directory Assistance*

Footnote continued on next page

owned subsidiaries of that Section 272 subsidiary. Accordingly, *all* of AT&T's in-region services and operations (*e.g.*, its local, long distance, and advanced services) will comply with the structural, transactional, and nondiscrimination requirements of Section 272 to the extent applicable (as SBC's in-region interLATA operations already do).[454] Further, even after the sunset of Section 272, the non-discrimination requirements of Sections 272(e)(1), 272(e)(3), 201, 202, and 251 of the Act will continue to apply. The merged company's adherence to the Section 272 safeguards established by Congress and the FCC

Footnote continued from previous page
Services, Memorandum Opinion and Order, CC Docket No. 97-172, 04-67 ¶ 7 n.23 (rel. Mar. 20, 2004). But because SBC operates on an integrated basis throughout its region, AT&T will be organized, upon the closing of the merger, as a Section 272 subsidiary of SBC in all states in the SBC region.

[454] Telscape argues that AT&T's in-region local facilities should be subject to unbundling under Section 251(c). *See* Telscape Comments at 9. However, the Commission has confirmed that a Section 272 affiliate may provide in-region *local* (as well as long distance) services without assuming unbundling and other obligations of the affiliated BOC under Section 251(c). *See In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 22055 ¶ 312 (1996); *see also* 47 U.S.C. § 251(h) (limiting definition of ILEC to incumbents and "successor or assign" of an ILEC, which does not apply here because SBC is acquiring and taking control of AT&T, not the reverse); *cf. In re Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, 12 FCC Rcd 15668, 15707-08 ¶¶ 65-66 (1997) (wireless affiliate of ILEC can provide in-region local wireline service without being subject to Section 251(c) obligations), *aff'd on other grounds, GTE Midwest, Inc. v. FCC*, 233 F.3d 341 (6th Cir. 2000). Nor is there any legitimate policy basis for requiring AT&T to unbundle its facilities. CLECs have never had access to those facilities before, and they are thus clearly not necessary for competition, nor would any competitor be impaired without them. Further, the benefit to CLECs would be miniscule: in the limited instances where AT&T has deployed in-region local facilities, SBC already has its own local facilities that are subject to unbundling requirements. Fea Reply Decl. ¶ 14 n.7. In any event, buildings with at least 2 DS-3s of capacity account for more than 99 percent of the in-region capacity provided by AT&T, Carlton & Sider Reply Decl. ¶ 36, and thus the vast majority of AT&T bandwidth would not be subject to unbundling even if AT&T were deemed an ILEC. *See Triennial Review Remand Order*, 2005 WL 289015, ¶ 177.

should assure that "competitors of the . . . section 272 affiliate [will] have access to essential inputs, namely, the provision of local exchange and exchange access services, on terms that do not discriminate against the competitors and in favor of the BOC's affiliate."[455]

There accordingly is no basis for NASUCA's assertion that approval of the merger should be conditioned on the extension of the full panoply of Section 272's separate affiliate and other requirements throughout SBC's region, including in those states where SBC's Section 272 obligations (other than Section 272(e)) already have sunset.[456] Indeed, NASUCA does not even attempt to show how the merger could give rise to the need for such extraordinary relief. The Section 272 safeguards, including their sunset, were deemed sufficient by Congress to protect competition and the public interest, and NASUCA has shown no reason why those same protections will be any less effective for the merged company.

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[455] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21913 ¶ 13. NASUCA also asserts that approval of the merger should be conditioned on the creation of a separate affiliate for the deployment of advanced services. *See* NASUCA Comments, Attachment C, at 1. In fact, because AT&T's in-region advanced services will be provided through a Section 272 affiliate, they will comply with structural safeguards that are *more* stringent than those imposed on Advanced Services, Inc. ("ASI"), SBC's advanced services affiliate. *See In re the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum, Opinion and Order, CC Dkt. No. 01-337, FCC 02-340 (Dec. 31, 2002) ("*ASI Forbearance Order*"); *see also Ameritech/SBC*, 14 FCC RCd. at 14901 ¶¶ 365, 460 (identifying ways in which restrictions imposed on ASI are less stringent than those imposed on Section 272 affiliates).

[456] *See* NASUCA Comments, ETI Report at 50-51. NASUCA asserts that these requirements "should be imposed and remain in place at least until after the conclusion of the Commission's review of the third biennial audit following merger approval . . . ." *Id.* at 50.

Instead, NASUCA's argument appears to rest on nothing more than general concerns about the sunset of Section 272 obligations with respect to SBC's preexisting business.[457] But those general concerns can and should be taken up in the pending Commission rulemaking proceeding dedicated specifically to Section 272 sunset issues.[458] In fact, imposing the expanded or extended Section 272 separation requirements NASUCA proposes in this proceeding would be especially inconsistent with the public interest given Congress's presumption in favor of eliminating those restrictions,[459] and the Commission's longstanding recognition that structural separation requirements "impose significant costs on the public in decreased efficiency and innovation that substantially outweigh[ ] their benefits."[460] NASUCA's proposal would

[457] *See* NASUCA Comments, Attachment A at 15 (criticizing prior FCC decisions to permit Section 272 to sunset).

[458] *See In re Section 272(f)(1) Sunset of BOC Separate Affiliate and Related Requirements*, Memorandum Opinion and Order, 17 FCC Rcd. 26869 (2002); *see also supra* note 19.

[459] 47 U.S.C. § 272(f)(1).

[460] *In re Amendment of Section 64.702 of the Commn's Rules & Regulations (Third Computer Inquiry)*, Report and Order, 104 F.C.C.2d 958, 964 ¶ 3 (1986) (subsequent history omitted). Nor has NASUCA provided any reason why the merger necessitates modification of the Section 272 biennial audit process. *See* NASUCA Comments, Attach. A., at 51. Under existing Commission rules, the results of the mandatory biennial audits *are* publicly available unless the Commission authorizes confidential treatment (which it has thus far refused to do). *See, e.g.*, *In re Accounting Safeguards Under the Telecomms. Act of 1996: Section2 72(D) Biennial Audit Procedures*, Memorandum Opinion & Order, 17 FCC Rcd 17012 (2002). Likewise, Commission rules already impose stringent requirements to ensure the independence of the biennial audit process under Section 272. *See In re Implementation of the Telecomms. Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539, 17628-32 ¶¶ 197-205 (1996), *order modified, In re 1998 Biennial Regulatory Review – Review of Accounting and Cost Allocation Requirements*, Order on Reconsideration, 14 FCC Rcd. 11396 (1999).

thus unfairly penalize the merged company and disserve the public interest at the same time.[461]

D. The Merger Raises No Concerns About AT&T Alascom.

The State of Alaska ("Alaska") raises concerns about the continuing applicability of certain requirements on AT&T Alascom.[462] There is no basis for those concerns, and no need to impose formal conditions to address them.

First, as noted in the Public Interest Statement, SBC is acquiring AT&T; AT&T and its subsidiaries will continue to exist and hold the authorizations under which they operate.[463] Thus, the transfer of control does not eliminate or reduce obligations under which AT&T and its subsidiary Alascom operate.

Specifically, SBC and AT&T understand that Alascom currently operates under state imposed carrier of last resort obligations, albeit with respect to interexchange

[461] For the same reasons, the Commission should reject NASUCA's request for a merger condition that requires "reinstate[ment of] all accounting and non-accounting safeguard requirements adopted by the FCC in 1996 . . . ." NASUCA Comments, Attachment A, at 50. NASUCA fails to show any reason that the merger would give rise to unique concerns necessitating reinstatement of protections the Commission already has concluded are unnecessary to protect the public interest. The merged company will, of course, comply with all protections that *remain* in effect. Likewise, the Telecommunications Consultants Coalition's ("TCC") requests that the Commission condition any approval of the merger on a requirement interpreting 47 C.F.R. § 42.10 (which requires a nondominant IXC to disclose "information concerning its current rates, terms, and conditions" for service) to mandate disclosure of "precise rates" for custom arrangements sought by the largest enterprise customers. TCC Comments at 5. The three companies in the TCC have filed a complaint against AT&T asking for the very same relief, alleging a violation of § 42.10. *See* Complaint, File No. EB-04-MD-008 (May 26, 2004). AT&T has filed a response, asserting that it complies with the provision and that TCC's interpretation of § 42.10 (the same one TCC advances here) is improper. See AT&T Amended Answer (July 2, 2004). The dispute over the proper interpretation of § 42.10 will be resolved in the complaint case, and there is no merger-specific issue that is appropriate for resolution in this merger proceeding. *See supra* note 19.

[462] Comments of the State of Alaska to Applications of SBC Communications Inc. and AT&T Corp. in WC Dkt. No. 05-65 Apr. 25, 2005 at 2-3.

[463] Public Interest Statement at 11.

services, and this transaction does not change those obligations. As an ILEC, and one that operates in rural as well as urban areas, SBC understands the obligation to provide services in rural and remote locations. SBC also understands that Alaska is the only state dependent on satellite communications for both intrastate and interstate services, and that Alascom's carrier of last resort obligations include, if necessary, replacing the satellite currently used at the end of its useful life.

Second, the Applicants also recognize that geographic rate averaging and rate integration are statutory and regulatory requirements applicable to all providers of interexchange service.[464] Those requirements will apply to the post-transaction company no less than they apply today.

In fact, for the reasons set forth in the Public Interest Statement and the accompanying declarations, AT&T's long distance customers in Alaska and elsewhere are likely to benefit from this transaction in many ways. As noted elsewhere, in most areas, AT&T has stopped competing for residential customers and is generally increasing its rates to maximize the cash flow it receives from them. And, as Drs. Carlton and Sider observed, "Because SBC does not plan to exit from the provision of local or long distance services, it has strong incentives to retain AT&T's former customers and would not have the same incentives as AT&T to raise prices to these consumers."[465] Since the merged company will be subject to the rate integration rules, Alaskan consumers will obtain interstate interexchange services at the same rates as offered in other states.

[464] *See* 47 U.S.C. § 254(g).

[465] Carlton & Sider Decl. ¶ 54.

Third, Alaska requests that SBC affirm that it intends to maintain Alascom as a separate company. SBC and AT&T understand that Alaska does ***not*** seek to reimpose obligations originally placed on Alascom in the Alaska Market Structure Order[466] or the Alascom Transfer Order,[467] and lifted by Section 112 of the Consolidated Appropriations Act of 2005; rather, SBC and AT&T understand that Alaska seeks assurances that the post-transaction firm will continue to have a corporate entity present in the State. SBC and AT&T generally operate state-specific businesses (such as Alascom) through a distinct (though not structurally separated) corporate entity. Particularly given the remoteness of Alaska from the Continental U.S. and the unique obligations of Alascom, SBC intends to continue to do so in Alaska.[468]

E. The Merger Will Not Harm Payphone Competition.

The American Public Communications Council ("APCC"), on behalf of independent (non-LEC-owned) payphone service providers ("PSPs") claims that the proposed merger "will have a dramatic anticompetitive effect on independent PSPs."[469]

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[466] *In re Integration of Rates and Servs. for the Provision of Communications by Authorized Common Carriers Between the Contiguous States and Alaska, Haw., P.R. and the V.I.*, Final Recommended Decision, 9 FCC Rcd 2197 (1993), *adopted and modified*, Memorandum Opinion and Order, 9 FCC Rcd 3023 (1994).

[467] *In re Application of Alascom, Inc., AT&T Corp. and Pac. Telecom, Inc. and Application of Alascom, Inc.*, 11 FCC Rcd 732 (1995).

[468] Alaska also requested that SBC also agree to make the "Alaska Spur" of the North Pacific Cable, an undersea cable linking Alaska to the Continental U.S., available to other carriers on a non-discriminatory basis. This request is moot because the North Pacific Cable, which at the time of the Alascom Transfer Order was the only cable linking Alaska to the Continental U.S., is no longer operational. Now, there are several undersea cables. In fact, Alascom does not control any undersea cable but has Indefeasible Rights to Use on two cables controlled by two unaffiliated entities.

[469] Petition of American Public Communications Council to Applications of SBC Communications Inc. and AT&T Corp. in W.C. Dkt. No. 05-65 Apr. 25, 2005 at 2 ("APCC Pet.").

APCC argues that allowing SBC to combine with one of the "largest interexchange carriers" will create a dominant entity "that will be in a position to throttle payphone competition"[470] and that will have "every incentive to manipulate the payphone compensation system in anticompetitive ways . . . ."[471] APCC then compiles a grab-bag of complaints[472] and asserts that a merged SBC/AT&T is "poised to exploit any opportunities that may arise to use artificial means to place . . . competitors at an unwarranted disadvantage."[473] APCC argues that, as a result of the merger, PSPs may be "forced to exit the market,"[474] and then proposes as a "solution" that the Commission require SBC to "exit the market."[475] Apart from their transparent opportunism, APCC's arguments have no substance.

APCC's principal claim is that by combining a payphone-owning local exchange carrier with the "largest interexchange carrier[]," the merger would increase SBC's incentive to harm its independent PSP competitors.[476] However, Section 276 of the Communications Act mandates that BOCs such as SBC "(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and (2) shall not prefer or discriminate in favor of its

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[470] APCC Pet. at 3.

[471] *Id.* at 3.

[472] *Id.* at 3-5.

[473] *Id..*, Attachment at 10, APCC Pet. at 3-5.

[474] *Id.*, Attachment at 25.

[475] *Id.* at 6 (arguing that SBC/AT&T "divest themselves of their payphone assets prior to consummation of the merger").

[476] *Id.* at 3-5.

payphone service."[477] Congress directed the FCC to "prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement" these requirements.[478] As APCC acknowledges, in the almost 10 years since Section 276 was enacted, the Commission has "issued more than 15 orders revising and refining the process" for compensating PSPs for "dial-around compensation."[479] The Commission's orders implement regulations that dictate virtually all aspects of the relationship among PSPs, LECs, and IXCs, including (i) the amount of dial-around compensation to which PSPs are entitled both on a per-phone and per call basis, (ii) the timing of those payments, (iii) the rate of interest on late payments, (iv) the obligations of LECs, ILECs and switch-based resellers to track completed payphone calls, and (v) the requirements of carriers to certify their compliance with these rules.[480]

APCC should not be permitted to convert this merger proceeding into an omnibus payphone rulemaking proceeding to extract concessions that APCC has been unable to convince the Commission were in the "public interest" in appropriate rulemaking proceedings.[481] To the extent that APCC believes that existing regulations fail to protect independent PSPs and that additional regulations are thus necessary, APCC can seek such

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[477] 47 U.S.C. § 276(a).

[478] 47 U.S.C. § 276(b)(1)(C). In doing so, Congress plainly recognized that BOCs would continue to own payphone assets, and these same BOCs also would operate as interexchange carriers once they had complied with the predicate requirements of the 1996 Act. *See* 47 U.S.C. § 271(b).

[479] APCC Pet., Attachment at 12.

[480] *See, e.g.*, 47 C.F.R. §§ 64.1300-1340.

[481] *See supra* note 19.

relief in a manner that would involve all PSPs and all the carriers that compensate them in an orderly rulemaking process.

V. SBC IS FULLY QUALIFIED TO CONTROL AT&T'S LICENSES AND AUTHORIZATIONS.

Conforming to the now-familiar pattern in merger proceedings, the merger opponents have alleged various instances of supposed misconduct by SBC in an attempt to question its character qualifications.[482] In particular, they argue that SBC has not complied with conditions imposed in early Commission decisions.[483] These allegations are not new, nor are they relevant to this proceeding. The Commission has consistently rejected them in other proceedings, most notably in its recent decision approving the acquisition of AT&T Wireless Services, Inc. by Cingular Wireless Corporation,[484] and it should do so once again.

A. SBC Has the Character Qualifications To Acquire Control of AT&T's Authorizations.

Most of the merger opponents' allegations concerning SBC's character were addressed and squarely rejected by the Commission when Thrifty Call, Inc. ("Thrifty

[482] Cbeyond Pet. at 10-19; CompTel-ATLS Pet. at 50-59, 61-69; ACN Comments at 30, 36, 74-75; Broadwing & SAVVIS Opp. at 36-37; Cox Comments at 7-8, 11; Global Crossing Comments at 22; Telscape Comments at 6, 11-12.

[483] Global Crossing Comments at 15-16; NASUCA Comments at 18-20; Telecomms. Consultants Comments at 1, 5; Tex. O.P.U.C. Comments at 7-8; U.S. Cellular Comments at 2-4; APCC Pet. at 2-6; Broadwing & SAVVIS Opp. at 22-64; Cbeyond Pet. at 10-16; Comptel-ALTS Pet. at 27-30; Cox Comments at 13; Qwest Pet. at 39; Independent Alliance Comments at 4-6.

[484] *Cingular/AWS*, 19 FCC Rcd. at 21550-52 ¶¶ 52-56; *SBC/Ameritech*, 14 FCC Rcd. at 14950 ¶¶ 571-73; *In re Applications of SBC Communications Inc. & BellSouth Corp.*, Memorandum Opinion and Order, 15 FCC Rcd. 25459, 25466 ¶ 17 (2000).

Call") presented them in opposition to the Cingular/AT&T Wireless merger.[485] In its order in that proceeding, the Commission held:

> Initially, we find that many of the Commission actions cited by Thrifty Call are not relevant to a character qualifications analysis. For example, some of the Commission actions cited are consent decrees. The Commission does not consider matters resolved in consent decrees adjudicated misconduct for the purposes of assessing an applicant's character qualifications. Thrifty Call also cites to a website listing, *inter alia*, a number of payments made by SBC to the federal government. However, most of these were voluntary payments that, under the terms of the SBC/Ameritech merger plan, SBC makes to the U.S. Treasury if it fails to meet the performance standards established in that plan.
>
> In addition, a number of the Commission actions cited by Thrifty Call had been taken and were part of the public record when the Commission upheld SBC's qualifications to hold Commission licenses in September 29, 2000. In all of the cases cited, the Commission has investigated the infractions and taken appropriate enforcement actions against SBC including the imposition of monetary penalties. In no case did the Commission think that license revocation was an appropriate penalty.[486]

This statement disposes of most of the allegations raised by Cox, all but three of those raised by CompTel in the "Character Qualifications" section of its Petition,[487] and all but two of those raised by Cbeyond.[488]

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[485] *See* Petition to Deny of Thrifty Call, Inc., WT Dkt. No. 04-70 (May 3, 2004) at 25-29, ¶ 113.

[486] *Cingular/AWS*, 19 FCC Rcd. at 21550, ¶¶ 53-54 (citations omitted). With respect to the website, the Commission said, "We also note that these website list entries have a number of other problems, including fines that are listed more than once, and entries that are factually inaccurate, including an erroneous reference to a $2.5 million fine in March of 2003." *Cingular/AWS*, 19 FCC Rcd. at 21550, ¶ 53 n.217. While Cbeyond does not cite that website, presumably because it no longer exists, it cites to two web articles that explicitly refer or appear to refer to the figures on that website. *See* Cbeyond Pet. at 16 n.44.

[487] CompTel-ATLS Pet. at 68.

[488] Indeed, the laundry list of allegations in Section III.A of Cbeyond's Petition reads almost word-for-word like the equivalent section of Thrifty Call's pleading. *See* Cbeyond Pet. at 13-16.

Nonetheless, Cbeyond argues that the Commission merely held that the allegations were "not determinative in the context of the proposed merger of Cingular Wireless and AT&T Wireless."[489] Thus, it argues the Commission should revisit them in this proceeding. Cbeyond's claim ignores the plain meaning of the Commission's words: despite knowing the conduct cited by Thrifty Call, the Commission had "upheld SBC's qualifications to hold Commission licenses" before; had not found "that license revocation was an appropriate penalty"; and was upholding SBC's qualifications again.

CompTel's attempt to distinguish *Cingular/AWS* is even less persuasive. Disregarding the Commission's citation to a long-settled precedent,[490] CompTel just says it "is confident that the Commission did not mean" it when the Commission said that conduct resolved by consent decrees is not relevant to analyzing a party's character qualifications.[491] CompTel's argument is absurd; the Commission manifestly said what it meant and meant what it said: entrance into a consent decree is not an admission of guilt by the licensee where the licensee does not admit guilt.[492] Moreover, nothing compels the Commission to enter into a consent decree for misconduct where the Commission believes that the conduct may establish that a licensee is unfit to hold a license. The Commission can and does revoke licenses when faced with misbehavior warranting such

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[489] Cbeyond Pet. at 18.

[490] *Cingular/AWS*, 19 FCC Rcd. at 21550, ¶ 53 (citing *In re Policy Regarding Character Qualifications in Broad. Licensing*, Report, Order and Policy Statement, 102 F.C.C. 2d 1179, 1205 n.64 (1986) ("*1986 Character Qualifications Policy Statement*"), *modified*, Policy Statement and Order, 5 FCC Rcd. 3252 (1990), *recons. granted in part*, Memorandum Opinion and Order, 6 FCC Rcd. 3448 (1991), *modified in part*, Memorandum Opinion and Order, 7 FCC Rcd. 6564 (1992)).

[491] CompTel-ALTS Pet. at 68.

[492] *1986 Character Qualifications Policy Statement*, 102 F.C.C. 2d at 1205 n.64.

action.[493] Despite CompTel's rhetoric, the examples it recycles from Thrifty Call's Petition just do not rise to that level.[494]

B. The Merger Opponents' "New" Allegations Are Irrelevant to This Proceeding and Raise No Issue Concerning SBC's Character Qualifications.

The other allegations concerning SBC's alleged character defaults are no more availing. Some involve proceedings which had been concluded prior to the most recent licensing decisions involving SBC.[495] Other allegations raise issues that currently are being or could be litigated in other FCC proceedings or non-FCC fora. These allegations should be addressed in those proceedings, if anywhere; under established precedent, they should not be considered here. In all events, however, the allegations raise no possible issue as to SBC's character qualifications. While AT&T has disagreed on the merits with many of the SBC positions that underlie these allegations, SBC acted at all times based on what it believed to be reasonable interpretations of the law and the public interest, and in many cases, SBC's positions were vindicated by regulatory bodies and courts. Thus,

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[493] 47 U.S.C. § 312(a); *see, e.g.*, *In re Revocation of the Licenses of Pass Word, Inc.*, Order to Revoke Licenses, to Terminate Comparative Proceedings, and to Proceed with Docket 20941, 76 F.C.C.2d 465, 518-520, ¶¶ 119-24 (1980) (revoking licenses after the president and principal or sole owner of licensees "*repeatedly and deliberately* misrepresented and concealed facts over a three year period . . . to obtain licenses . . . , to obtain permits . . . , and to forestall Commission inquiry into the late construction and operation of the . . . channels and [his] responsibility therefor") (emphasis added), *recons. denied*, Order on Reconsideration, 86 F.C.C.2d 437 (1981), *aff'd sub nom. Pass Word, Inc.* v. *FCC*, 673 F.2d 1363 (D.C. Cir. 1982).

[494] Cox does not even attempt to distinguish *Cingular/AWS*.

[495] *See, e.g.*, *Wireless Telecomms. Bureau Site-by-Site Action*, Public Notice, Rpt. No. 2133, at 7 (Apr. 27, 2005) (granting new licenses to New Cingular Wireless PCS, LLC); *Wireless Telecomms. Bureau Market-Based Action*, Public Notice, Rpt. No. 2103, at 1 (Mar. 23, 2005) (granting a license renewal to Ameritech Mobile Services, Inc.).

the allegations are patently insufficient to raise any issue about SBC's character qualifications.

1. ACN Allegations

The ACN Petitioners condemn SBC for exercising its First Amendment right to petition state legislatures to, in SBC's view, fix problems with their telecommunications laws that had disadvantaged SBC and generated windfalls for CLECs.[496] However much the ACN Petitioners may dislike the positions SBC advocated or the effectiveness of SBC's advocacy, the Constitution protects these activities; and, pursuant to the Noerr-Pennington Doctrine, the Commission may not consider them in this proceeding.[497] Moreover, ratemaking is inherently a quasi-legislative activity.[498] It is no less proper for SBC (or any CLEC, for that matter) to argue its policy positions on the appropriate application of the TELRIC methodology to legislatures than to state commissions.

[496] *See* ACN Comments at 36 n.93.

[497] *See United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-70 (1965); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-40 (1961); *White* v. *Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) ("While the Noerr-Pennington doctrine originally arose in the antitrust context, it is based on and implements the First Amendment right to petition and therefore, with [an exception relating to sham litigation in the labor law context], applies equally in all contexts."); *see also In re Referral of Questions from Gen. Communication Inc. vs. Alascom, Inc., in the United States Dist. Court for the W. Dist. of Wash.*, Memorandum Opinion and Order, 4 FCC Rcd. 7447, 7450, ¶ 13 & n.19 (1988) (citing *Noerr* and stating, "The adoption of overly restrictive limitations, in whatever form, on a person's right to present this Commission with open and candid comments in the appropriate procedural context will almost certainly have a chilling effect on the open expression of views before this Commission, as well as other agencies, and may raise questions of constitutional propriety.").

[498] *See generally Ariz. Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 386-88 (1932) (holding that a regulatory commission's ratemaking activities are quasi-legislative).

ACN also criticizes SBC for refusing to negotiate "271 network elements" as part of the Section 252 interconnection agreement process.[499] While ACN might want SBC to engage in those negotiations, SBC believes that there is no statutory or Commission requirement that a BOC negotiate 271 network elements as part of that process and that federal courts of appeals have so held.[500] Further, the FCC has held that Section 271 does require SBC to provide access and interconnection to loops, transport, and switching unbundled from each other at just and reasonable rates under Sections 201 and 202.[501] SBC believes that those obligations are separate and apart from the requirements SBC faces under Sections 251 and 252,[502] and SBC thus considers itself entirely within its statutory rights to refuse ACN's invitation to undertake such negotiations. Certainly, SBC's refusal to do so says nothing about its character qualifications.

2. Broadwing Allegation

Broadwing's assertion that SBC has discriminated in the provision of special access rests in SBC's view on old data taken out of context and other mischaracterizations of the Section 272 audits of SBC.[503] Under the terms of their Agreed Upon Procedures engagements, the auditors were required to note all findings

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[499] ACN Comments at 74-75.

[500] *Coserv Ltd. Liab. Corp. v. S.W. Bell. Tel. Co.*, 350 F.3d 482, 488 (5th Cir. 2003); *accord MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1273 (11th Cir. 2002).

[501] *See* 47 U.S.C. § 271(c)(2)(B)(iv)-(vi); *Triennial Review Order*, 18 FCC Rcd. at 16978, 17387 ¶¶ 656, 662-64.

[502] *See Triennial Review Order*, 18 FCC Rcd. at 17384-92, ¶¶ 653-67. ACN uses vague language in the *Triennial Review Order* and the *Triennial Review Remand Order* to attempt to trump the specific statutory interpretation of the Appeals Courts. ACN, not SBC, is overreaching.

[503] Broadwing & SAVVIS Opp. at 32-33.

regardless of materiality.[504] Consequently, the audit reports mention isolated, minor differences in treatment – which is all that Broadwing is able to point to.

However, apparent differences in treatment do not necessarily reflect discrimination; they may simply represent random variation. As the Commission has described,

> Volumes may be so low as to render the performance data inconsistent and inconclusive. Performance data based on low volumes of orders or other transactions is not as reliable an indicator of checklist compliance as performance based on larger numbers of observations. Indeed, where performance data is based on a low number of observations, small variations in performance may produce swings in the reported performance data.[505]

Moreover, although the first audit on which Broadwing relies reached no conclusions either way, the more recent 2003 Audit Report "noted no differences between how the section 272 affiliates, the SBC BOC itself and the other BOC affiliates were treated compared to the non-affiliates."[506] The Commission also found that "[t]he section 272 audit reports that have been concluded to date have identified certain compliance issues but generally have not disclosed systemic or significant issues warranting enforcement

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[504] Ernst & Young, *Report of Independent Accountants on Applying Agreed-Upon Procedures*, in *In re Section 272(d) Biennial Audit of SBC Communications Inc.*, EB Dkt No. 03-199, App. B at 7 (filed Dec. 18, 2003) ("2003 Audit Report"); Letter from Michelle A. Thomas, Executive Director-Federal Regulatory, SBC Telecommunications, Inc., to Mr. Hugh Boyle, FCC, & Mr. Brian Horst, Ernst & Young LLP, *in* Ernst & Young, *Report of Independent Accountants on Applying Agreed-Upon Procedures*, Attach. B-2 (Dec. 17, 2001) ("2001 Audit Report") *in In re Accounting Safeguards Under the Telecomms. Act of 1996*, CC Dkt No. 96-150 (filed Sept. 16, 2002).

[505] *In re Joint Application by SBC Communications, Inc., S.W. Bell Tel. Co. & S.W. Bell Communications Servs., Inc. d/b/a S.W. Bell Long Distance Pursuant to Section 271 of the Telecomms. Act of 1996 to Provide In-Region, InterLATA Servs. in Ark. & Mo.*, Memorandum, Opinion and Order, 16 FCC Rcd. 20719, 20740 App. C ¶ 11 (2001).

[506] 2003 Audit Report at 30.

action."[507] Since whatever compliance issues were identified with respect to SBC in either audit did not warrant any enforcement whatsoever, they certainly do not undermine SBC's character qualifications.

3. CompTel Allegations

CompTel cites two additional consent decrees that Cbeyond somehow overlooked.[508] But, as noted above,[509] issues resolved by consent decree do not count against character qualifications. Indeed, the 2004 consent decree cited by CompTel demonstrates SBC's good corporate citizenship. When SBC discovered that it had violated the rules of the E-Rate program, it investigated the violations, self-reported to the Commission, returned the money SBC had received improperly from the Schools and Libraries Division of the Universal Service Administrative Company and implemented remedial measures.[510] No large company is going to achieve perfect regulatory compliance; SBC's response to the violation is far more probative of its character than the fact of the violation itself.

CompTel also dusted off a five-year-old decision concluding that Ameritech (principally prior to its acquisition by SBC) improperly had partnered with interexchange carriers to provide a combined local and long-distance service contrary to Section 271.[511]

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[507] *In re Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, Report and Order, 19 FCC Rcd. 5102, 5114, 5121 (2004) ("Section 272(b)(1)'s Order"). The exception to the general rule involved Verizon. *Id*. at 5114 ¶ 21, n.68.

[508] CompTel-ALTS Pet. at 65 (citing *In re SBC Communications Inc.*, Order, 18 FCC Rcd. 4997 (2003)), 65-66 (citing *In re SBC Communications Inc.*, Order, 19 FCC Rcd. 24014 (2004)).

[509] *See* Section V.A, *supra*.

[510] *In re SBC Communications Inc.*, Consent Decree, 19 FCC Rcd. at 24016, ¶ 3.

[511] CompTel-ALTS Pet. at 64 (citing *In re MCI Telecomms. Corp.* v. *Ill. Bell Tel. Co*, Memorandum Opinion and Order, 15 FCC Rcd. 23184 (2000) ("*MCI* v. *Ill. Bell*")).

SBC believes that the rules in question were not bright lines and that the analysis turned on a "fact-based test," which "balance[s]" a "non-exclusive" list of factors.[512] However, once the Commission ruled that the statute proscribed the service as offered, SBC promptly discontinued it. Indeed, this example actually demonstrates SBC's drive to assure full compliance with the Commission's rules.

Finally, although it does not include this allegation in its unwarranted attack on SBC's character qualifications, CompTel claims that the pricing for SBC's new 271 Local Switching offering is unreasonably discriminatory because it incorporates volume discounts which, CompTel speculates, appear to favor AT&T and may not be cost-based.[513] However, this complaint, which should be addressed through a formal complaint to the Commission[514] or a state commission, fails for several reasons. First, the offering is based on a commercial agreement negotiated on an arms'-length basis with MCI.[515] Accordingly, the volume discounts are presumptively reasonable.[516] Second,

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[512] *MCI* v. *Ill. Bell*, 15 FCC Rcd. at 23190, ¶ 10.

[513] CompTel-ALTS Pet. at 50-59.

[514] *See* 47 U.S.C. § 208.

[515] *See* Commercial Agreement for 271 Local Switching between Pacific Bell Telephone Company d/b/a SBC California, Illinois Bell Telephone Company d/b/a SBC Illinois, Indiana Bell Telephone Company Incorporated d/b/a SBC Indiana, Michigan Bell Telephone Company d/b/a SBC Michigan, Nevada Bell Telephone Company d/b/a SBC Nevada, The Ohio Bell Telephone Company d/b/a SBC Ohio, Southwestern Bell Telephone, L.P. d/b/a SBC Arkansas, SBC Kansas, SBC Missouri, SBC Oklahoma and/or SBC Texas, Wisconsin Bell, Inc. d/b/a SBC Wisconsin and MCImetro Access Transmission Services LLC (Mar. 14, 2005). This agreement was filed with the FCC pursuant to 47 U.S.C. § 211(a) and 47 C.F.R. § 43.51. Letter of 3/18/05 from Jim Lamoureux, Senior Counsel, SBC Services, Inc. to Marlene H. Dortch, Secretary, FCC (attaching the agreement). This filing is publicly available at the Commission, so CompTel would have known the offering had nothing to do with AT&T had it bothered to look.

[516] *See Triennial Review Order*, 18 FCC Rcd. at 16978, ¶ 664 ("[A] BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable

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AT&T does not take service under this offering.[517] Third, SBC believes the volume discounts are cost-based, contrary to CompTel's questions,[518] which makes them reasonable and nondiscriminatory. But, even if the discounts were not cost-based, CompTel ignores the settled doctrine that volume discounts do not have to be cost based for competitive services[519] -- and, much as CompTel might wish it were otherwise, the

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by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.").

[517] Although CompTel suggests pricing for this offering is suspicious given that SBC offered it for the first time shortly after agreeing to buy AT&T, to paraphrase Freud, sometimes, a coincidence is just a coincidence. The timing of the offering has nothing to do with the merger and everything to do with the release of the *Triennial Review Remand Order* shortly after the merger was announced. SBC debuted the 271 Local Switching offering just a few weeks after the *Triennial Review Remand Order* dismantled UNE-P and abolished the local switching UNE, thereby creating the market for such products.

[518] Establishing 271 Local Switching involves substantial fixed costs that are relatively insensitive to volume. These fixed costs need to be recovered in the per unit price. If there is limited demand for stand-alone switching, a larger cost must be recovered per unit, thus supporting a price structure that discounts the prices for greater quantities. In addition, 271 switching can be used by carriers for multiple purposes that have vastly different market values. As an example, some carriers could choose to use 271 switching strictly to serve relatively few very-high-margin customers. In this case both the cost and the value of the service is very high. In the alternative, a carrier could use 271 switching to serve the mass market of customers. In this situation, volumes will be significantly greater thus reducing unit costs. In addition, in this situation, the carrier only will be willing to purchase 271 switching if the price reflects the economies of scale and the market value for the service.

[519] *See e.g., In re 1998 Biennial Regulatory Review-Review of Accounts Settlement in the Maritime Mobile & Maritime Radio-Satellite Radio,* Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 20703, 20712, ¶ 20 n.26 (1999) ("*1998 Biennial Reg. Review*") (1999) ("In its access charge rules, for example, the Commission has allowed carriers to offer term and volume discounts for various rate elements . . . where sufficiently competitive conditions exist such that unreasonable and unlawful discrimination will not likely result."); *In re Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, 14288 ¶ 124 (1999) (holding that price cap LECs should be permitted to offer volume discounts to enable them to respond to competition in MSAs where the existence of competition has been demonstrated by satisfaction of the Phase I triggers); *In re David S. Poole & Mich. Multimedia Telecomms., Inc. v. Michiana Metronet, Inc. & Lucas J. Caruso*, Memorandum Opinion and Order, 15 FCC Rcd. 9944, 9950, ¶ 16 (1999) (noting that "the Commission has granted carriers considerable flexibility in structuring volume discount offerings, particularly in situations . . . where sufficiently competitive conditions exist such that unlawful discrimination will not likely result") (note omitted).

Commission has concluded that both components of the 271 Local Switching offering (local switching and shared transport) are competitive.[520]

4. Cox Allegations

Cox attacks SBC for rearbitrating before the California PUC three points on which it previously had received adverse decisions.[521] However, California PUC decisions clearly permitted SBC to rearbitrate those decisions because the PUC's arbitration decisions do not set precedents.[522] CLECs too rearbitrated certain issues after losing.[523] In these circumstances, SBC's decision to rearbitrate particular issues says nothing about SBC's qualifications to control FCC licensees.

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[520] *See Triennial Review Remand Order* at 17106, ¶ 204 (determining not only that competitive LECs are not impaired in the deployment of switches, but that it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation); *Triennial Review Order*, 18 FCC Rcd. at 17319-20, ¶ 534 (finding that requesting carriers are impaired without access to unbundled shared transport only to the extent that the FCC finds they are impaired without access to unbundled switching).

[521] Cox Comments at 7-8. SBC generally does not rearbitrate issues it previously has lost in California unless it thinks the facts or the law have changed or other circumstances (*e.g.*, a change in the PUC policy or new authority from other states) warrant rearbitration.

[522] *Application by AT&T Communications of Calif., Inc., (U 5002 C) for Arbitration of an Interconnection Agreement with Pac. Bell Tel. Co. (U 1001 C) Pursuant to Section 252(b) of the Telecomms. Act of 1996,* Application 00-01-022, Opinion, Decision 00-08-011, slip op. at 30 (Cal. P.U.C. Aug. 3, 2000) ("We reiterate the FAR's finding that the 1996 arbitration decision between AT&T and Pacific does not constitute binding precedent. We have stated before, and will do so again in this context, that we are not bound by a provision we adopted in the 1996 arbitration decision, or any other prior arbitration."); *Order Instituting Rulemaking on the Comm'n's Own Motion into Competition for Local Exch. Serv.*, Order, Rulemaking 95-04-043, Decision 97-08-076, 1997 WL" 618795 (Cal. P.U.C. Aug. 15, 1997). ("The outcomes reached in the arbitration cases are not precedent setting, and only apply to the individual carriers involved in the arbitration.").

[523] For instance, in 2000, Level 3 lost an arbitration over having to compensate Pacific Bell for the latter's costs in transporting Level 3's "virtual NXX" traffic. *Level 3 Communications, LLC (U 5941 C) Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecomms. Act of 1996, for Rates, Terms, & Conditions with Pac. Bell Tel. Co. (U 1001 C),* Application 00-04-037, Decision 00-10-032, slip op. at 5-9 (Oct. 5, 2000), *reh'g denied*, Order Denying

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5. Global Crossing Allegations

Global Crossing repeats CLEC allegations that (a) SBC has hindered their interconnection with SBC's network and (b) SBC offers discriminatory wholesale prices. Aside from documents arising from the misunderstanding about Vonage's access to E911 facilities, which we discuss elsewhere,[524] Global Crossing merely cites two stories from *Communications Daily*. The first of these stories reports on concerns that were expressed when SBC first offered its True IP to PSTN ("TIPTop") tariff in November 2004. At the time, various parties apparently thought that the TIPTop tariff was mandatory for providers of IP-enabled services that want to interconnect with the PSTN, and the Commission pledged to review whether this was in fact the case. As SBC explained in November, TIPTop is a purely voluntary service.[525] Therefore, the Commission neither suspended nor instituted a formal investigation of the tariff, and other parties' concerns appear to have disappeared.

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Rehearing of Decision 00-10-032, 2001 WL 491188 (Cal. P.U.C. Feb. 8, 2001). In 2004, Level 3 re-arbitrated the issue. *See Petition of Level 3 Communications, LLC (U-5941-C) for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecomms. Act of 1996, & Applicable State Laws for Rates, Terms, & Conditions of Interconnection with SBC Bell Tel. Co. dba SBC Cal. & SBC Communications*, Application 04-06-004, Final Arbitrator's Report, slip op. at 18 (Cal. P.U.C. ALJ Feb. 8, 2005) (pending a decision of the PUC to approve or disapprove the Final Arbitrator's Report); *see also id*. at 19-22.

[524] *See* note 217 and accompanying text.

[525] Ameritech Operating Companies, Description and Justification Transmittal No. 1425, at 1 (filed Nov. 24, 2004) ("TIPToP service is not a mandatory offering. [Internet Protocol (IP) enabled Voice Information Services] providers who choose not to purchase TIPToP service may use other services, to the extent permitted by Ameritech's tariffs and prevailing law, to connect traffic from their IP end users to end users of the PSTN via the Telephone Company's existing network."), *available at* http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/bin/native_out.pl?73598; *see FCC to Review SBC's Tip Top Tariff*, Communications Daily, Nov. 29, 2004, *available at* 2004 WLNR 12929832.

The second story notes allegations made by SBC's competitors about SBC's procedures for offering line splitting. Those competitors were opposing SBC's application for Section 271 relief in Michigan.[526] Unlike many of the allegations raised by Opponents in this proceeding, these allegations actually were adjudicated by the Commission. The Commission rejected the CLEC complaints regarding line splitting and concluded that SBC's Michigan ILEC provided nondiscriminatory access to line splitting.[527]

6. Telscape Allegations

Without any citation (not even to an affidavit or declaration by one of its employees), Telscape alleges that SBC has prejudiced it by offering "temporary promotional or winback prices that are below Telscape's costs of service and, perhaps, below the price that Telscape pays for loops."[528] SBC is a little mystified that Telscape is not sure whether the wholesale loop price is above or below the promotional retail price. Be that as it may, however, promotional pricing is extensively regulated by the California PUC, and it is unlikely that the Commission would permit rates that are predatory. Furthermore, short-term promotional prices – even those that are below-cost – generally are not deemed to be predatory if the price cutter will not be able to recoup its lost profits

[526] Communications Daily, Apr. 3, 2003, *available at* 2003 WLNR 7293728**.**

[527] *In re Application by SBC Comm. Inc., Mich. Bell Tel. Co., S.W. Bell Comm. Servs., to Provide In-Region, InterLATA Servs. in Mich.,* Memorandum Opinion and Order, 18 FCC Rcd. 19024, 19100-06, ¶¶ 134-43 (2003); *id*. at 19195 (separate statement of Commissioner Michael J. Copps) ("Based on the current record, I expect that through collaborative efforts SBC and competitive carriers will be able to iron out any future process difficulties [with line splitting] as they arise.").

[528] Telscape Comments at 6.

in the future by raising prices to supracompetitive levels.[529] Yet, SBC's rates, particularly for the residential customers Telscape specializes in serving,[530] are regulated, so SBC's ability to recoup lost profits seems unlikely. Moreover, for a predatory pricing claim of the sort Telscape appears to make out, it is not Telscape's cost structure that matters, but SBC's. Hence, Telscape's allegation that SBC's promotional rates are below Telscape's costs is irrelevant. Not surprisingly, the California PUC recently concluded, "There is also insufficient evidence to support Telscape's claim that SBC-CA's special winback offers are predatory and anticompetitive."[531]

Telscape also points to several other issues covered by that decision.[532] In doing so, however, Telscape attempts to make a mountain out of a molehill. While the PUC did find that "some aspects of SBC-CA's OSS implementation are not in compliance with SBC-CA's legal obligations, . . . [the record] does not show that the problems are so pervasive or intractable that we ought to accept Telscape's implicit invitation to become the day-to-day supervisor of SBC-CA's OSS."[533] Rather, the PUC ordered SBC to fix select practices and to refund or pay certain amounts it concluded that SBC owed. The PUC's remedies were injunctive and restitution-driven, not punitive. Since the PUC

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[529] *E.g.*, *Am. Academic Suppliers* v. *Beckley-Cardy, Inc.*, 922 F.2d 1317 (7th Cir. 1991); *A.A. Poultry Farms* v. *Rose Acre Farms*, 881 F.2d 1396, 1400 (7th Cir. 1989); *see also Buffalo Courier-Express, Inc.* v. *Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979).

[530] Telscape Comments at 2.

[531] *Telscape Communications, Inc.* v. *Pac. Bell Tel. Co.*, Case No. 02-11-011, Decision No. 04-12-053, slip op. at 28 (Cal. P.U.C. Dec. 16, 2004).

[532] Telscape Comments at 11.

[533] *Telscape*, slip op. at 29.

clearly did not find that SBC's conduct was sanctionable, its decision provides no basis for the Commission to question SBC's character qualifications.[534]

Finally, Telscape alleges that SBC's implementation of the Commission's rulings in the *Triennial Review Remand Order* "proves that SBC continues to perceive itself as above the law."[535] Nothing could be further from the truth. SBC is merely attempting to give effect to its understanding of the Commission's decision. The *Triennial Review Remand Order* established a "nationwide bar on such unbundling" of mass-market switching.[536] SBC believes that bar to be self-effectuating on March 11, 2005.[537] The FCC repeatedly emphasized that its transition plan for the period after the effective date "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3)."[538] As one federal court has observed:

> Given the clarity with which the FCC stated its position on this issue, it is not surprising that the majority of state utilities commissions and courts,

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[534] Indeed, the PUC's language was most heated in the portions of the decision ordering SBC to provide "naked DSL" when SBC's voice customers wish to switch to a CLEC. *See id.* at 17-27. Although Telscape points to those conclusions too, Telscape Comments at 11, the Commission has ruled that such state commission decisions are preempted as inconsistent with federal law, *In re BellSouth Telecomms., Inc. Request for Declaratory Ruling That State Comm'ns May Not Regulate Broadband Internet Access Servs. by Requiring BellSouth to Provide Wholesale or Retail Broadband Servs. to Competitive LEC UNE Voice Customers*, WC Dkt No. 03-251, Memorandum Opinion and Order and Notice of Inquiry, FCC 05-78 (rel. Mar. 25, 2005).

[535] Telscape Comments at 12.

[536] *Triennial Review Remand Order*, 2005 WL 289015, ¶ 204.

[537] *Id.* ¶ 235.

[538] *Id.* ¶ 227; *see also id.* ¶ 5 ("This transition plan applies only to the embedded base, and does not permit competitive LECs to add new switching UNEs"); *id.* ¶ 199 ("This transition period . . . does not permit competitive LECs to add new customers using unbundled access to local circuit switching."); 47 C.F.R. § 51.319(d)(2)(iii) ("Requesting carriers may not obtain new local switching as an unbundled network element.").

> by far, having considered this issue have held, on persuasive reasoning, that the FCC's intent in the TRRO is an unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change of law provisions in parties' interconnection agreements.[539]

Accordingly, SBC advised CLECs of its view of the FCC's deadline for placing new UNE-P orders. And, it simultaneously invited them to negotiate alternative commercial arrangements, if they wished to continue receiving a commercial equivalent of the UNE- P. However, CLECs like Telscape, which continue to seek to preserve these arrangements, attempt to cast SBC as the party flouting the law. In view of the Commission's statements in the *Triennial Review Remand Order* and the other authority

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[539] *BellSouth Telecomms., Inc.* v. *Miss. Pub. Serv. Comm'n*, Civil Action No. 3:05CV173LN, slip op. at 7-8 (S.D. Miss. Apr. 13, 2005); *see BellSouth Telecomms., Inc.* v. *Cinergy Communications Co.*, Civil Action No. 3:05-CV-16-JMH, slip op. at 7 (E.D. Ky Apr. 22, 2005); *BellSouth Telecomms., Inc.* v. *MCIMetro Access Transmission Servs., LLC*, No. 1:05-CV-0674-CC, slip op. at 2-6 (N.D. Ga. Apr. 5, 2005); *Complaint of Indiana Bell Tel. Co.*, Order, Cause No. 42749, at 7 (Ind. URC Mar. 9, 2005); *Implementation of the FCC's Triennial Review Order*, Docket No. TO03090705, Order, (N.J. BPU Mar. 24, 2005); *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes in Law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP, Vote Sheet at Issue 2 (Fla. PSC Apr. 5, 2005); *Emergency Petition of LDMI Telecomms., Inc., et al*., Case Nos. 05 298-TP-UNC & 05-299-TP-UNC, Entry (Ohio PUC, Mar. 9, 2005); *Ordinary Tariff Filing of Verizon New York Inc.*, Order Implementing TRRO Changes, Case No. 05-C-0203 (N.Y. PSC Mar. 16, 2005); *Petition of Verizon California Inc.*, Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders, App. No. 04-03-014 (Cal. PUC Mar. 11, 2005) (On March 17, 2005, the California Public Utility Commission voted to adopt the Assigned Commissioner's ruling.); *Arbitration of Non-Costing Issues*, Docket No. 28821, Proposed Order on Clarification, Approved as Written, at 1 (Tex. PUC Mar. 9, 2005); *General Investigation to Establish a Successor Standard Agreement*, Order Granting in Part and Denying in Part Formal Complaint and Motion for an Expedited Order, Docket No. 04-SWBT-763-GIT (Kan. SSC Mar. 10, 2005); *Verizon RI Tariff Filing to Implement the FCC's New Unbundled (UNE) Rules*, Open Meeting, Docket 3662 (R.I. PUC Mar. 8, 2005); *Verizon-Maine Proposed Schedules, Terms Conditions and Rates for Unbundled Network Elements*, Order, Docket No. 2002-682 (Me. PUC Mar. 17, 2005); *Petition of Verizon New England, Inc.*, Briefing Questions to Additional Parties, D.T.E. 04-33 (Mass. DTE Mar. 10, 2005) (declining to take emergency action to block implementation of ban on new UNE-P orders on March 11, 2005); Order, *Application of the Competitive Local Exchange Carriers*, Case No. U-14303, at 9 (Mich. PSC Mar. 29, 2005); *Complaint of A.R.C. Networks, Inc.*, Open Meeting, Docket No. 334-05 (Del. PSC Mar. 22, 2005). *But see, e.g., Ill. Bell Tel. Co.* v. *Hurley*, No. 05 C 1149, 2005 WL 735968, *6 (N.D. Ill. Mar. 29, 2005).

upon which SBC relies, SBC's actions do not remotely suggest its lack of character qualifications to hold licenses.

C. Opponents' Allegations Do Not Call SBC's Trustworthiness into Question.

Although the merger opponents have thrown vast quantities of mud at SBC, they cannot make it stick. None of their charges changes the fundamental fact that SBC is overwhelmingly qualified to control AT&T's authorizations.

Given the precedents arrayed against them, these opponents must have realized that their allegations would not convince the Commission that it should stray from its consistent determination that SBC has the requisite character qualifications to control licensees. Instead, they appear to have resurrected the old claims and concocted the new ones in a not-so-subtle effort to suggest that SBC cannot be trusted to keep its commitments to the Commission. However, like the argument that SBC is not qualified to control licensees, this suggestion is defeated by the Commission's repeated findings that SBC, in fact, does have those qualifications. In reaching that conclusion time and again, the FCC implicitly has found that SBC *can* be trusted "to deal truthfully with the Commission and to comply with our rules and orders."[540]

[540] *Cingular/AWS*, 19 FCC Rcd. at 21548 ¶ 47 (stating that "the central focus of our review of an applicant's character qualifications is conduct that bears on the proclivity of an applicant to deal truthfully with the Commission and to comply with our rules and orders") (emphases removed); *see generally In re Request of MCI Communications Corp. & British Telecomms. plc*, Declaratory Ruling and Order, 9 FCC Rcd. 3960, 3963 ¶ 18 (1994) (presuming that parties will abide by their commitments to the Commission); *In re Petitions of News Int'l, plc*, Memorandum Opinion and Order, 97 F.C.C.2d 349, 356 ¶ 17 (1984) (same).

VI. CONCLUSION

For the foregoing reasons, the Commission should dismiss or deny the filings made in opposition to the merger of SBC and AT&T. The Applicants have demonstrated that the proposed merger serves the public interest, convenience, and necessity. Accordingly, the Commission should expeditiously grant, without conditions, the applications to transfer control of AT&T's FCC authorizations to SBC.

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