

June 24, 2005

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Re: WC Docket No. 05-65

Dear Ms. Dortch:

In their Joint Opposition, and again in a May 17, 2005 *ex parte*, SBC and AT&T (“Applicants”) demonstrated that their merger will not harm competition in the special access marketplace and, indeed, will benefit consumers. Applicants here respond to the June 6 and June 14, 2005 *ex parte* submissions of the so-called “Responding CLECs” and to the June 2, 2005 *ex parte* submission of Global Crossing, each of which attempts to bolster claims that the merger will substantially reduce special access competition. These submissions are completely unreliable as they continue to be based on “data” and other factual claims that are demonstrably false and misleading in every respect:

- AT&T owns connections to only a tiny fraction of the commercial office buildings in the 19 metropolitan areas where AT&T has limited local facilities in SBC’s region, and other CLECs own connections to far more commercial buildings in these metropolitan areas.
- Other CLECs already have built connections to many of the buildings AT&T serves with its own facilities, and they would not be impaired in replacing AT&T’s facilities in most of the others.
- The remaining few buildings are not competitively significant and most are, in any event, in close proximity to competitive fiber.
- The vast majority of the commercial buildings that the Responding CLECs attribute to AT&T are buildings that AT&T serves using special access facilities leased from SBC, not with AT&T’s own loops. These are typically buildings that AT&T serves without ever touching its local facilities *at all*, but which are served *entirely* over SBC special access services (from POP to customer premises). Any other facilities-based CLEC – and there are many in each of these metropolitan areas – has an equal or greater ability to use leased SBC facilities to serve *all* of these buildings (and any other buildings in those metropolitan areas).
- Even as Dr. Wilkie improperly attributes to AT&T buildings that AT&T serves using SBC special access, he fails fully to attribute to other CLECs buildings that they serve in the same manner, thus resulting in a comparison that is not only analytically flawed (in its treatment of leased facilities), but also internally inconsistent.

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	19 SBC MSAs WHERE AT&T HAS LOCAL FACILITIES	CHICAGO, CLEVELAND, MILWAUKEE & LA
Commercial Buildings with DS1 Level or Greater Demand		
AT&T Lit Buildings Less: Buildings Known to be Served by Other CLECs Less: Buildings Subject to Multiple Competitive Supply under Impairment Test Remaining AT&T Buildings As a Percentage of "Special Access" Commercial		

Sources: AT&T Building Census; AT&T CLEC Census; Dun & Bradstreet

[CONFIDENTIAL END]

This is not a case of legitimate economic debate, but of the Responding CLECs' deliberate refusal to confront irrefutable empirical facts. In Exhibit 1 to this letter, Applicants supplement the record with detailed maps of the four SBC region metropolitan areas (Cleveland, Milwaukee, Chicago, and Los Angeles) on which Dr. Wilkie and the Responding CLECs have focused their advocacy. These maps were prepared by Lexecon from source data obtained from Applicants, other carriers and the third party sources indicated on the maps. They identify the buildings directly connected to the local networks of AT&T or the subset of CLECs that provide AT&T with lists of their "on-net" buildings. In addition, the maps identify the deployed metro fiber routes of AT&T and these other CLECs. These maps and underlying data demonstrate that, in the metropolitan areas in which AT&T has local facilities: i) AT&T serves only a small minority of commercial buildings; ii) the other CLECs serve many more buildings than AT&T; iii) the other CLECs have deployed substantially more local fiber than AT&T; and iv) existing CLEC fiber passes very near virtually all of the AT&T "on-net" buildings that are not currently connected to other CLEC networks. The record further shows that other CLECs have the same ability as AT&T (or greater) to reach buildings by leasing ILEC loop and transport facilities and interconnecting them with the CLECs' metropolitan fiber facilities. The record thus supports

only one conclusion: AT&T has no unique “special access” assets and nothing of competitive significance will be lost through the merger of SBC and AT&T.

1. The Responding CLECs’ case for supposed merger-related impacts on special access competition rests entirely on flawed “concentration” analyses that systematically overstate AT&T’s presence relative to the many other CLECs that compete in SBC’s region.¹ As we have previously shown, the Responding CLECs’ expert, Dr. Simon Wilkie, reports as “AT&T buildings” thousands of buildings where AT&T does not reach its retail customers with its own facilities, but with special access facilities leased from SBC – facilities that are equally available to *any* carrier at the same tariffed rates on a nondiscriminatory basis. As the Responding CLECs correctly state, AT&T reaches some of these buildings by connecting special access circuits leased from SBC with AT&T’s metropolitan fiber in an AT&T collocation in a nearby wire center. But AT&T has no greater ability to serve these buildings over its own facilities – in whole or in part – than the many other CLECs in these MSAs. Any CLEC with a collocation in a nearby wire center – and we have demonstrated that there are multiple additional collocators in the wire centers at issue² – can provide the same partially facilities-based “Type II” connections that the Responding CLECs posit to any of the so-called “AT&T buildings” and, indeed, to *any* commercial building served by SBC.³ As we have also demonstrated, AT&T pays rates that are no lower than those available to other CLECs, so other CLECs have at least the same ability as does AT&T to establish such “Type II” connections.⁴ Indeed, other CLECs will in some cases have a greater ability economically to establish such arrangements, because they may be able to use UNE “EELs” in lieu of special access.

Further, the buildings that Dr. Wilkie assigns to AT&T typically are buildings where AT&T provides retail service to business customers using leased special access *entirely* (from POP to customer premises) without using any of AT&T’s limited local facilities at all. Obviously, AT&T has no advantage whatsoever in obtaining these or any other special access

¹ See *Cbeyond et al.*, Wilkie Dec. ¶¶ 18-21; 6/14/05 Wilkie Presentation at 7-12.

² See SBC-AT&T Joint Opposition, Carlton-Sider Reply Dec. ¶¶ 56-57 & *Fea et al.* Reply Dec. ¶¶ 12-13.

³ In fact, a CLEC need not even be collocated in the same wire center from which SBC serves a customer to obtain a special access termination service from SBC to that customer’s premises.

⁴ The “Type II” designation encompasses any arrangement in which a carrier does not provide a “Type I” service entirely over its own local facilities. For buildings that are not on AT&T’s local network but that are located in areas where AT&T has a metropolitan fiber network, it is sometimes most economic for AT&T to connect to a building by obtaining ILEC special access and connecting it AT&T’s local network at a nearby fiber-based collocation. The POP-to-premises connections are thus provided over combinations of AT&T and ILEC (or CLEC) facilities. These “hybrid” connections are classified as “Type II” arrangements, because they do not ride exclusively over AT&T’s facilities. AT&T’s POP-to-premises connections to commercial buildings typically are provided entirely over ILEC special access services. These connections, too, are classified as Type II arrangements, because they obviously do not rely exclusively on AT&T facilities.

facilities, and the availability of these special access facilities will be wholly unaffected by the merger.⁵

The Responding CLECs now concede that our earlier showings were correct and that Dr. Wilkie's analysis lumps together both the relatively few "on-net" AT&T buildings and thousands more "Type II" buildings that are connected to AT&T's local networks, if at all, only through leased SBC special access circuits that are (at least) equally available to and economic for other CLECs.⁶ But the Responding CLECs and Dr. Wilkie continue to rely on this flawed data. For example, in Cleveland, Dr. Wilkie's map shows AT&T with more than 1600 unique building connections,⁷ when, in fact, AT&T's fiber connects to less than [CONFIDENTIAL BEGIN] [CONFIDENTIAL END] commercial buildings in that entire metropolitan area. These are tremendous disparities, and the Responding CLECs dispute neither their existence nor their magnitude. Instead, they claim first that Dr. Wilkie did not rely solely upon the GeoResults data that we criticized in our earlier filing and second that his inflation of the AT&T presence with Type II connections does not, in any event, rob his analysis of all possible relevance. Neither argument withstands scrutiny.

First, although the Responding CLECs now assert that Dr. Wilkie relied on other (undisclosed) CLEC "building lists," and not GeoResults data, as "his primary sources for information regarding the buildings served by AT&T and other carriers,"⁸ Dr. Wilkie expressly stated in his initial declaration that his results were derived *solely* from GeoResults data.⁹ But there is little point in debating Dr. Wilkie's sources or methodology, neither of which has been disclosed, much less placed in the record. It is clear from the face of his analysis that whatever his data sources or methodology, Dr. Wilkie committed the error we identified: inflating AT&T's "share" in a manner that grossly overstates the true competitive significance of AT&T's local facilities, while also deflating other CLECs' capabilities and significance. And Dr. Wilkie's conclusions continue to be consistent with the flawed GeoResults data.¹⁰ In both

⁵ In disputing this fact, the Responding CLECs misleadingly point to AT&T's testimony that it provides *wholesale* private line services only if it can provide them at least in part over its own local facilities. Compare 6/6/05 Responding CLECs Ex Parte at 5 with SBC-AT&T Joint Opposition, Fea *et al.* Reply Dec. ¶ 41. But most of the "AT&T" Type II buildings captured by GeoResults are buildings in which AT&T provides only *retail* service and to which it does so, in the typical case, *entirely* over SBC-provided special access services.

⁶ 6/6/05 Responding CLECs Ex Parte at 5-6.

⁷ See Cbeyond *et al.*, Wilkie Dec. ¶ 18; 6/14/05 Wilkie Presentation at 9.

⁸ 6/6/05 Responding CLECs Ex Parte at 6-7.

⁹ Wilkie Dec. ¶ 18 n.7 ("The source for the commercial building data cited in this Declaration is GeoResults, Inc.").

¹⁰ For, example, Dr. Wilkie's data shows AT&T serving 1630 buildings in Cleveland while MCI serves only 239. 6/14/05 Wilkie Presentation at 8-9. In Milwaukee, Dr. Wilkie shows AT&T as serving 2106 buildings and MCI as serving only 191. *Id.* at 11-12. One likely explanation for this mismatch in the GeoResults data is GeoResults' reliance upon the Telcordia "CLONES" database, which records carrier-specific building "CLLI" codes. The CLONES database is populated individually by AT&T and other carriers pursuant to their own internal business

(continued . . .)

Cleveland and Milwaukee, for example, Dr. Wilkie assigns AT&T more than 20 times AT&T's actual number of lit on-net buildings, while treating MCI and other CLECs as serving negligible numbers of buildings. And Dr. Wilkie's analysis assumes that AT&T has about 11,600 "lit" buildings in Chicago,¹¹ notwithstanding the Responding CLECs' acknowledgement that AT&T, in fact, has only 6,250 lit (or "on-net") buildings *nationwide* (and less than 1800 on-net commercial buildings in the entire SBC region).¹² Although the other CLECs have substantially more lit buildings and substantially more local fiber in the ground than AT&T, Dr. Wilkie's analysis treats AT&T as if it were much more competitively significant than all of these other CLECs combined. No weight can be given to conclusions drawn from such obviously incorrect data.

Although this misuse of building-level data is reason enough to disregard Dr. Wilkie's analysis, the reported results are themselves facially implausible. For example, the Los Angeles "HHI" loop study assigns SBC, AT&T and MCI an almost 99% collective "share" of lit buildings.¹³ In other words, Dr. Wilkie is claiming that *all other CLECs combined have a mere 1% share* of buildings in Los Angeles. Indeed, with respect to OCn-level buildings – where all acknowledge that facilities-based competition is the most widespread – Dr. Wilkie asks the Commission to believe that SBC, AT&T and MCI have a collective *99.9% share*, leaving nothing but the rounding error to all other CLECs combined.¹⁴ That is simply absurd. In a similar vein, Dr. Wilkie's analysis shows only 38 commercial buildings with OCn-level demand in all of Los Angeles,¹⁵ and only 93 OCn-level buildings in the entire Chicago metropolitan area. Anyone with even the slightest familiarity with those areas would, for example, recognize that there have more commercial buildings with OCn-level demand on only a few blocks.

Dr. Wilkie's "transport" HHIs are just as contrived. Dr. Wilkie states that he based his transport analysis entirely on the responses to a *single* RFI – supported by no record evidence

(. . . continued)

practices. AT&T, which developed CLONES, uses this CLLI code data for many of its own internal record-keeping systems and is, accordingly, an unusually heavy user of the system, recording *every* building in which it places any equipment at a retail customer's premises. Thus, in many cases, the existence of an AT&T record in the CLONES database means only that AT&T has placed testing (or similar) equipment in the premises of a retail customer in a building that is not connected at all to AT&T local facilities and that AT&T reaches *entirely* over ILEC special access. Other CLECs have different internal record-keeping practices and appear to make much less use of the CLONES database, populating the database (and incurring associated charges from Telcordia) only when they need a CLLI code to facilitate interconnection with other carriers. In addition, the CLONES database contains old AT&T records for thousands of buildings where AT&T no longer has any presence at all.

¹¹ See 6/14/05 Wilkie Presentation at 15 (241,726 * .048 = 11,602.8).

¹² 6/6/05 Responding CLECs Ex Parte at 5 n.13.

¹³ 6/14/05 Wilkie Presentation at 14 (assigning SBC, AT&T and MCI between 97.1 and 99.9% of "lit buildings" in Los Angeles, depending on capacity).

¹⁴ *Id.*

¹⁵ *Id.* at 14.

whatsoever.¹⁶ The conclusions drawn from that single unsupported anecdote are impossible to reconcile with the marketplace facts. As the attached fiber maps show, CLECs in the aggregate have deployed substantially more local fiber than AT&T in each of the relevant MSAs. In Cleveland, for example, other CLECs have collectively deployed more than three times as many route miles of local fiber in the same areas. Similar conditions apply in each of the other metropolitan areas where AT&T has local facilities. This is also confirmed by the available collocation data. For example, all but a handful of AT&T's collocations in the relevant areas are in central offices where other carriers have also collocated equipment.¹⁷ In short, contrary to the Responding CLECs' assertion, Applicants most certainly do "challenge the HHI numbers" that Dr. Wilkie has submitted.

There is no excuse for the Responding CLECs' continued reliance upon these obviously flawed comparisons. The Responding CLECs now concede that they have access to the detailed AT&T and CLEC actual lit building data that Applicants submitted to the Commission.¹⁸ Yet they ignore the evidence of actual CLEC-owned fiber and building connections and rest their entire case on useless data that count as "AT&T buildings" thousands of buildings that are, in fact, connected only to SBC's local networks merely because AT&T happens to have *retail* customers in those buildings – that are reached by leasing the same SBC special access circuits that are available to any other carrier on nondiscriminatory terms.

The Responding CLECs nonetheless attempt to justify their data by arguing that buildings that AT&T serves partially through loop and transport facilities leased from SBC are competitively significant, stating that "AT&T is able to constrain, to some degree, SBC's pricing through such Type II facilities."¹⁹ Even aside from the fact that their data do not include all buildings that other CLECs serve in this manner, the fundamental problem with this argument is that other CLECs have the same economic ability to serve customers in those buildings by connecting channel terminations obtained under special access tariffs (and sometimes UNEs) to the CLECs' fiber networks, and other CLECs in fact offer such Type II services. The Responding CLECs are thus reduced to repeating their prior unsupported claims that AT&T has a unique advantage because it is "able to leverage the discounts it receives from SBC for special access to offer competitively low prices in the wholesale market."²⁰ But, as Applicants demonstrated in their reply comments, this claim is false.²¹ AT&T does *not* obtain greater special access discounts than are available to other carriers and thus has no greater ability to "leverage" discounts through resale. Further, unlike AT&T, many of these CLECs obtain loop and transport facilities as UNEs at TELRIC-based rates, and thus, if anything, have an advantage over AT&T in establishing economic Type II arrangements that are partially facilities-based.

¹⁶ See 6/6/05 Wilkie Presentation at Slide 18 ("Source: Carrier responses to Request for Information issued by a Competitive Provider"); accord 6/6 Responding CLEC Ex Parte at 10.

¹⁷ SBC-AT&T Joint Opposition, Carlton-Sider Reply Dec. ¶ 56.

¹⁸ 6/6/05 Responding CLECs Ex Parte at 7 n.17.

¹⁹ 6/6/05 Responding CLECs Ex Parte at 5.

²⁰ *Id.*

²¹ SBC-AT&T Joint Opposition at 30 & Casto Reply Dec. ¶¶ 3-7.

Thus, whatever constraint CLEC provision of Type II local private line services places on SBC's special access pricing, removing AT&T from the mix cannot, by definition, change that, because the merger will not affect the many other CLECs that have the same capabilities to reach the same buildings and customers.

Moreover, even if one ignored the fact that multiple other CLECs could readily replace AT&T's Type II private line sales on a moment's notice, it is clear that AT&T's sales are far too limited to "constrain . . . SBC's pricing."²² As Applicants have shown, AT&T earns only [CONFIDENTIAL BEGIN] [CONFIDENTIAL END] annually in Type II wholesale local private line sales in the entire SBC region,²³ far too little to have any conceivable impact on SBC's pricing of the billions of dollars of special access services it sells annually. That is because other carriers, like AT&T, typically have little interest in purchasing "Type II" wholesale local private line services when they can purchase access to the same facilities directly from the owner of those facilities (and thereby avoid the customer-impacting complications associated with provisioning and trouble-shooting when both the ILEC and the CLEC suppliers share responsibility for the same ILEC-owned facility).

Indeed, the Responding CLECs rely only on anecdotal evidence involving a single bid, which they claim shows that AT&T "offered" prices for 70% of the proposed routes, notwithstanding that it had facilities on only 30% of those routes.²⁴ As an initial matter, even if a single anecdote could otherwise be relevant, no weight can be given to this "evidence" so long as the Responding CLECs refuse to even describe the nature of the RFI and the other bids that were submitted, let alone place the allegedly supporting data in the record. And whatever the range of bids in response to the single RFI, AT&T's preliminary analysis of its own wholesale local private line sales and its purchases of wholesale local private line services from other CLECs confirms that AT&T is charging *more*, on average, than it is paying to other CLECs that offer such services.²⁵ In sum, none of the CLECs' submissions in any way undermines the conclusion that the proposed merger will have no material impact on special access competition.

2. The Responding CLECs attacks on our affirmative showings fare no better. The Responding CLECs first claim that our entire showing is "vacuous from the perspective of antitrust and competitive impact analysis," because we purportedly have failed to analyze the data "on anything other than an SBC region-wide basis."²⁶ That is patently false. We have provided data and analyses of unprecedented granularity and detail – disaggregated to the level of individual buildings and collocations – with respect to each of the 19 metropolitan areas in

²² *Id.*

²³ See SBC-AT&T Joint Opposition, Fea *et al.* Reply Dec. ¶ 43.

²⁴ 6/6/05 Responding CLECs Ex Parte at 10.

²⁵ On average, the prices AT&T pays for DS1, DS3 and OC3 wholesale private line services purchased from CLECs are all *lower* than the prices AT&T charges CLECs for its own wholesale local private line services.

²⁶ 6/6/05 Responding CLECs Ex Parte at 3.

which AT&T provides facilities-based local services in SBC's region.²⁷ Moreover, these data show that because there are no material differences among the metropolitan areas in which AT&T operates local facilities, regionwide analysis would be fully consistent with sound antitrust and competitive analysis. In *each* of these metropolitan areas, other CLECs (i) collectively serve many more buildings than AT&T, (ii) already serve many of the same buildings that AT&T serves, and (iii) could economically replicate AT&T's facilities to all or virtually all of the buildings that they do not already serve.²⁸

The Responding CLECs next complain that we have not made the relevant information about individual CLEC-owned building connections "readily available," but then concede that we have, in fact, submitted and made available for review "several extensive building lists," which the Responding CLECs apparently cannot be bothered to spend time reviewing.²⁹ In particular, AT&T, which purchases special access substitutes from a number of CLECs, has submitted detailed "lit" building information that AT&T obtained directly from a subset of those CLECs in each MSA. Although the Responding CLECs claim that it is "unclear" whether the AT&T-supplied lists of CLEC "lit" buildings include only buildings that CLECs serve with their own fiber, AT&T's submissions state quite clearly that AT&T has listed only buildings to which CLECs have such "Type I" connections.³⁰ Indeed, because these lists include only buildings served by those AT&T suppliers that provide building lists to AT&T – and thus exclude buildings served by many other facilities-based CLECs, including CLECs that supply special access services to AT&T and CLECs that do not – they necessarily *understate*, probably substantially, the actual number of on-net CLEC buildings.

Nor is there any basis for the Responding CLECs' claim that it is "unclear the extent to which the lists include connections from CLECs other than AT&T in the relevant MSAs."³¹ The fiber-connected building exhibits provide individual building level data separately for each MSA and identify by CLEC name and building address each of the Type I building connections disclosed to AT&T by CLECs that AT&T has pre-qualified as a supplier in that MSA.³²

²⁷ See SBC-AT&T Joint Opposition, Carlton-Sider Dec. ¶¶ 31-51, App. 1; AT&T Response to FCC Information Request Nos. 5-6.

²⁸ See SBC-AT&T Joint Opposition, Carlton-Sider Dec. ¶¶ 31-51, App. 1 & Fea *et al.* Dec. ¶¶ 20-25; AT&T Response to FCC Information Request Nos. 6(a), (e).

²⁹ 6/6/05 Responding CLECs Ex Parte at 4 & n.10. It is ironic that the Responding CLECs complain that Applicants have adhered to procedures designed to protect the confidentiality of this competitively sensitive information. The Responding CLECs state that the building list data that they have collected were provided under the condition that "the specific building addresses be kept strictly confidential and not revealed to any third party." 6/6/05 Responding CLECs Ex Parte at 7 n.17.

³⁰ SBC-AT&T Joint Opposition, Fea *et al.* Dec. ¶ 17; AT&T Response to FCC Information Request No. 6(e).

³¹ 6/6/05 Responding CLECs Ex Parte at 4.

³² AT&T Response to FCC Information Request No. 6(e).

The Responding CLECs next focus on the subset of AT&T-connected buildings that are not currently served by other CLECs. With respect to these buildings, they claim that the Commission must ignore its “non-impairment” findings, which establish that many of the local facilities at issue serve sufficiently high-demand locations that they are subject to competitive supply. The Responding CLECs acknowledge that AT&T typically serves buildings with “tremendous demand” that are most clearly susceptible to competitive supply,³³ but claim that the Commission’s non-impairment findings are nonetheless irrelevant, because the impairment standard “is based on the current ability of a CLEC to obtain facilities to serve a customer.”³⁴

That argument only bolsters our showing. The Commission has found that its impairment criteria accurately reflect instances where CLECs can “current[ly]” self-deploy the same types of facilities that AT&T has constructed. CLECs’ ability to do so necessarily constrains the ability of a combined SBC-AT&T to raise prices.³⁵ Thus, like the Horizontal Merger Guidelines, the Commission’s impairment test seeks to assess whether entry is timely, likely and sufficient to constrain anticompetitive behavior. Indeed, in at least one respect the Commission’s impairment test is more restrictive than the Horizontal Merger Guidelines, for it examines the carriers’ ability to enter at today’s prices rather than an hypothesized higher post-merger prices. And to the extent that the Responding CLECs are suggesting that Applicants included AT&T collocations in assessing which wire centers would satisfy the Commission’s non-impairment triggers, they are simply wrong. These collocations were expressly excluded from the analysis.³⁶

The Responding CLECs nonetheless complain that the Commission’s impairment test is inapt, because there is no way “any” single CLEC could immediately replicate AT&T’s local networks. But the economically relevant issue is not whether a single CLEC can replicate the entirety of AT&T’s SBC-region local networks, but whether other carriers *collectively* could replicate enough of AT&T’s local network facilities in SBC’s region to render unprofitable an attempt by the merged entity to raise prices. And, as vividly illustrated in the attached fiber maps, CLECs today have *already* duplicated AT&T’s local network facilities – CLEC metro fiber blankets the same areas where AT&T has deployed metro fiber.³⁷ Further, hundreds of the buildings currently connected to AT&T’s local networks are already connected to other CLECs’

³³ 6/6/05 Responding CLECs Ex Parte at 6.

³⁴ *Id.* at 8.

³⁵ See *TR Remand Order* ¶ 9.

³⁶ SBC-AT&T Joint Opposition, Carlton-Sider Reply Dec. ¶ 39.

³⁷ See Exhibit 1; see also AT&T-SBC Reply, Carlton-Sider Reply Dec. ¶¶ 54-57 & Fea *et al.* Dec. ¶ 13. Thus, even if the Responding CLECs were correct that “the majority of customers” are not located in dense business districts, 6/6/06 Responding CLECs Ex Parte at 9, that is simply irrelevant to this merger, for, like other CLECs, AT&T’s local network does not extend to those customers. Thus, the proposed merger will, by definition, have no impact on CLECs’ ability to gain access to competitive facilities to serve customers outside of the core urban and suburban business centers where AT&T has deployed its local facilities.

fiber networks,³⁸ and, with few exceptions, the rest are very close to existing CLEC fiber.³⁹ Thus, “replication” concerns could logically be directed only to a small subset of AT&T-connected buildings. As Applicants have demonstrated, the Commission’s non-impairment findings further confirm that it would be economic for CLECs to replicate most of those building laterals, and any remaining buildings are so dispersed and account for so small a percentage of overall capacity, that they can carry no merger-specific economic significance.⁴⁰

The Responding CLECs fall back to the argument that they often do not need the OCn-level connections into buildings over which AT&T provides service to its retail customers, but instead desire “channelized” DS1 or DS3 service to serve other customers in the building.⁴¹ In the majority of buildings at issue, however, AT&T provides service using a “fiber to the floor” arrangement that serves just a single retail customer.⁴² In the majority of cases, AT&T provides OCn-level service to those retail customers, and any other CLEC that sought to serve those customers would also require an OCn-level connection. Thus, the Responding CLECs’ claim boils down to the complaint that in the tiny fraction of instances where AT&T is the only CLEC in the building and has access to common space, where the building has multiple tenants, and where AT&T is currently providing OCn-level service to an “anchor tenant,” they will lose the ability to gain channelized DSn-level services from AT&T to serve other customers in the building. But other CLECs have exactly the same incentive as AT&T to win the highest demand (OCn-level) customers in a building and then generate additional revenues by “channelizing” their fiber and selling wholesale access to other tenants in the building. Indeed, unlike AT&T, many CLECs’ business plans focus on selling services at the wholesale level, and would certainly provide at least the same level of channelized DSn access that AT&T today provides.

Further, it is critical to recognize that the Responding CLECs cannot claim the merger will cause any loss of significant *actual* channelized DSn competition. AT&T is, at most, a trivial supplier of the channelized DSn-level services for which the Responding CLECs contend AT&T is a “principal supplier.”⁴³ Not only are DSn-level sales only a fraction of AT&T’s overall wholesale local private line sales (which are in aggregate themselves competitively

³⁸ The preliminary electronic comparison of building lists that AT&T completed prior to the submission of the Applicants’ Joint Opposition identified [CONFIDENTIAL BEGIN] [CONFIDENTIAL END] AT&T “on net” buildings where another CLEC already has a fiber connection. That estimate was underinclusive because it captured only buildings for which the different lists had exact CLLI code matches. Ongoing manual examination of the building addresses for the records has revealed more than [CONFIDENTIAL BEGIN] [CONFIDENTIAL END] additional AT&T on-net buildings with existing CLEC fiber connections.

³⁹ See Exhibit 1; AT&T-SBC Reply, Carlton-Sider Reply Dec. ¶¶ 31-57, Fea *et al.* Dec. ¶¶ 18-19.

⁴⁰ AT&T-SBC Reply at 47 & Carlton-Sider Reply Dec. ¶¶ 31-57.

⁴¹ 6/6/05 Responding CLECs Ex Parte at 8.

⁴² Indeed, AT&T has for several years ceased building common space when it constructs facilities to a building and constructs only fiber-to-the-floor arrangements.

⁴³ 6/6/05 Responding CLECs Ex Parte at 10.

trivial), but that is abundantly the case with respect to the three Responding CLECs who are now claiming that AT&T is a leading wholesale provider. Two of these carriers buy *no* wholesale local private line services from AT&T at all, and the third spends less than [CONFIDENTIAL BEGIN]

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For its part, Global Crossing claims that AT&T, MCI, SBC, and Verizon collectively receive half of Global Crossing's special access spend in the United States.⁴⁴ Global Crossing presented this data in aggregated form, and improperly included Verizon and MCI to boot, because it, in fact, purchases very little *from AT&T* in SBC's territory – as Global Crossing's own presentation confirms.⁴⁵

Finally, the Responding CLECs continue to pretend that AT&T-SBC are effectively merging with MCI-Verizon on the theory that SBC and Verizon have a history of “mutual forbearance.”⁴⁶ But since they concede that “AT&T and MCI . . . are likely to continue to provide facilities-based services to existing customers in Verizon's and SBC's territory,”⁴⁷ their argument is limited to the assertion that SBC and Verizon will not expand the scope of their out-of-region offerings because that would trigger “retaliation.”

That is preposterous. SBC is spending billions of dollars to buy AT&T precisely because it has a nationwide and global enterprise business and network reach. SBC is making a substantial investment in AT&T local network facilities and customers in Verizon's region. SBC will have every incentive to utilize and expand those facilities as opportunities present themselves, rather than to let its investment go to waste.⁴⁸ Dr. Wilkie's “solution” of requiring

⁴⁴ 6/2/05 Global Crossing Ex Parte at 7.

⁴⁵ *Id.*

⁴⁶ 6/6/05 Responding CLECs Ex Parte at 12.

⁴⁷ *Id.*

⁴⁸ The postulated collusion also defies economics. Because the amount of each contract is substantial, customers play heterogeneous suppliers off against each other by confidentially negotiating, combining or dividing requirements between two or more suppliers under term contracts. And, there would, of course, be powerful incentives to “cheat” with respect to any tacit agreement to maintain only “current” levels of competition but not seek to use existing, sunk assets to attract additional, profitable business. As the Department of Justice's *Horizontal Merger Guidelines* recognize, it is entirely implausible that competitors could tacitly reach and police an agreement to refrain from competing for certain customers under these conditions. See generally United States Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines* § 2.11 (“reaching 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.”); *id.* § 2.12 (“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.”).

SBC and Verizon to construct facilities into each other's regions is as unnecessary as it is inefficient.⁴⁹ In the increasingly competitive global enterprise business, both SBC and Verizon will continue to have incentives to expand access facilities where that is the low cost solution.⁵⁰

* * *

In sum, the proposed merger poses no risk to special access competition. The arguments the Responding CLECs and Global Crossing advance, wrong as they are, have been directed not only at SBC, but at other incumbent LECs as well, and they long pre-date the merger.⁵¹ Notwithstanding the attempts of merger opponents and others to bog down the merger review process, these are industry-wide issues, and both precedent and sound policy demand that they be addressed in the pending rulemaking and not in this proceeding.⁵²

⁴⁹ 6/14/05 Wilkie Presentation at 31.

⁵⁰ Moreover, the premise that AT&T would, absent the merger, dramatically expand its access facilities is foreclosed by the record evidence that AT&T's new construction plans were, in fact, very modest. See SBC-AT&T Joint Opposition, *Fea et al.* Reply Dec. ¶ 31; AT&T Response to FCC Information Request No. 6(b).

⁵¹ This is particularly true with regard to Global Crossing's claims that SBC has increased special access prices. The Commission has issued a Notice of Proposed Rulemaking seeking comment on these arguments as it considers a post-CALLS regulatory regime for special access. On June 12, 2005, SBC filed detailed comments in that proceeding that, among other things, respond to the types of claims that Global Crossing advances here.

⁵² The Commission has regularly declined to consider in merger proceedings matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability. See, e.g., Memorandum Op. and Order, *Applications of Southern New England Telecommunications Corp. and SBC Communications, Inc.*, 13 FCC Rcd. 21292, ¶ 29 (1998); Memorandum Op. and Order, *Applications for Consent to Transfer Control of Tele-communications, Inc. to AT&T Corp.*, 14 FCC Rcd. 3160, ¶ 43 (1999); Memorandum Op. and Order, *Applications of AT&T Wireless Servs., Inc. & Cingular Wireless Corp.*, 19 FCC Rcd. 21522, ¶ 183 (2004).

Sincerely,

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