

VIA ECFS

May 13, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: Docket 05-65; Reply Comments of ACN Communications Services, Inc. *et al.*

Dear Ms. Dortch:

Please find attached the reply comments of ACN Communications Services, Inc. *et al.*, These reply comments are being refiled to add McLeod USA Telecommunications Services, Inc., but are identical in all other respects. Should you have any questions, please do not hesitate to contact me at (202) 424-7500.

Respectfully submitted,



Patrick J. Donovan

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

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

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

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

Communications (collectively “Commenters”) submit these Reply Comments in this proceeding¹ concerning the proposed acquisition of AT&T Corporation (“AT&T”) by SBC Communications, Inc. (“SBC”) (collectively “Applicants”).

All of the substantive initial comments filed concerning the proposed merger of SBC and AT&T reached the same conclusions as Commenters’ initial comments: the Applicants failed to provide sufficient information to permit a serious evaluation of the proposed merger; the proposed merger would produce serious harms including an undue concentration of the local exchange, interexchange, and IP backbone markets; the proposed merger would enhance SBC’s ability to harm competition in each of those markets; and SBC’s arguments concerning public interest benefits were invalid. While SBC procured a number of brief statements from local chambers of commerce and others in support of the application, they are non-substantive. As such, the initial record gathered in this proceeding requires denial of the Application, or if the Application is granted, imposition of substantial conditions as have been proposed by Commenters. Accordingly, Commenters will not at this point submit extensive reply comments.

Commenters respond briefly, however, to the submission of the Progress and Freedom Foundation (“PFF”), an organization substantially funded by the BOCs and their trade association that masquerades as an independent think tank, requesting that the Commission not address competitive concerns or impose any conditions that would address them. Commenters also request that the Commission “stop the clock” on this proceeding in light of Applicant’s failure to submit adequate information to permit an evaluation of the serious public interest harms that the proposed merger would cause.

¹ Public Notice, “Commission seeks Comment on Application for Consent to Transfer of Control Filed By ABC Communications Inc. and AT&T, WC Docket No. 05-65, DA 05-656 (rel. Mar. 11, 2005).

I. THE COMMISSION SHOULD REJECT PFF'S PROCESS-RELATED "REFORMS."

PFF proposes that the Commission, "in an exercise of regulatory self-restraint," implement two process-related "reforms" in evaluating the proposed merger of SBC and AT&T.² First, PFF contends that the Commission should defer to the Department of Justice's ("DOJ") regarding competition issues. PFF asserts that doing so would "reduce the burden on merging companies and eliminate the duplication of government resources."³ PFF submits that Commission review is unnecessary because the DOJ and the Federal Trade Commission ("FTC") already perform the same function.

Contrary to PFF's arguments, as determined by the Courts, the Commission's review is complementary, not duplicative of other federal agency review.⁴ "Although the Commission's

² PFF Comments at 2-3.

³ PFF Comments at 3.

⁴ *See Bell Atlantic/GTE Merger Order*, 15 FCC Rcd 14032, at n.65; *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712, at n.121 (citing *FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure.")). *See also Worldcom/MCI Order*, 13 FCC Rcd at 18034, ¶ 13 (citing *FCC v. RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice ... must apply."); *see also Prometheus Radio Project v. Federal Communications Commission*, 373 F.3d 372, 414 (3rd Cir. Jun. 24, 2004) (rejecting the contention that the Commission's review is duplicative of antitrust enforcement (by the Department of Justice and the Federal Trade

analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed nor limited by them, thus permitting the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws.”⁵ The Commission has explained that:

The Commission and the DOJ each have independent authority to examine telecommunications mergers, but the standards governing the Commission’s review differ from those of DOJ. DOJ reviews mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to lessen competition substantially in any line of commerce. The Commission, on the other hand...is charged with determining whether the transfer of licenses serves the broader public interest. In the communications industry, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players. In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger’s effect on future competition. We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.⁶

For these reasons, the PFF’s first proposed “reform” should be rejected out of hand.

Second, the PFF asks the Commission to limit conditions to those narrowly tailored to assure compliance with existing statutory requirements and the FCC rules.⁷ In other words, even if the Commission were to find competitive concerns with the merger, which it must, it should

Commission) and, thus, not in the public interest and stating that the “Commission ensures that license transfers serve public goals of diversity, competition, and localism, while the antitrust authorities have a different purpose: ensuring that merging companies do not raise prices above competitive levels.” (citations omitted).

⁵ See *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd 14032, at n.65 (citations omitted).

⁶ *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket Nos. 04-70, 04-254, 04-323, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 42 (2004) (“*AWS/Cingular Merger Order*”).

⁷ PFF Comments, at 3-5.

impose no conditions to address those concerns. PFF claims that the conditions on the past SBC/Ameritech merger “went far beyond the existing requirements of the Communications Act or the FCC’s rules.”⁸

However, under the statutory public interest standard, the Commission may not grant the application if, as with this Application, adverse impacts on competition outweigh any benefits. Where the harms outweigh the benefits, the Commission has two options: (1) it may deny the Application; or (2) it may approve the Application with conditions that are necessary to mitigate the public interest harms. In fact, the Commission has already established an approach to reviewing mergers that avoids overly broad conditions. The Commission “will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are *fairly related* to the Commission’s responsibilities under the Communications Act and related statutes.”⁹ The Commission has emphasized that it “will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.”¹⁰ The Commission should retain this approach rather than PFF’s BOC-inspired transparent effort to obtain a green light for anticompetitive conduct dressed up as a proposed “reform.”

II. THE COMMISSION SHOULD “STOP THE CLOCK” IN THIS PROCEEDING

In initial comments, Commenters and others emphasized that the Application “fails to provide sufficient information concerning among other things, market share, and market definitions for the services provided by the Applications.”¹¹ The Wireline Competition Bureau (“WCB”) apparently came to the same conclusion based on its extensive April 18, 2005

⁸ PFF Comments at 4.

⁹ *AWS/Cingular Merger Order*, ¶ 43.

¹⁰ *AWS/Cingular Merger Order*, ¶ 43.

¹¹ Comments of Commenters, at 2.

information request to the Applicants.¹² In initial comments, Commenters urged that the WCB seek additional, more rigorous, information from the Applicants and proposed questions that the Commission Staff could ask the Applicants to elicit such information that is necessary to evaluate fully and properly whether the proposed merger serves the public interest, convenience and necessity.¹³

Commenters' ability to meaningfully participate in this proceeding has been seriously compromised by Applicants' failure to provide critical market and other information initially. First, initial comments could not address the full extent of potential harms because adequate information was not yet available. Second, Applicants yesterday submitted a very large number of documents, over 100 boxes of information, in response to the Bureau's information request, large portions of which are subject to confidential treatment. The 24 hours or less since the Applicants' response was filed yesterday does not provide sufficient time to comment in these reply comments on this huge filing. In fact, Commenters understand from the Applicants that the confidential information will not be available for inspection until tomorrow in any event. And, one third of the 180 day merger review period has already passed. It is not likely to be possible for interested parties to evaluate the Applicants' new information, bring any further issues to the Commission's attention, and for the Commission to reach a balanced decision within a 180 day time period. Applicants' failure to submit adequate information initially, and not provide basic threshold information until day 60, is clearly an effort to manipulate to their

¹² Letter from Michelle M. Carey, Deputy Chief, Wireline Competition Bureau, FCC, to Patrick J. Grant, Arnold & Porter LLP and David Lawson, Sidley Austin Brown & Wood LLP (April 18, 2005)

¹³ Comments of Commenters, at 2 and Appendix.

advantage the Commission's goal of reviewing proposed mergers within 180 days by precluding a meaningful review within that time period.

Although the Commission informally targets completing its review of a proposed transaction within 180 days, the Commission has stated that it may "stop the clock" if doing so is warranted (albeit discretionary). Stopping the clock may be necessary when "the Commission's ability to process and review the merits of an application is impeded by justifiable delay, the parties' actions, or external events."¹⁴ The Commission has explained that "[s]topping the clock in such circumstances is intended to provide a more accurate picture of the time the Commission finds necessary to process a particular transaction."¹⁵ In its non-exhaustive list of reasons for stopping the clock, the Commission noted that doing so may be appropriate if it "receives significant new information about an application, or the parties file a substantial amendment to the application."¹⁶

Under these standards and given the importance of this proceeding, its complexity, the need to permit interested parties a meaningful opportunity to participate, the Commission should at this time "stop the clock" on this proceeding until (1) the Commission determines that the Application contains the information necessary to evaluate fully the harms and benefits associated with the proposed merger, including responses to supplemental questions including those suggested by Commenters, and (2) the conclusion of a subsequent comment cycle, which the Commission would establish, that would give interested parties a sufficient opportunity to

¹⁴ See, e.g., Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers, *available at* <http://www.fcc.gov/transaction/timeline.html> (last modified June 14, 2004).

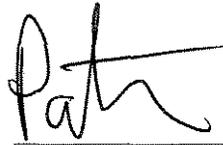
¹⁵ *Id.*

¹⁶ *Id.*

review the additional information submitted by the Applicants and file supplemental comments or petitions to deny the proposed merger.¹⁷

III. CONCLUSION

For the foregoing reasons, the Commission should reject PFF's "reforms" and "stop the clock" in this proceeding as discussed above.



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Pac-West Telecomm, Inc.,
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US LEC Corp., and
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Communications

¹⁷ The Commission should also schedule times for interested parties to meet with WCB staff, on an *ex parte* basis, to discuss issues that they intend to raise in such supplemental filings.