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July 14, 2005

**BY HAND DELIVERY**

Marlene H. Dortch

Secretary

Federal Communications Commission

The Portals

445 - 12th Street, SW

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Federal Communications Commission  
Office of Secretary

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Re: **SBC/AT&T Application - WC Docket No. 05-65**

Dear Ms. Dortch:

On June 24, 2005, SBC and AT&T ("Applicants") submitted their latest attempt to convince the Commission that AT&T is a minor player in the telecommunications industry, and that its disappearance will have no significant impact on the competitive landscape.<sup>1</sup> Of course, that is like claiming that Lake Michigan is not large, because the Pacific Ocean holds much more water in comparison. But try to tell that to the people of Chicago who need fresh water for drinking and require it from a nearby source. As is the case with our water analogy, the Applicants reach their conclusions by applying a grossly incorrect definition of the applicable geographic and product markets. Like inappropriately comparing fresh and salt water, Applicants define the product market as including only buildings served by fiber owned by AT&T, whereas the correct market definition is all territory where AT&T offers a wholesale service, regardless of whether service may be provided in part over leased facilities. Similarly, like incorrectly comparing a regional water supply to global water resources, Applicants try to define a geographic market that is SBC region-wide, rather than the specific MSAs, and collections of buildings within those MSAs, where AT&T provides a meaningful alternative to SBC's legacy monopoly transport facilities to CLECs. Once again, the Commission must take care not to be misled by largely irrelevant data into ignoring the obvious: AT&T provides critical

<sup>1</sup> Letter from Gary Phillips of SBC and Lawrence Lafaro of AT&T to Ms. Marlene Dortch of the FCC, dated June 24, 2005 and filed in the WC Docket No. 05-65 ("*Applicants' June 24 Letter*"). This reply is filed on behalf of Cbeyond Communications, Conversent Communications, TDS Metrocom and XO Communications ("Joint CLECs").

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competition to SBC in the provision of local access facilities -- competitive pressure that even Applicants do not deny will be lost if their proposed merger is consummated.

Herein, the Joint CLECs will refute the often misleading and sometimes simply incorrect assertions made by the Applicants in their *June 24 Letter*. However, before doing so, it is important to observe what the Applicants did *not* do in their submission. The Applicants spent their entire 13 pages nit-picking the data sources mined by Dr. Wilkie in performing his analysis, and trying to contend that his alleged use of purportedly imperfect data may have over-stated AT&T's importance in the relevant market. While we agree that there is no perfect source of data on the deployment of telecommunications facilities used to provide wholesale services, as explained in detail later, we disagree in the strongest terms that the data relied upon by Dr. Wilkie are materially incorrect or unreliable and should be ignored.

At the outset, it is critical to recall why the data are important and how they were used. Dr. Wilkie used the building and route data ultimately to compute HHIs which show an increase in already concentrated markets (i.e., pre-merger HHIs over 1,800) ranging from 400 to 2,700 in the loop market and more than 2,200 in the interoffice transport market, in all instances substantially in excess of the thresholds for triggering likely material anticompetitive effects under the *DOJ-FTC Horizontal Merger Guidelines*.<sup>2</sup> And Dr. Wilkie used competitive bid data to demonstrate that the increase in concentration would indeed have the anticompetitive effect predicted by the *DOJ Merger Guidelines*, by driving prices up significantly. Perhaps not surprisingly, after suggesting throughout their filing numerous ways to modify the data set relied upon by Dr. Wilkie, the Applicants did not use their supposedly corrected data to compute their own HHIs and likely price effects. There can only be one explanation for this glaring omission—*i.e.* that it does not make a material difference in estimates of market concentration. In this case, the result is clear: regardless of how the data are scrubbed, the result is the same -- post-merger market concentration (according to criteria enunciated in the *DOJ Merger Guidelines*) which yields a presumption that the proposed merger is “likely to create or enhance market power or facilitate its exercise.”<sup>3</sup>

Having said that, the *Applicants' June 24 Letter* is helpful in defining and narrowing our points of disagreement. For all of the mountains of paper and competing expert reports produced in these dockets, it is now evident that the Applicants' main rebuttal point is that competition supplied by AT&T simply does not matter whenever the company resells ILEC special access as part of its serving arrangement. The Applicants' argument is as simple as it is wrong -- that the competitive pressure applied by AT&T in the local access and transport markets is

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<sup>2</sup> U.S. Department of Justice and Federal Trade Commission, “Horizontal Merger Guidelines” (revised 1997) (“*DOJ Merger Guidelines*”).

<sup>3</sup> *Id.* § 1.51.

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inconsequential unless service is provided 100% over facilities controlled by AT&T, and that even where the facilities are entirely “on-net,” AT&T’s competitive presence is minor.

This contention is stunning when compared to SBC’s assertion less than a year ago in the *TRRO* docket that AT&T is a formidable local competitor and that AT&T’s use of special access is a primary source of local competition to them.<sup>4</sup> As for AT&T, its claim simply cannot be regarded as credible in light of the following: (1) AT&T has provided information to the Commission (in its response to the Commission’s April 18 Information Request) that it employs both Type I and Type II facilities to connect to a large number of buildings; and (2) Dr. Wilkie’s analysis of competitive bid data demonstrates that AT&T’s presence as a bidder even using Type II services substantially increases discounts off ILEC special access rates. Like the Applicants’ complete failure to compute HHIs using what they perceive to be correct data, their utter inability to rebut Dr. Wilkie’s reliance on actual AT&T bid data is a gaping hole in their filing. Applicants do not attempt to explain away how or why AT&T has routinely bid rates much lower than special access to steal the wholesale business of competitive carriers away from SBC -- presumably because they simply cannot. The facts are the facts, and AT&T has been one of only two (along with MCI) nationwide bidders for such business, and they commonly do so using Type II facilities.

With that preface, we will discuss individually each of the major points made in *Applicants’ June 24 Letter*.

**I. APPLICANTS’ WRONGFULLY CLAIM THAT AT&T OWNS A *DE MINIMIS* AMOUNT OF LOCAL TRANSMISSION FACILITIES.**

No one could blame the Commission for being insulted by the Applicants’ repeated suggestion that AT&T’s local network facilities are simply too minor to matter.<sup>5</sup> It was not long ago that an independent AT&T presented to the FCC on the topic of “AT&T Local Investment: Our Commitment to Facilities-Based Competition”<sup>6</sup> in an effort to convince the Commission that the availability of UNE-P to serve mass market customers did not undercut its deployment of facilities to serve the enterprise market. AT&T demonstrated impressively that it had installed 153 local switches, over 200 class 4/edge switches and 1.44 million fiber miles over 7,100 SONET rings to provide facilities-based local telecommunications services in 90 cities. By the

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<sup>4</sup> See, e.g. Reply Comments of SBC, WC Dkt. 04-313 (Oct.19, 2004), pp. 38-40 (stating that AT&T provides CLEC competition to SBC using ILEC special access 98% of the time to obtain last mile connectivity).

<sup>5</sup> *Applicants’ June 24 Letter*, p. 1.

<sup>6</sup> *Ex parte* Presentation by Ellyce Brenner, Vice President, AT&T ABS Business Local Services, in Dkt. 01-338.

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end of 2004, AT&T reported that its local facilities had grown to 156 switches and 8,603 metropolitan SONET rings in 91 cities.<sup>7</sup> Indeed, AT&T pointed out that it made an *additional* capital investment of over \$4.5 billion in local facilities even *after* acquiring the extensive Teleport local facilities in 1999. Similarly, only a year ago, SBC co-sponsored a "UNE Fact Report 2004" in which it claimed that AT&T had deployed over 21,000 local route miles of fiber in 70 MSAs across 38 states, nearly twice as much as any other competitive carrier and more than 1/3 of all competitive local fiber deployed in the entire nation.<sup>8</sup> Indeed, *SBC stated that AT&T operated its own local fiber networks in 27 MSAs in the SBC operating region, spread across all but one of the 13 states where SBC is the incumbent LEC.*<sup>9</sup>

Of course, the only real difference between the parties' prior statements and their present contentions is that it is now in their mutual interests to understate AT&T's network assets. But in either event -- whether AT&T's local fiber facilities are located in 27 MSAs in SBC's territory as SBC stated a year ago or 19 MSAs as they state now -- it is important to realize that "good fisherman fish where the fish are."<sup>10</sup> That is, AT&T's fiber is carefully and strategically located where the largest concentrations of customers and traffic can be found. As SBC has stated, the "markets served by competitive fiber networks have been carefully chosen to reach the most potential customers with the fewest miles of fiber," and 80% of SBC's special access revenues are generated in approximately one quarter of its wire centers.<sup>11</sup> This concentration of traffic persists all the way down to the building level, so even accepting Applicant's incorrect assertion that Type II facilities are immaterial, the 6,776 buildings<sup>12</sup> which AT&T now claims to be "on net" are highly likely to generate a hugely disproportionate share of overall traffic volumes. Indeed, in a relevant geographic market for local access services, the economically correct measure of a firm's market share is not the absolute number of building it serves. Instead, as explained by Dr. Wilkie to the FCC in his *ex parte* presentation on June 14, 2005, the correct

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<sup>7</sup> AT&T Corp. SEC Form 10-K Report (Dec. 31, 2004) ("AT&T 2004 SEC Form 10-K Report"), p. 6.

<sup>8</sup> "UNE Fact Report 2004," submitted by SBC, Verizon, BellSouth and Qwest in Docket 04-313, attached to the Letter of Evan Leo of Kellog Huber to Marlene Dortch of the FCC dated Oct. 4, 2004 ("*BOC UNE Fact Report*"), III-4.

<sup>9</sup> *See Id.*, Appendix D-1.

<sup>10</sup> As discussed below, while other CLECs would like to "fish in the same waters," there are practical and economic reasons why the Commission cannot simply assume that smaller CLECs will fill the void left by AT&T and MCI in the event the proposed merges are allowed.

<sup>11</sup> *BOC UNE Fact Report.*, III-7 & 8.

<sup>12</sup> AT&T SEC Form 10-K Report, p.6.

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measure of a firm's share is its capacity to serve bandwidth demanded by the buildings in a given geographic market.

**II. APPLICANTS INCORRECTLY CONTEND THAT DR. WILKIE RELIES ON DATA WHICH OVERSTATE AT&T'S MARKET PRESENCE.**

**A. *Applicants' Criticism of GeoResults Data is Misplaced.***

Applicants are nearly breathless in their four page *ad hominem* attack on Dr. Wilkie's use of GeoResults data to ascertain CLEC market presence. For six full paragraphs, the Applicants attack the means by which GeoResults assembles data as unreliable, but the fact is that SBC routinely uses the same data for the same purposes. After all, the Joint CLECs selected GeoResults *precisely because* it is the generally accepted data source used by *both* RBOCs and CLECs for network planning purposes. As Verizon stated in the *TRRO* docket only a year ago, the GeoResults data are derived from Telcordia Common Language data products which "are recognized as an *industry standard* by numerous national and international telecommunications standards-setting bodies," and can be reliably used to "identify and locate buildings ... that are served by [CLEC] fiber-enabled network equipment" and create a "unique summary of building locations to which carriers have provisioned fiber-based equipment." Indeed, according to Verizon, "[u]sing the [GeoResults] report, it is possible to obtain information on more than 80,000 fiber lit buildings and the identity of each service provider that has deployed equipment in each of these buildings."<sup>13</sup>

As for Applicants' half-hearted contention that GeoResults' reliance on the Telcordia CLONES database is misplaced,<sup>14</sup> that assertion simply is impeached by SBC's unqualified assertion to the opposite made to the Commission less than a year ago. In filing numerous maps that SBC swore reliably demonstrated the reach of competitive fiber networks, SBC explained that the maps were developed utilizing the GeoResults database, and trumpeted the value and reliability of the source:

All carriers use multiplexers to provision high-capacity services, such as DS-1 and DS-3 services. As a consequence, one can identify buildings that are being served by competitive carriers, and thus which are 'lit' by alternatives to ILEC facilities, by searching the CLONES database to identify where CLECs have deployed such equipment at specific customer locations and

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<sup>13</sup> Verizon Comments, Declaration of Verses, LaTaille, Jordan and Reny (June 15, 2004), Dkt. 01-338, paras. 22-24 (emphasis added).

<sup>14</sup> See *Applicants June 24 Letter*, fn. 10.

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connected that equipment to non-ILEC fiber or other means of transport....*GeoResults has painstakingly reviewed and analyzed the Telcordia databases to compile its listing of competitively lit buildings.*<sup>15</sup>

In sworn declarations filed with the Commission, SBC defended its CLEC fiber deployment maps stating that "SBC presented data from an *independent third party, GeoResults, which compiles industry data regarding the deployment and location of fiber terminating equipment*" and that "GeoResults is a *reasonably reliable source, and if anything its data understate the deployment of competitive fiber.*"<sup>16</sup>

Indeed, in defending maps they filed in the *TRRO* record that were based on "data assembled by GeoResults," SBC provided additional sworn declarations claiming that "state commission proceedings...*validated...the reliability of the GeoResults data.*"<sup>17</sup> SBC reported that the "Illinois Commerce staff expert accordingly concluded that GeoResults is a reasonably reliable source" and that the administrative law judge in Illinois concluded that the GeoResults data are "of a type commonly relied on by reasonably prudent persons in the conduct of their affairs."<sup>18</sup> Again, Applicants cannot have it both ways. When weighed against the Applicants' own prior statements and these sources of independent validation, their marginal criticisms of the GeoResults data are a slim reed indeed.

As mentioned above, the Applicants' real objection to Dr. Wilkie's use of the GeoResults data is that they count buildings as having a CLEC presence wherever such CLECs have provisioned terminating equipment, regardless of whether the last mile pipe is CLEC-owned fiber or a leased special access channel termination connected to CLEC-owned backbone fiber. But it is critical to realize that Dr. Wilkie's treatment is wholly consistent with how SBC and other RBOCs used the GeoResults data only last year in asking the Commission to make non-impairment findings.<sup>19</sup>

<sup>15</sup> Letter of Christopher Heimann of SBC to Marlene Dortch of the FCC, Dkt. 01-338, dated Aug. 18, 2004, p. 4.

<sup>16</sup> Joint Declaration of Scott Alexander and Rebecca Sparks of SBC, ¶¶22-23, attached to Letter of Christopher Heimann of SBC to Ms. Marlene Dortch of the FCC dated Nov. 16, 2004, filed in Dkt. 01-338 (emphasis added, footnotes omitted).

<sup>17</sup> SBC Reply Comments in Docket 04-313, 01-338, (Oct. 19, 2004), p. 17, fn. 45 and Alexander/Sparks Declaration attached thereto, ¶¶ 63-66.

<sup>18</sup> Alexander/Sparks Declaration, attached to Letter of Christopher Heimann of SBC to Marlene Dortch of the FCC, filed in Dkt. 01-338, dated Nov. 16, 2004, ¶ 23.

<sup>19</sup> *See Id.*, p. 5.

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Thus, if Dr. Wilkie committed "error" in relying on GeoResults data as now contended by the Applicants, then it is precisely the same error that SBC and other RBOCs made a year ago in the *TRRO* docket, and the Commission would need to set aside its high capacity UNE non-impairment findings *sua sponte* as based on critical information that the sponsors now contend was fatally flawed. More to the point, while the Joint CLECs concede that no available database is perfect,<sup>20</sup> they and Dr. Wilkie agree with the BOCs' assessment of a year ago that the GeoResults data are the best available for determining where CLECs have deployed fiber-based terminating equipment. Most importantly, any discrepancies would not change the ultimate conclusion that AT&T operates by far the largest set of non-ILEC local transport networks in the nation, that the facilities were developed first by Teleport and then AT&T over two decades' time, and that the loss of this capacity to competing carriers will result in a substantial diminishment of competition.

Indeed, it is significant that the New York PSC Staff recently achieved similar results analyzing a separate data set. They used confidential data collected as part of the New York *TRO* proceeding to analyze the impact of the merger on routes deemed sufficiently competitive under the new *TRRO* rules to lose high capacity UNEs. The New York PSC Staff determined that the increase in HHI in the interoffice transport market resulting from the Verizon/MCI merger alone is as high as 1410, matching Dr. Wilkie's conclusion drawn from the GeoResults data that the HHI increase dwarfs the level considered acceptable under the DOJ Merger Guidelines,<sup>21</sup> and providing an independent source of validation for the results of Dr. Wilkie's analysis.

**B. Applicants' Misapprehend Dr. Wilkie's Use of Their Lit Building List.**

In their *June 24 Letter*, Applicants mistakenly suggest that Dr. Wilkie is vacillating on whether GeoResults data or their Lit Building Lists were used as the data source for conducting his analysis. The fact is that both items were used, but for different purposes at different times. As we have always made clear, Dr. Wilkie used GeoResults data to prepare several maps and tables used in his Declaration and *Ex Parte Presentation* -- specifically, the tables and maps showing simple counts of buildings served by AT&T and other CLECs in the Cleveland,

<sup>20</sup> Elsewhere SBC AT&T have used another database, GeoTel, but they acknowledge that the GeoTel data does not include *any* facilities deployed by AT&T and must be supplemented with AT&T's own, non-public internal information. Clearly this concocted database is not nearly as reliable as the publicly available GeoResults information. In addition, by supplementing the GeoTel database only with information regarding Type I AT&T facilities, Applicants have created a source which is grossly *under-inclusive* and must be disregarded as a result.

<sup>21</sup> See New York PSC Department of Public Service Staff "White Paper," filed in NY PSC Cases 05-C-0237 & 05-C-0242 (July 6, 2005) ("*NYPSC Staff White Paper*"), pp. 34-35.

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Milwaukee and Los Angeles areas.<sup>22</sup> However, as we made clear in our *June 6 Letter* to the Commission,<sup>23</sup> the Lit Building Lists provided by competitive carriers to Dr. Wilkie were used in tandem with building bandwidth demand data reported by GeoResults to perform his analysis of loop market concentration, specifically the calculation of HHIs in the Chicago market.<sup>24</sup> As we previously explained:

Professor Wilkie's HHI calculations do *not* rely on lit building information from GeoResults. While Professor Wilkie does make use of GeoResults data regarding the total telecommunications bandwidth demanded by buildings in Chicago, his primary sources for information regarding the buildings served by AT&T and other carriers are various 'on-net' building lists provided to the CLECs by the wholesale carriers themselves.<sup>25</sup>

In an attempt to impeach Dr. Wilkie's credibility, Applicants have intentionally taken this discussion in our *June 6 Letter* out of context, and erroneously conflated Dr. Wilkie's totally appropriate use of Lit Building Lists to calculate HHIs with his equally appropriate use of GeoResults data to count the absolute number of locations served by various CLECs.

This bit of misdirection by the Applicants appears intended to draw the Commission's attention away from the fact that the Applicants choose wholly to ignore the real point made in our *June 6 Letter* regarding the data used in Professor Wilkie's HHI calculations:

Professor Wilkie's understanding is that such [carrier-provided building lists] are provided to CLECs by AT&T and other providers of wholesale local access in order to identify for the CLEC which customer locations can be served by the provider's facilities. Presumably, AT&T is not intentionally misleading CLECs regarding the number of buildings to which it can provide wholesale local access service. Because AT&T has every incentive to provide customers with lists that are as up-to-date and

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<sup>22</sup> See "Proposed Mergers of SBC/AT&T and Verizon/MCI: Preliminary Analysis of Competitive Effects: by Prof. Simon Wilkie, dated June 14, 2005, filed in Dkt. 05-65 ("*Wilkie Ex Parte Presentation*"), pp.7-12 & 33-35.

<sup>23</sup> Letter of Brad Mutschelknaus of Kelley Drye & Warren LLP to Marlene Dortch of the FCC, filed in Dkt. 05-65, dated June 6, 2005 ("*CLECs June 6 Letter*"), pp.6-7.

<sup>24</sup> *Wilkie Ex Parte Presentation*, p.15.

<sup>25</sup> *CLECs June 6 Letter*, p. 6-7.

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accurate as possible, the information on which the *Horizontal Impacts Analysis* relies should be deemed reliable.<sup>26</sup>

SBC and AT&T still have not asserted that the Lit Building Lists routinely supplied by AT&T to CLECs regarding the number and location of its on-net buildings is incorrect. Instead, they obfuscate by incorrectly suggesting that Dr. Wilkie has been less than forthright regarding the sources of his data. Presumably, that is because they are incapable of confronting the truth of what the data show on the merits.

**C. *Applicants Erroneously Confuse Bandwidth Demand with Building Counts.***

The Applicants further attempt to mischaracterize Dr. Wilkie's work by wrongly suggesting that Dr. Wilkie assumes there to be 11,600 AT&T lit buildings in Chicago whereas Applicants contend that only 6,250 exist nationwide.<sup>27</sup> This is nonsense. First, it bears repeating that Dr. Wilkie makes no assumption at all regarding the number of AT&T on-net buildings in the Chicago area. As we have explained above and in our *June 6 Letter* to the Commission, Dr. Wilkie's HHI analyses make use of on-net building lists provided to him by various competitive carriers, who in turn originally received them directly from AT&T and other carriers providing wholesale local access service. As such, Dr. Wilkie was given discrete lists of AT&T on-net buildings, originally prepared by AT&T itself, with each building specifically identified by street address or CLLI code. Again, AT&T has not asserted that the information it previously provided to CLECs regarding the number and location of its on-net buildings was or is incorrect.

Second, and more specifically, we note that nowhere in his declarations and *ex parte* presentations to the FCC does Dr. Wilkie assume "that AT&T has about 11,600 'lit' buildings in Chicago." That the Applicants make such a claim betrays either their very poor understanding of Professor Wilkie's analysis or their willingness to misrepresent his clearly stated findings to the Commission.

The 11,600 figure is *created by the Applicants* in an attempt to paint Dr. Wilkie's *Horizontal Impacts Analysis* as absurd. The Applicants derive this number by multiplying the number of buildings in the Chicago metropolitan region reported by Dr. Wilkie in his *ex parte* presentation (241,726 buildings) by a measure of share calculated by Dr. Wilkie for AT&T for the loop market in Chicago (4.8%).<sup>28</sup> According to the Applicants, this product – 241,726 times

<sup>26</sup> *CLECs June 6 Letter*, p. 7.

<sup>27</sup> *Applicants June 24 Letter*, pp.4-5 (emphasis and internal citations omitted).

<sup>28</sup> *See Wilkie Ex Parte Presentation*, p. 15.

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0.048, or approximately 11,600 – is the number of on-net buildings that Dr. Wilkie assumes AT&T serves in the Chicago area.

What the Applicants fail to appreciate or acknowledge is that the market share percentage given by Dr. Wilkie for AT&T in Chicago (4.8%) is not the carrier's share of *buildings*. The *Horizontal Impacts Analysis* presented by Dr. Wilkie shows estimates of carrier shares of the wholesale local access market in the Chicago area. However, the market shares are based on the amount of voice and data *bandwidth demanded by buildings* to which the carriers are connected by their own facilities. More specifically, the market shares express (1) the total bandwidth demanded by buildings to which a particular carrier provides service via its own facilities as a percentage of (2) the total such bandwidth across all carriers in the Chicago area. Thus, the shares are essentially capacity shares, indicating each carrier's relative ability to serve total bandwidth demand in the Chicago area over its own facilities. Multiplying the 4.8% capacity share by the total number of buildings in Chicago, as the Applicants do, is thus mixing apples and oranges. The Applicants' 11,600 figure is a preposterous result that does not accurately describe Dr. Wilkie's analysis, and accordingly their criticism of the concocted figure should be disregarded by the Commission.

The Applicants' position, rather than demonstrating a fault with Dr. Wilkie's analysis, merely highlights their own lack of understanding or intentional obfuscation. If anything, Dr. Wilkie's *Horizontal Impacts Analysis* confirms that AT&T serves a relatively small proportion of buildings within the Chicago metropolitan area, but that the buildings it does serve tend to be those with relatively high levels of demand.<sup>29</sup>

Applicants make the same mistake when complaining that Dr. Wilkie's "Los Angeles 'HHI' loop study assigns SBC, AT&T and MCI an almost 99% collective 'share' of lit buildings. In other words, Dr. Wilkie is claiming that all other CLECs combined have a mere 1% share of buildings in Los Angeles."<sup>30</sup> Again, SBC and AT&T display a fundamental misunderstanding of Dr. Wilkie's share calculations and *Horizontal Impacts Analysis*. As was noted above, the share figures reported by Dr. Wilkie in his loop market HHI analyses do *not* measure buildings. Rather, they *measure* relative capacity, as the market shares express (1) the total bandwidth demanded by buildings to which a particular carrier provides service via its own facilities as a percentage of (2) the total such bandwidth across all carriers in the SBC Los Angeles area

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<sup>29</sup> For example, Dr. Wilkie's analysis indicated that the relative amount of total bandwidth demand across all buildings in the Chicago area "passed" by AT&T's facilities is 4.8%. By contrast, the relative amount of total bandwidth demanded across buildings with at least 150 Mbps (approximately OC3-level) demand passed by AT&T's facilities is much higher – 15.7%. *See Wilkie Ex Parte Presentation*, p.12.

<sup>30</sup> *Applicants June 24 Letter*, p.5 (emphasis and internal citations omitted).

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service territory. Thus, the Applicants' contention that Dr. Wilkie assigns SBC, AT&T, and MCI a collective 99% share of lit buildings is absurd on its face.

What Dr. Wilkie does report – based on on-net building lists provided to him by competitive carriers actually providing service in the Los Angeles area and on publicly available data regarding the bandwidth demanded by these buildings – is that the buildings in the SBC Los Angeles service territory identified as on-net for AT&T or MCI collectively represent demand that is much greater than the total demand represented by any other competitive carrier's on-net buildings. Dr. Wilkie's analysis also reveals that few, if any, competitive carriers other than AT&T and MCI have an on-net presence in the "largest" buildings within the SBC Los Angeles service territory – *i.e.*, buildings for which the residents collectively demand at least 150 Mbps (approximately OC3-level) of total voice and data bandwidth.<sup>31</sup>

**D. *Applicants' Fail to Account for Differences in Fiber Capacity vs. Fiber Usage.***

In their continuing attempt to mischaracterize Dr. Wilkie's presentation, Applicants go on to incorrectly allege that "Dr. Wilkie's analysis shows only 38 commercial buildings with OCn-level demand in all of Los Angeles, and only 93 OCn-level buildings in the entire Chicago metropolitan area," and that, "anyone with even the slightest familiarity with those areas would, for example, recognize that there have [*sic*] more commercial buildings with OCn-level demand on only a few blocks."<sup>32</sup> As an initial matter, we note that the Applicants' claim contains a factual error. Dr. Wilkie's loop market HHI analysis indicates that there are 38 commercial buildings in the SBC local service territory of the Los Angeles metropolitan area with total bandwidth demand of 150 Mbps or greater – not in "all of Los Angeles," as the Applicants assert. This small correction aside, we suspect that the Applicants again misunderstand (or intentionally misstate) the data and analyses presented by Dr. Wilkie.

The "demand" referenced by Dr. Wilkie in this context is the total volume of voice and data bandwidth actually demanded on a monthly basis by a particular building. In the case of a commercial building, for instance, the demand on any given month is the total voice and data bandwidth (in Mbps) collectively demanded by the tenants of the building at that time. As discussed above, the source of this bandwidth demand information is GeoResults. Thus, the 38 commercial buildings in the SBC Los Angeles service territory with at least 150 Mbps (approximately OC3-level) demand that are highlighted by Dr. Wilkie are the 38 buildings

<sup>31</sup> Dr. Wilkie's understanding is that an OC3 line is roughly the equivalent of 100 T1 lines and can carry a total signal at approximately 155 Mbps.

<sup>32</sup> *Applicants June 24 Letter*, p.5 (internal citations omitted).

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within the area identified by GeoResults as demanding at least 150 Mbps of voice and data bandwidth.

We suspect that the Applicants are confusing the total building bandwidth demand figures reported by Dr. Wilkie with the total available capacity of fiber facilities connecting to commercial buildings in Los Angeles and Chicago. To be sure, there are many buildings within the Los Angeles and Chicago metropolitan areas connected to ILEC or competitive carrier networks by fiber facilities that are capable of accommodating OCn levels of voice and data traffic. Indeed, Dr. Wilkie's understanding is that, when a carrier deploys fiber to a building, the carrier often lays circuits capable of accommodating many times the traffic currently demanded by the carrier's customer(s) in that location. In other words, carriers tend to put in a much bigger "pipe" than is immediately required. As a consequence, many buildings in Los Angeles, Chicago, and elsewhere are served by fiber facilities for which the collective capacity equals or exceeds OC3 levels. This is a quite different situation than that to which Dr. Wilkie refers in his *Horizontal Impacts Analyses*, which examines the aggregate *bandwidth demand* in a building as opposed to the potential capacity of facilities serving it.

Finally, we note that the Applicants offer no additional information regarding building demand in Los Angeles, Chicago, or elsewhere in support of their cavil. Instead of quantifying the allegedly large number of commercial buildings with OCn-level demand they say exists within "only a few blocks" of major metropolitan areas, SBC and AT&T merely dismiss out of hand the well documented and publicly available data that Dr. Wilkie has supplied to the Commission.

### **III. APPLICANTS FALSELY CLAIM THAT AT&T'S EXTENSIVE LOCAL NETWORK FACILITIES CAN BE EASILY REPLICATED BY OTHER CLECS.**

In a remarkable example of playing "make believe," the Applicants go on to contend that there is nothing special about AT&T's local networks and that other CLECs can simply deploy the same thing overnight. Once again, this assertion runs head on into contrary prior sworn declarations by AT&T in the *TRO* and *TRRO* proceedings. Then, AT&T -- the CLEC that had been by far the most successful in deploying local facilities -- was adamant that constructing local network facilities is an extremely difficult, time-consuming and capital intensive undertaking.<sup>33</sup> Obtaining building access, winning franchise rights, securing environmental permits and the like is an uncertain process.<sup>34</sup> Apart from the technical impediments, there is the

<sup>33</sup> See generally, AT&T Comments, Dkt. 04-313 (filed Aug. 27, 2004) ("*AT&T TRRO Comments*"), Declaration of Fea and Giovanni; see also *Order on Remand* in FCC Docket 04-313 (Feb. 4, 2005), ("*TRRO Order*") ¶¶ 149-154.

<sup>34</sup> *TRRO Order*, ¶ 154.

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very real dilemma of obtaining funding to put a third fiber loop into a building that already has ample bandwidth built in from SBC and AT&T. As AT&T put it, with respect to loops, "[j]ust because one competitor may find it economically feasible to construct a lateral from its metro fiber to a particular location...that does not mean that any other carrier...could deploy loops to that same location at the same capacity level."<sup>35</sup> With respect to transport, AT&T explained that "the existence of one carrier's transport in a wire center does not allow an inference that other carriers could deploy transport even to that wire center, much less in broader geographic markets."<sup>36</sup> As AT&T acknowledged, carriers lacking AT&T's unmatched traffic volumes could not hope to replicate its facilities. "Whether any particular carrier can deploy its own transmission facilities is...a function," stated AT&T, "of whether that individual carrier has enough traffic on a given route to justify" deployment.<sup>37</sup>

Applicants brush aside the fact that the standard at issue in this proceeding is even more exacting than that applied by the Commission in its impairment analysis. Rather than addressing the fundamental issue in any review of a proposed merger – whether and to what extent the proposed combination will raise prices and lead to competitive harm – the Applicants here focus instead on the potential “impairment” of other competitive carriers with regard to the duplication of AT&T’s facilities once AT&T is eliminated from the local access and local interoffice transport markets. The Applicants’ claim here is similar to one previously made by them and previously responded to by us in our *June 6, 2005 Letter*. As we explained in detail at that time:

The Applicants claim that other CLECs can readily replicate AT&T connections. . . . At the outset, it is important to note that this claim is based on flawed reasoning equating the FCC’s impairment analysis with the analysis of competitive harm required pursuant to the DOJ-FTC Horizontal Merger Guidelines. The Commission’s impairment test is not the same as the entry test in the DOJ-FTC Horizontal Merger Guidelines, which asks “whether timely and likely entry would be sufficient to return market prices to their premerger levels.” The impairment analysis is based on the current ability of a CLEC to obtain facilities to serve a customer. The competitive harm analysis examines the totality of the harm that would ensue from the removal of AT&T’s competitive presence from the market.<sup>38</sup>

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<sup>35</sup> *AT&T TRRO Comments*, p. 39.

<sup>36</sup> *Id.*, p. 50.

<sup>37</sup> *Id.*, p. 14.

<sup>38</sup> *CLEC June 6 Letter*, p.8.

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The Applicants fail to appreciate (or willingly ignore) our earlier response, which makes plain the fact that there is a difference between the “competitive harm” standard and the “impairment” standard. The Applicants’ continued focus on the latter is not surprising, of course, given that the impairment standard typically is a lesser hurdle. When both costs and prices within a market rise as the result of a merger, for instance, a firm may still find it profitable to enter and provide service. In such an instance, the firm is not impaired with regard to its entry, yet it is clear that the increased prices may very well indicate competitive harm, especially if the increases in costs resulting from the merger cannot be competed away by subsequent entry.

The fundamental oversight in the Applicants’ reasoning is that they ignore the effect of AT&T’s removal on prices offered by competitive carriers to provide wholesale private line service. Together with their other claim that “the merger will not affect the many other CLECs that have the same capabilities to reach the same buildings and customers” as does AT&T currently, the Applicants implicitly appear to be arguing the following: assuming that competitive carriers can purchase from SBC at the same special access rates as AT&T, those carriers will charge the same prices in AT&T’s absence as AT&T charged previously. This does not follow, either logically or empirically.

As Dr. Wilkie discussed in his Declarations and *Ex Parte Presentations*, it is clear that competitive carriers can and do differ from one another in terms of the bids they offer to provide particular wholesale circuits and that, in fact, the bids can vary quite a bit. As Dr. Wilkie observed, if AT&T is the low bidder for a given circuit, then it is clear that removing the firm will raise the price paid for that circuit. This clearly makes the buyer worse off. The removal of AT&T from situations in which it otherwise would have been the first choice of a competitive provider necessarily makes the buyer of the wholesale input worse off. This issue has been thoroughly discussed in the Declarations of Dr. Wilkie,<sup>39</sup> who notes furthermore that the magnitude of the harm to the buyer can and is likely to be larger than the difference between the AT&T bid and the bid of the next-lowest competitive provider, since it is the change in the equilibrium bid that matters. Following the removal of AT&T, noted Dr. Wilkie, the next-lowest bidder (even if previously the low bidder) would now be able to win the circuit procurement by bidding slightly less than the third lowest bidder. In cases in which the third lowest bidder is SBC itself, offering its posted special access rates (or a fixed discount from them), then the competitive carrier remaining in the bidding can win by just undercutting the SBC tariff rate –

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<sup>39</sup> See Petition to Deny of CBeyond *et al* in Dkt. 05-65 (April 25, 2005), Exh. A, Declaration of Simon Wilkie, ¶¶ 22-27; Petition to Deny of CBeyond *et al* in Dkt. 05-75, (May 9, 2005), Exh. A, Declaration of Dr. Simon Wilkie, ¶¶ 21-25 (combined “*Wilkie Declarations*”).

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rather than the often substantially lower AT&T price. Again, the buyer is made worse off with the removal of AT&T, suggesting competitive harm.<sup>40</sup>

That the market for alternatives to SBC for wholesale special access facilities is significant, and that AT&T is a major player in it, cannot be seriously disputed. In an SBC filing with the Commission made only last October, AT&T and MCI are listed first and second among alternative special access providers in 15 major markets in SBC's region. SBC stated that these two providers offer to sell alternative special access to other carriers at rates that "typically were 15-30% below, and sometimes more than 35% below, SBC's tariffed rates."<sup>41</sup> What are the odds that other carriers can quickly step up and replace the lost AT&T and MCI alternative local facilities, and supply the same pricing discipline that their market participation does today? Taking Chicago as an example, the GeoResults data shows that for the business sector AT&T and MCI combined have a 71% share (by capacity) of the total CLEC presence. By contrast, the next three largest providers' shares are 13%, 4.8% and 4.5% respectively.<sup>42</sup> Clearly, in the real world no other carrier can step in to fill the void left should AT&T and MCI cease competing in the wholesale market. The AT&T and MCI facilities are the result of more than 20 years of local network development by Teleport and MFS/Brooks, as augmented by virtue of the traffic volumes that only AT&T and MCI can direct over the networks. Simply put, no other CLEC individually, or collectively with other CLECs, would find it profitable to replace the extensive local network footprints of AT&T and MCI within the foreseeable future.

Indeed, it is important to realize what Applicants are suggesting. They imply that market concentration simply does not matter. They indicate that even if *only one* competitor or potential competitor, *however tiny or weak*, remains along a route vacated by AT&T/MCI, the harm of their abandonment is obviated. While there may be theoretical economic markets in which only two bidders are enough to guarantee the benefits of competition, these markets are not among them. To the contrary, even the most rudimentary bid analysis demonstrates that in the wholesale market, the number of bidders, and the identity of those bidders, matters a lot: three bidders produces lower prices than two bidders; four bidders produces lower prices than three bidders; and when AT&T and MCI bid (whether they win or not), the prices are significantly lower than when they do not bid. AT&T and MCI compete with each other and sometimes with smaller players to provide alternatives to ILEC special access. Even when AT&T loses a bid to MCI, it is AT&T's participation in the market that compels MCI to produce an even lower price bid, and yields discounts which often are 50% or greater as compared to ILEC special access.<sup>43</sup>

<sup>40</sup> See *Wilkie Ex Parte Presentation*, p.15.

<sup>41</sup> SBC Reply Comments, filed in Dkt. 01-338 (Oct. 19, 2004), pp. 44-46.

<sup>42</sup> See *Wilkie Ex Parte Presentation*, p. 15.

<sup>43</sup> *Wilkie Ex Parte Presentation*, pp. 20-22. Applicants repeatedly attempt to discredit the price impact produced by multiple bidders by claiming that Dr. Wilkie's conclusion is

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If either or both of these major players exit the market, the obvious temptation for remaining participants is to simply treat existing ILEC tariffed special access rates as "umbrella rates" which they need to price only marginally below. That is the very definition of a loss of competition and resulting decline in consumer welfare due to increased horizontal concentration through merger.

**IV. APPLICANTS GROSSLY UNDERSTATE THE IMPORTANCE OF LOCAL ACCESS AND TRANSPORT COMPETITION THROUGH TYPE II CIRCUITS.**

Applicants argue stridently that AT&T only truly competes with SBC special access when it provides service end-to-end, *i.e.* "Type I," over its own fiber facilities, and that all other service configurations must therefore be excluded from any market concentration analysis. The central problem with this position is that it is contravened by the facts, which show irrefutably that AT&T's use of ILEC special access alone or in combination with its own backbone network is a major component of today's wholesale local access market and the level of competition that exists within it. The facts are:

- AT&T admits that "when [it] uses its local network to serve customers it does so in the vast majority of cases by connecting its backbone fiber to a leased special access circuit that connects to the customer location ('Partial Type II')";<sup>44</sup>
- AT&T provides wholesale private line services *both* under a Type I arrangement *and* "in a partial Type II arrangement in which transport and one 'tail' are 'on net' ";<sup>45</sup> and
- AT&T has filed in this docket (in response to the Commission's April 18, 2005 information request) confidential information listing numerous locations where it provides wholesale service using Type II facilities.

AT&T's resale of Type II circuits should not be surprising. It is quite rare for the telecommunications demand for a single customer or building to utilize precisely 100% of the capacity of a circuit (nominally 24 lines for a DS1, 672 lines for a DS3 or 2016 lines for an OC3

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drawn from results of a "single RFP." *Applicants June 24 Letter*, p. 5. This contention is patently untrue. Dr. Wilkie has reviewed bid data from multiple CLECs, which includes a large number of observations, and found discounts of 50% or more as compared to ILEC special access rates to be common.

<sup>44</sup> Anthony Giovanni, Director of AT&T Media Engineering Organization, *Ex Parte Presentation to the FCC ("Giovanni Ex Parte Presentation")*, WC Dkt. 05-65, June 28, 2005, slide 2.

<sup>45</sup> *Id.*, slide 8.

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circuit). Therefore, the larger the equipped circuits for which AT&T has the end user demand needed to justify installing the circuit, the greater the amount of spare, unused capacity that exists in the circuit. If a large business customer of AT&T in a building requires, for example, 1,500 lines of AT&T's OC3 facility to that building, AT&T still has over 500 equivalent lines of capacity left over -- or more than 20 DS1s. Even allowing for demand growth by its principal customer, AT&T would still have multiple DS1s worth of spare transmission capacity. It is precisely this capacity that an independent AT&T seeks to leverage by offering wholesale private line services to CLECs whose main business focus is the smaller end of the business market.

Since the fact that AT&T offers wholesale services using resold ILEC special access facilities is inescapable, Applicants are left to argue that competition over Partial Type II facilities does not matter for other reasons. First, they contend that any other CLEC is free to order the same special access terminations as does AT&T. As a practical matter, this assertion simply is untrue. While AT&T's negotiated volume and term arrangements are technically available to others, no other CLEC possesses the traffic volumes required to qualify for the maximum discounts.<sup>46</sup> Even if they could qualify for the maximum discounts, other CLECs do not have anything like the 21,000 route miles of backbone fiber and more than 8,600 metropolitan SONET rings to which the channel terminations could be connected to create a similarly efficient hybrid circuit. Moreover, Applicants' assertion ignores the fact that AT&T -- because of the size of its customer base and service to very large business customers -- is able to order special access circuits of much higher *bandwidth* than smaller CLECs can use economically. In any event, the AT&T volume and term special access agreements are a result of the unique bargaining leverage of AT&T, which will be lost to the market on the date of the merger.

Second, Applicants contend that the amount of wholesale service sold using Type II facilities is not significant.<sup>47</sup> But only a year ago AT&T's CEO said that his business plan is to be an "arms merchant" to other carriers by selling them wholesale capacity on AT&T's network.<sup>48</sup> How significant the sales are to AT&T is hard to gauge, since we are not privy to the requisite bid and sales information. Mr. Giovanni provided sales numbers for "LPL" services in his presentation, but that likely badly understates actual gross sales by omitting Entrance Facilities, Interoffice Transport (without loops), Local Frame Relay, Local ATM, High Speed

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<sup>46</sup> There are numerous other practical impediments to the use of these special access volume and term plans by other CLECs, such as requirements that CLECs forgo use UNEs or their own networks, and prohibitions against porting circuits.

<sup>47</sup> See *Giovanni Ex Parte Presentation*, slide 8.

<sup>48</sup> "AT&T Rings in a New Business Strategy," USA Today, Aug. 8, 2004.

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Packet, ACCU-Ring, DEF, Wavelength and Optering<sup>49</sup> and similar offerings.<sup>50</sup> Moreover, Mr. Giovanni's wholesale revenue statistics simply are grossly inconsistent with AT&T's representations to the SEC and with the results of a recent Yankee Group study of the wholesale special access services market in SBC's operating territory.

In AT&T's most recent annual report to the SEC, the company bragged that:

**We offer transport services to other service providers**

We provide local...wholesale networking capacity...to other service providers. We offer a combination of high volume transmission capacity, conventional dedicated line services and dedicated switched services to internet service providers (ISPs) and facility-based and switchless resellers. Our wholesale customers are primarily large tier-one ISPs, wireless carriers, competitive local exchange carriers, regional phone companies, inter-exchange carriers, cable companies and systems integrators.<sup>51</sup>

Critically, AT&T reported that its local voice transport revenues totaled \$1.6 billion in 2004,<sup>52</sup> worlds apart from Mr. Giovanni's suggestion that revenue for the wholesale unit was only a small fraction of that. While AT&T does not report what portion of its local voice transport revenue is derived from wholesale sales, MCI has reported that 70% of its local voice revenues are attributable to sales to other carriers, and there is no reason to believe that AT&T's experience is markedly different.<sup>53</sup>

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<sup>49</sup> All of these services are listed on the AT&T website as wholesale offerings.

<sup>50</sup> As SBC stated to the Commission in a sworn declaration only 7 months ago, "in the real world, AT&T's own public website expressly offers wholesale services 'for you' and 'for your customers, and AT&T's 'comprehensive' wholesale portfolio includes a 'private line' connection from a customer premises to a carrier's point-of-presence." Declaration of Scott Alexander and Rebecca Sparks of SBC, ¶ 17, attached to the Letter of Christopher Heimann of SBC to Marlene Dortch of the FCC, dated Nov. 16, 2004 and filed in Dkt. 01-338.

<sup>51</sup> AT&T SEC 2004 Form 10-K, p. 5.

<sup>52</sup> *Id.*, p. 42.

<sup>53</sup> A recent Yankee Group study performed for SBC found that MCI's wholesale special access revenue is only moderately larger than AT&T's. In that study, for example, the Yankee Group determined that AT&T's 2004 wholesale private line revenue in California was [**\*\*CONFIDENTIAL/SUBJECT TO PROTECTIVE ORDER\*\***] while MCI's totaled [**\*\*CONFIDENTIAL/SUBJECT TO PROTECTIVE ORDER\*\***]. "SBC

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Indeed, the substantial scale of AT&T's wholesale local transport business is conclusively demonstrated by documents produced by SBC in response to the Commission's April 18, 2005 information request. Less than a year ago SBC commissioned the Yankee Group to undertake a major study of the wholesale private line revenues and market shares throughout the SBC region. Presumably based on the results of this study, the same attorney that signed the *Applicants June 24 Letter* for SBC, who now tells the Commission that special access competition is insignificant, reported to the Commission in November 2004 that "[c]ompetitors have won 40% of the total wholesale market for special access services in SBC's territory" and "[c]ompetitors currently supply over a third of the wholesale market for DS-1 and DS-3 services."<sup>54</sup> Mr. Phillips listed AT&T first among the competitive local network suppliers, and even quoted from AT&T officials concerning their commitment to this market segment.<sup>55</sup>

The Yankee Group study apparently underlying the presentation makes clear that the actual AT&T revenue derived from wholesale special access sales in competition to SBC are very many times larger than the numbers apparently provided by Mr. Giovanni to the Commission in this docket. For example, the Yankee Group found that AT&T's wholesale private line revenues last year exceeded [**\*\* CONFIDENTIAL/SUBJECT TO PROTECTIVE ORDER\*\***] in California alone.<sup>56</sup> These statistics make clear that the revenue numbers by Mr. Giovanni of AT&T are grossly misleading, and must simply be disregarded. Indeed, the Yankee Group study results reveal why SBC previously described AT&T's assertion that its wholesale private line business is unimportant as a "self-serving litigation position."<sup>57</sup>

However, any such sales number surely understates the true impact of AT&T's offering in the overall marketplace. AT&T's participation is critical even when its sales efforts fail, as its bid becomes the price for others to beat. In addition, it is absolutely crucial to acknowledge that the wholesale market, while already important, is at this moment assuming even greater significance. The wholesale market for alternative special access facilities became essential

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Special Access Study: Final Project Deliverable Wholesale Private Line," Nancy Bedard, J.P. Gownder and Steve Hilton, Yankee Group, Nov. 2004 ("*Yankee Group Special Access Study*"), p. 32. The Yankee Group study was filed in Response to the Commission Information and Document Request dated April 18, 2005. See Response to SBC of to Information Request, Dkt. 05-65 (May 9, 2005), B.5(b)d.

<sup>54</sup> Letter of Gary Phillips of SBC to Marlene Dortch of the FCC, Nov. 12, 2004, "Special Access Pricing and Competition," p. 3, filed in WC Dkt. 04-313.

<sup>55</sup> *Id.*, p.4.

<sup>56</sup> *Yankee Group Special Access Study*, p. 32.

<sup>57</sup> Alexander/Sparks Declaration, attached to letter of Christopher Heimann of SBC to Marlene Dortch of the FCC, dated Nov. 16, 2004, filed in Dkt. 01-338, ¶ 17.

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upon the phase-out of high capacity loop and transport UNEs, a process which is only now occurring as part of the implementation of the Commission's *TRRO* order.

The Joint CLECs are not alone in their belief that the proposed RBOC mergers will substantially dampen special access competition. After investigating the proposed SBC/AT&T and Verizon/MCI mergers, the New York PSC Staff recently reached the same tentative conclusion. In their recently released White Paper regarding the mergers, Staff stated that:

the acquisition of the second (MCI is roughly tied for second place with AT&T) largest wholesale provider by the largest provider of high capacity loop access services (Verizon) will significantly increase market concentration in the transport and special access markets. This ... could result in the elimination of the favorable rates, terms and conditions currently offered by MCI to smaller carriers....Staff tentatively concludes that the merger could affect business customers by potentially increasing T1 prices, and/or cause deterioration of retail service quality....In sum, the current field of wholesale providers will be reduced my one major provider, and because AT&T is being acquired by another former RBOC, the potential for price or rate collusion, or discrimination in the provision of access for transport or special access facilities in favor of their respective affiliates, increases (to the detriment of small carriers and business customers.<sup>58</sup>

The bottom line is that Applicants argue that Type II -- even Partial Type II -- circuits are irrelevant to any concentration analysis because they have no choice. In the event the Commission accepts, as it must, that AT&T competes through the use of Type II facilities of any sort, there is no avoiding concentration numbers that cause a literal *HHI/DOJ Merger Guidelines* meltdown. It is noteworthy that Applicants make absolutely no effort to calculate their own market concentration statistics or even to massage the data in line with their own suggestions. One can only presume that they cannot figure out a way to do so that comports with government guidelines applicable to horizontal mergers, and that the results would be fatal to their cause.

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<sup>58</sup> *NY PSC Staff White Paper*, p. 44.

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**V. APPLICANTS OFFER NO REAL EVIDENCE TO CONTEST THAT AT&T IS A CRITICAL SUPPLIER OF WHOLESALE INTEROFFICE TRANSPORT SERVICES.**

Importantly, the *Applicants June 24 Letter* is almost entirely devoted to defending their position that AT&T is not a meaningful supplier of alternative *loop* facilities. The letter is relatively silent on the topic of AT&T's role as a major provider of *interoffice transport* services. The letter, however, does offer a brief criticism of the Dr. Wilkie's transport HHI example, and so we must deal with it here.

First, the Applicants response is premised largely on a chart of CLEC collocations in SBC territory offered by Carlton-Sider.<sup>59</sup> This chart, however, only cites individual collocations – not collocations on both ends of a route – and thus has little meaning in the marketplace—or in the calculation of HHIs.<sup>60</sup> Second, the Applicants once again refuse to offer their own HHI calculations. Third, after reviewing data in NY relating to the loss of competitive transport facilities there due to the proposed SBC/AT&T and Verizon/MCI Mergers, the New York PSC staff recently reached the same conclusion as did Dr. Wilkie, stating that the “level of overlapping transport facilities, and the concomitant lack of additional transport providers on some of those routes with overlaps, indicates a significant anti-competitive impact of the merger(s)...”<sup>61</sup> *Indeed, in a shocking demonstration of the potential anticompetitive outcome, the New York PSC staff determined that some combination of the four merger partners are the only transport providers on 69.2% of the 487 TRRO triggered transport routes in New York.*<sup>62</sup> As recited earlier by Professor Bernheim, this is suggestive of a “merger to monopoly,”<sup>63</sup> and there can be no serious dispute that the increase in concentration in interoffice transport facilities caused by the proposed merger would undermine competition in the local telecommunications market.

<sup>59</sup> SBC-AT&T Joint Opposition, Dkt. 05-65, Carlton-Sider Reply Dec. ¶ 56.

<sup>60</sup> No carrier can provide alternative transport services without maintaining collocations on both ends of a route.

<sup>61</sup> *New York PSC Staff White Paper*, p. 36.

<sup>62</sup> *Id.*, p. 37. Notably, due to the operation of the so-called “one-way ratcheting” feature of the new TRRO rules, there is no “re-counting” or “re-listing” if the number of fiber-based collocators present falls below the threshold level.

<sup>63</sup> Declaration of B. Douglas Bernheim, April 25, 2005, attached to Petition to Deny of Qwest Communications in Docket 05-65 (“*Bernheim Declaration*”), ¶ 44-46.

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**VI. APPLICANTS' DISMISSAL OF THE LIKELIHOOD THAT SBC AND VERIZON WILL MUTUALLY FORBEAR FROM COMPETING WITH EACH OTHER OUT OF REGION IS DEFIED BY THEIR OWN HISTORY.**

The Applicants simply dismiss as "preposterous" Dr. Wilkie's suggestion that the economic literature predicts that the post-merger SBC and Verizon will be disinclined to compete with each other out-of-region. Their sole stated reason for rejecting Dr. Wilkie's analysis is that "SBC is spending billions of dollars to buy AT&T"<sup>64</sup> and would not be inclined to waste its nationwide network assets. The problem is that Applicants fail to explain away the horrid history of both SBC and Verizon in this area. They do not explain why SBC and Verizon have not followed through on promises in past mergers to become meaningful out-of-region competitors.<sup>65</sup> And they are strangely silent on why SBC and Verizon fail to compete with each other significantly in areas where they already have major adjacent local network facilities (*i.e.*, Southern California, Dallas/Irving, Connecticut/New York).<sup>66</sup> The record is overwhelming that SBC and Verizon have chosen not to compete head on,<sup>67</sup> even after committing to do so as a condition of approval of prior mergers, and Applicants utterly fail to provide any evidence of why this time will be different. Most fundamentally, whatever one believes about past history, Dr. Wilkie has painstakingly explained, using rigorous economic analysis, why mutual forbearance is a rational and achievable strategy for maximizing the profits of SBC and Verizon post-merger, given the prevailing level of competition in the market at the time. We hope that the Commission will heed the exhortation of Deep Throat and "follow the money," rather than crediting SBC's unsubstantiated and self-serving assertion that "this time will be different."

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In sum, the *Applicants June 24 Letter* is simply more of the same. Like any good public relations firm would teach them, Applicants hope that by simply stating often enough that the acquisition of the largest CLEC and largest IXC by the largest ILEC raises absolutely no competitive issues, that listeners will ultimately regard their rhetoric as fact by in effect "paying no attention to that man behind the curtain." Of course, the entire notion is nonsense. While the public interest benefits of a combination can be the subject of a policy debate, there can simply be no denying the fact that such a combination materially diminishes competition and causes the

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<sup>64</sup> *Applicants June 24 Letter*, p.11.

<sup>65</sup> Petition to Deny of Cbeyond *et al*, Dkt. 05-65 (April 25, 2005), pp. 16-18 & 46-59.

<sup>66</sup> See *Wilkie Ex Parte Presentation*, pp. 30-35; see *e.g. Bernheim Declaration*, ¶ 45.

<sup>67</sup> See, *e.g.*, "Broken Promises and Strangled Competition: The Record of Baby Bell Merger and Market Opening Behavior," Consumer Federation of America, Consumers Union and USPIRG, June 2005, pp. 22-25 (filed in WC Docket, 05-65).

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substantial public harms that flow from it. The Commission should decline the Applicants' request that it ignore the "800 pound guerilla" in the room. *As the New York PSC staff aptly summarized, "to the extent that one of two major wholesale services providers is being absorbed by the largest wholesale provider, the anti-competitive aspects of the merger appears obvious."*<sup>68</sup>

Sincerely,



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Jonathan Levy  
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<sup>68</sup> *NY PSC Staff White Paper*, p. 45.