

whatsoever on the numerous and powerful competitors that actively compete with BellSouth today for bundled, local and long distance service customers.

Bundled Services. BellSouth today faces intense competition from a wide variety of bundled service providers, including cable companies, wireless carriers and traditional CLECs. As the FCC concluded, “competition from intermodal competitors is growing quickly, and we expect it to become increasingly significant in the years to come.”³⁰¹

Cable companies, in particular, provide powerful competition to incumbent LECs for bundled services. Cable companies have near ubiquitous network facilities and established mass market customer relationships. Many major cable companies have been providing switched telephony services for years, and have an existing base of approximately 3 million circuit switched telephony subscribers.³⁰² For example, in South Florida, Comcast offers its cable customers an all-distance circuit switched telephone bundle for \$48.95 per month and, in Louisiana, Cox offers its cable customers an all-distance circuit switched telephone bundle for \$49.95 per month.

The development of VoIP technologies has allowed cable incumbents to upgrade their networks at very low incremental cost to support VoIP services in addition to the broadband Internet and video programming services they already offer. Comcast, for example, is offering its cable and Internet customers in Atlanta, Georgia a promotional local and long-distance VoIP bundle for \$19.95 for the first two months (and \$39.95 thereafter). In North Carolina, Charter is offering its cable and Internet customers a local

³⁰¹ *SBC/AT&T Merger Order* ¶ 101.

³⁰² *VoIP Gathering Momentum* at 9.

and long-distance VoIP bundle for \$39.99 per month, and Time Warner is offering a local and long-distance VoIP bundle to its cable and Internet customers for \$39.95 per month. These cable-based VoIP services offer the same local and long distance voice calling capabilities as traditional wireline services, as well as novel enhanced features.³⁰³ For these reasons, cable is BellSouth's most important competitor for bundled services.³⁰⁴

Indeed, the cable incumbents today have a significant regulatory advantage in trying to win local and bundled service customers from incumbent LECs like BellSouth and AT&T. Under today's rules, VoIP services are subject to minimal regulation and, as a result, cable incumbents can readily provide such services. By contrast, the regulatory status of AT&T's IP video offering has not been resolved. Although AT&T believes that its IP video service is not a "cable service" subject to Title VI local franchising requirements, local franchising authorities have taken a different view. And, as the record in the Commission's section 621 proceeding starkly confirms, the local franchising process is undisciplined by Commission rules and infected by protracted delays and unreasonable requirements that threaten entirely to thwart competitive video entry and investment in many areas.³⁰⁵

³⁰³ Thus, as the Commission has found, cable-based VoIP services are reasonably interchangeable with traditional wireline services and are in the "relevant service market." *SBC/AT&T Merger Order* ¶ 87.

³⁰⁴ *See id.* ("[T]here is documentary evidence that SBC views cable-based VoIP as its primary competitive threat in the mass market, and considers the prospect of consumer substitution to cable-based VoIP when devising its strategies and service offers.").

³⁰⁵ The Applicants remain hopeful that the Commission will take prompt action to eliminate these barriers to competition; however, until the Commission acts, AT&T's roll-out of its video service will be subject to questions and obstacles that the cable companies do not face in their deployment of telephony.

It is no surprise, then, that cable incumbents are making net gains in the bundled service market at a very rapid pace. “Cable telephony subscribers currently represent roughly 9% of telephony-ready homes, 9% of basic cable subscribers, 22% of cable modem subscribers and 8% of Bell households.”³⁰⁶ In 2005, the cable incumbents added 1.7 million new VoIP subscribers for an annualized growth rate of 301%, ending the year with 2.3 million VoIP subscribers.³⁰⁷ Overall, analysts estimate that cable companies have approximately 5.5 million telephony subscribers, compared with 3.6 million at the end of 2004.³⁰⁸

This already substantial competition from cable is intensifying. Cable companies are leveraging their broadband networks to expand their VoIP footprints and, as more communities gain access to this service, cable VoIP subscription rates will dramatically increase.³⁰⁹ Analysts predict that the “cable VoIP subscriber base [will] grow *even faster* in 2006” than in 2005.³¹⁰ By 2010, analysts “expect cable VoIP subscribers to exceed

³⁰⁶ *Wireline Telecom Play Book* at 3.

³⁰⁷ *VoIP Gathering Momentum* at 1.

³⁰⁸ *Id.* at 9.

³⁰⁹ *VoIP Gathering Momentum* at 8. Comcast, which had been the most conservative of the major cable MSOs in deploying VoIP, has a goal of “2M phone customers by end of ’06.” Jim Barthold, *Comcast Targets Phone in 2006*, Telecomms Online, Jan. 10, 2006, available at http://www.telecommagazine.com/Archives/article.asp?HH_ID=AR_1562. “Comcast’s network now passes about 16 million homes ‘that we’re ready to market and close to 20 million that are now ready but not yet marketed.’” *Id.* (quoting Brian Roberts); see also *Telecom Services 3Q05 Trend Tracker: Wireless Winners and Losers Diverge*, Morgan Stanley Equity Research North America, at 15 (Dec. 1, 2005) (noting that in key markets where cable VoIP has been actively marketed, Verizon has suffered substantial line losses).

³¹⁰ *VoIP Gathering Momentum* at 1; see also *Wireline Telecom Play Book* at 3 (predicting even greater increases in cable subscribership).

18% penetration of homes passed,³¹¹ and that cable companies will have about 22 million telephone subscribers.³¹²

Cable competition will further intensify as a result of the recently announced joint venture involving Sprint Nextel, Comcast, Time Warner Cable and Advance Newhouse that aims to provide access “to the most advanced integrated entertainment, communications and wireless products available anywhere in the United States.” The joint venture will be able to offer the “quadruple play” of video, wireless voice and data, high speed Internet and wireline voice service to the 75 million homes passed by the cable companies.³¹³

There are also multiple other very active providers of bundled services in the BellSouth region. Consumers are increasingly replacing their traditional wireline services with wireless services that bundle local and long-distance services.³¹⁴ Traditional wireline providers are also very active in the BellSouth region. In Florida for example, Supra Telecom – which provides wireline local, long-distance and Internet bundles to consumers and businesses – has over 200,000 customers, and has annual

³¹¹ *VoIP Gathering Momentum* at 1.

³¹² *Id.* at 8.

³¹³ Press Release, Sprint Nextel, Sprint Nextel, Comcast, Time Warner Cable, Cox Communications and Advance/Newhouse Communications to Form Landmark Cable and Wireless Joint Venture (Nov. 2, 2005), *available at* http://www2.sprint.com/mr/news_dtl.do?id=8961.

³¹⁴ *Personal Wireless Calling Surpasses Wireline Calling: A Wireless Substitution Update*, Yankee Group, at 2 (Aug. 2005) (“*Wireless Substitution Update*”).

revenues in excess of \$150 million.³¹⁵ Supra very recently announced aggressive plans to expand into Orlando and Tampa.³¹⁶

Local Service. The Commission already has determined that BellSouth, the incumbent provider of local exchange and exchange access services in its service areas, has irreversibly opened its local markets to competition.³¹⁷ BellSouth competes today with a multitude of cable and other local service providers of various types.³¹⁸

As the Commission concluded in the *SBC/AT&T Merger Order*, for example, “[t]he record reveals that growing numbers of subscribers in particular segments of the mass market are choosing mobile wireless service in lieu of local wireline service. . . . We also find that SBC considers this growing substitution in developing its marketing, research and development, and corporate strategies for its local service offerings.”³¹⁹

According to more recent data, “10% of wireless users [have] decid[ed] to do without a

³¹⁵ See Supra Telcom, About Us, available at <http://www.supratelecom.com/about.html>.

³¹⁶ See *Supra Telecom Expands Services To Orlando, Tampa*, Orlando Bus. J., Mar. 20, 2006, available at <http://orlando.bizjournals.com/orlando/stories/2006/03/20/daily7.html>.

³¹⁷ See *In re Joint Application by BellSouth Corp., BellSouth Telecomms., Inc., & BellSouth Long Distance, Inc., for Authorization to Provide In-Region InterLATA Servs. in Fla. & Tenn.*, Memorandum Opinion and Order, 17 FCC Rcd. 25828, 25830 ¶ 3 (Dec. 19, 2002); *In re Joint Application by BellSouth Corp., BellSouth Telecomms., Inc., & BellSouth Long Distance, Inc., for the Provision of In-Region InterLATA Servs. in Ala., Ky., Miss., N.C., & S.C.*, Memorandum Opinion and Order, 17 FCC Rcd. 17595, 17597 ¶ 3 (Sept. 18, 2002); *In re Joint Application by BellSouth Corp., BellSouth Telecomms., Inc., & BellSouth Long Distance, Inc., for Provision of In-Region InterLATA Servs. in Ga. and La.*, Memorandum Opinion and Order, 17 FCC Rcd. 9018, 9020 ¶ 3 (May 15, 2002).

³¹⁸ *SBC/AT&T Merger Order* ¶ 100 (“These competitors include not only wireline competitive LECs and long distance service providers but also, to at least some extent, facilities-based and over-the-top VoIP providers, and wireless carriers.”).

³¹⁹ *Id.* ¶ 90.

landline phone”³²⁰ and in households using wireless, “36% of local calls are now displaced by wireless.”³²¹

The trend toward wireless substitution is, if anything, accelerating. Industry analysts now estimate that 18 percent of households will be wireless-only by 2010.³²² As the Commission has explained, “a number of wireless carriers offer plans designed as a landline replacement service, *e.g.*, MetroPCS, Leap Wireless (Cricket) and Triton, as these plans include unlimited local calling within some specified local calling area and offer a traditional monthly recurring fee long distance calling option that closely resembles the cost for wireline local exchange service.”³²³ In the BellSouth region, there is vigorous competition among the national wireless carriers, including Verizon Wireless, Sprint Nextel and T-Mobile as well as numerous regional carriers, and there are a wide variety of wireless carriers that target and serve “wireless only” customers, including MetroPCS, Cricket, SunCom (formerly Triton) and others.

BellSouth also competes with many wireline carriers that use unbundled network elements or commercially negotiated substitutes therefor. For example, a number of carriers use negotiated UNE-P replacement arrangements; MCI (Verizon), for one, continues to advertise its “Neighborhood” calling plans in the BellSouth region, and MCI is still one of the largest takers of BellSouth’s mass market customers.

³²⁰ *Wireless Substitution Update* at 2.

³²¹ *Id.* at 5.

³²² *Telecom Services/Wireline*, JP Morgan North America Equity Research, at 1 (Jan. 13, 2006) (“*Telecom Services/Wireline*, JP Morgan”); *see also id.* at 4 (predicting that “wireless substitution will claim 20.3 million primary lines (18% of telephony households) by 2010”).

³²³ *Cingular/AT&T Wireless Merger Order* ¶ 240.

These numerous sources of competition are increasing in intensity. “[A]fter [incumbent] line losses had stabilized at 6.5 – 6.7M per year . . . in 2003 and 2004, they accelerated to more than 8.6M in 2005 (5.7% of total lines).”³²⁴ Analysts expect that incumbent telephone carriers will lose about 7.1 million access lines in 2006,³²⁵ and they expect cable and other VoIP providers to increase share of primary lines to 28% by 2010.³²⁶ AT&T’s combination with BellSouth will not have any adverse impact on the competitive abilities of these other active providers that will continue to compete for mass market customers.

Long Distance. Finally, the merger will not have any negative impact on competition for long distance services. The Commission has concluded many times that the long distance service market is structurally competitive.³²⁷ There are numerous established long distance providers with national fiber networks, including not only AT&T, but Verizon, Qwest, Global Crossing and Level 3. Further, entry barriers into the market are “low.”³²⁸ As the FCC has recognized repeatedly, there is a glut of long haul

³²⁴ *VoIP Gathering Momentum* at 5.

³²⁵ *Id.* at 10.

³²⁶ *Telecom Services/Wireline*, JP Morgan at 4. Analysts also predict that “wireless substitution will claim 20.3 million primary lines (18% of telephony households) by 2010.” *Id.* Thus, the best available evidence suggests that intermodal competitors will capture 46% of the mass market by 2010.

³²⁷ *Triennial Review Remand Order* ¶ 36 n.107 (citing earlier orders); *see also OI&M Order* ¶ 28 (“[T]he long distance market is substantially competitive.”).

³²⁸ *In re Application of 360° Commc’ns Co. & ALLTEL Corp.*, Memorandum Opinion and Order, 14 FCC Rcd. 2005, 2017 ¶ 26 (Dec. 30, 1998); *In re Application of Worldcom, Inc. & MCI Commc’ns Corp. for Transfer of Control of MCI Commc’ns Corp. to Worldcom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 18025 ¶¶ 36, 65 (Sept. 14, 1998) (“*MCI/Worldcom Merger Order*”).

capacity.³²⁹ Any carrier without its own long-distance network can obtain bulk capacity from facilities-based carriers at extremely competitive rates.³³⁰ And, demand for long distance service is highly elastic: mass market customers are extremely price sensitive and will switch providers should an existing carrier attempt to raise prices above competitive levels.³³¹

Moreover, as the Commission found in the *SBC/AT&T Merger Order*,³³² “consumers are increasingly using their mobile wireless services for long distance calls,” “SBC and AT&T consider minute substitution in their business strategies” and “a consumer who subscribes to both a mobile wireless service and a wireline long distance service will allocate minutes between these services in an optimal manner.”³³³ The most recent evidence suggests that wireless service is now the *dominant* means by which consumers make long distance calls.³³⁴ In households using wireless, “60% of long distance calls . . . are now displaced by wireless.”³³⁵ These trends are accelerating in response to “technological innovation [that] is making it likely that cellular networks will

³²⁹ *AT&T Non-Dominance Order* ¶ 58; *SBC/AT&T Merger Order* ¶ 146 (noting “the presence of extensive competitive national networks with excess capacity”); *id.* ¶ 150.

³³⁰ See *SBC/AT&T Merger Order* ¶ 103 n.314 (“AT&T’s significance is diminished further by the ability of other competitors to provide such service, given continued competition and excess capacity for wholesale interexchange services.”).

³³¹ *AT&T Non-Dominance Order* ¶ 63 (“[R]esidential customers are highly demand-elastic and will switch to or from AT&T in order to obtain price reductions and desired features.”).

³³² *SBC/AT&T Merger Order* ¶¶ 92-93.

³³³ *Id.* ¶ 93.

³³⁴ *Wireless Substitution Update* at 9 (“[W]ireless personal calling . . . exceeded that of wireline [in 2005].”).

³³⁵ *Id.* at 5.

be extended into the home using local-area wireless technologies.”³³⁶ For all of these reasons, the merger will have no adverse effect on competition for any mass market service.

3. The Merger Will Have No Adverse Impact on Competition from Over-the-Top VoIP Providers

AT&T is one of numerous over-the-top VoIP providers in the BellSouth region, many of which have a much more substantial market presence than AT&T. Vonage is the largest over-the-top VoIP provider, with 1 million customers nationwide (and 1.5 million subscriber lines).³³⁷ Numerous other over-the-top VoIP providers are active in the BellSouth region, including TouchTone, Broadfone, Broadvox Direct, Covad, EarthLink, MyPhoneCompany.com, Net2Phone, Opex, Packet 8, VoicePulse and ZingoTel; indeed, EarthLink and Covad just entered into an agreement to expand their residential VoIP offerings, including in Atlanta and Miami. These providers are unquestionably having an impact: analysts estimate that the U.S. VoIP subscriber base grew by 2.8 million subscribers in 2005, or 254%, to more than 4 million subscribers, of which 1.7 million are customers of over-the-top VoIP providers,³³⁸ and analysts expect over-the-top VoIP carriers to gain at least 4 million customers by 2008.³³⁹ With the

³³⁶ *Id.* at 10.

³³⁷ See Press Release, Vonage, Vonage Crosses the 1.5 Million Line Mark (Mar. 1, 2006), available at http://www.vonage.com/media/pdf/pr_03_01_06_mil.pdf; Tim Greene, *Vonage Hits One Million Paying Customers*, NetworkWorld.Com, Sept. 12, 2005, available at <http://www.networkworld.com/weblogs/convergence/009961.html>.

³³⁸ *Quarterly VoIP Monitor: VoIP Gathering Momentum, Expecting 20M Cable VoIP Subs by 2010*, Bernstein Research Call, at 1, 3 (Jan. 17, 2006) (“*VoIP Gathering Momentum*”).

³³⁹ *Competitive Telecom Carriers Industry Primer: Selectivity is Key*, The Buckingham Research Group, at 10 (Sept. 28, 2005).

explosion of broadband penetration and the expected “emergence of a credible ‘third provider’ of broadband access in the U.S.,”³⁴⁰ market penetration by VoIP providers can only increase.³⁴¹

In the *SBC/AT&T Merger Order*, the Commission found that the record was “inconclusive” as to whether “over-the-top” VoIP providers should be included in local service and bundled service product markets. If AT&T’s over-the-top VoIP service is in a product market separate from BellSouth’s local and bundled services, then there would

³⁴⁰ *Wireline Telecom Play Book*, UBS Investment Research, at 4 (Jan. 3, 2006) (“*Wireline Telecom Play Book*”); see also *In re Amendment of Part 15 Regarding New Requirements & Measurement Guidelines for Access Broadband Over Power Line Sys.*, Report and Order, ET Dkt. No. 04-37, 2 ¶ 1 (Oct. 28, 2004), available at <http://www.fcc.gov/omd/prd/docs/3060-1087/3060-1087-05.doc> (“This new technology offers the potential for the establishment of a significant new medium for extending broadband access to American homes and businesses. Given that power lines reach virtually every residence and business in every community and geographic area in this country, Access BPL service could be made available nearly everywhere. This new broadband delivery medium could also serve to introduce additional competition to existing cable, DSL, and other broadband services.”). Manassas, Virginia was the first city in the U.S. to offer municipal BPL -- it was available over a 10-mile radius for \$29 per month. See W. David Gardner, *First Citywide Broadband-Over-Powerline Site Inaugurated*, *InformationWeek*, Oct. 5, 2005, available at <http://www.informationweek.com/story/showArticle.jhtml?articleID=171203323>. Current Broadband now offers a BPL service in the Cincinnati area for \$26.95 a month. See *Current Communications*, available at <http://www.current.net/>.

³⁴¹ *SBC/AT&T Merger Order* ¶ 88 n.262 (noting broadband penetration generally exceeds 20%); *Telecom Services/Wireline*, JP Morgan, at 19 (predicting that “broadband penetration will increase from 31% in 2004 to 63% in 2010”). In addition, other large competitors, like Microsoft, Google and AOL, are moving into the over-the-top VoIP market. *Skype Hype Becomes Reality*, UBS Investment Research, at 4 (Sept. 13, 2005). Computer-based services like Skype also have the potential to make substantial inroads with recent technical advances. “A number of vendors are working to produce portable handsets that can support the Skype client and connect to the Internet through WiFi connections. Such a device, often called a WiFi phone, would enable a user to access the Skype service without a computer anywhere a WiFi signal could be obtained.” *Id.* at 5; see also, Press Release, Skype, D-Link and Skype Enable Internet Calls Using Traditional Phones (Jan. 3, 2006), available at http://www.skype.com/company/news/2006/skype_ces_dlink.html (noting that Skype has introduced phone adapter allowing consumers to use their traditional corded or cordless telephone while making VoIP calls on Skype’s network).

be no overlap and this merger plainly would not adversely affect competition in either market.³⁴²

But even analyzing over-the-top VoIP as part of the same market, there is no basis for concern, because AT&T still is not a significant provider.³⁴³ AT&T's over-the-top VoIP service, AT&T CallVantage, has fewer than 80,000 customers nationwide, and fewer than 14,000 in the nine states in which BellSouth operates.³⁴⁴ Out-of-region, AT&T has no relevant facilities or current capabilities that would provide significant advantages relative to the many other over-the-top VoIP providers in the market. As the Commission has long held, where (as here) one of the merging parties is "not a significant competitor" in the market or does "not possess any special retail assets or capabilities that would make it more likely than other carriers to become a major participant in the mass market," the merger "is not likely to affect adversely competition in this consumer market."³⁴⁵

³⁴² BellSouth has no over-the-top VoIP offering, as defined by the Commission. Rather, it has a "private label" agreement with 8x8 to market 8x8's service under the BellSouth brand to BellSouth's in-region DSL subscribers, with 8x8 supplying the equipment, technology, operational services, customer service, fulfillment and billing. See Boniface Decl. ¶ 35.

³⁴³ See *SBC/AT&T Merger Order* ¶ 88 n.263 ("[W]e cannot find that AT&T is a significant provider of this service.").

³⁴⁴ See Kahan Decl. ¶ 51.

³⁴⁵ *MCI/Worldcom Merger Order* ¶¶ 128-29. To date, AT&T has continued legacy AT&T's over-the-top VoIP strategy, but recently AT&T has begun to consider other options, including expanded marketing of AT&T CallVantage and using fixed wireless to serve territory adjacent to its ILEC service area.

D. The Merger Will Not Harm Competition in the Provision of Internet Services

The merger will not harm competition in the provision of either Internet backbone services or Internet access services. Moreover, there is no justification for imposing “net neutrality” conditions on the merger.

1. The Merger Will Not Harm Competition in the Provision of Internet Backbone Services

In the *SBC/AT&T Merger Order*, the Commission examined in detail the Internet backbone market and concluded that there were no anticompetitive horizontal or vertical effects that would arise from that transaction. That analysis applies with equal force here.³⁴⁶ In particular, the Commission concluded that the SBC/AT&T merger did not remove a Tier 1 competitor, and that the presence of numerous strong Tier 1 Internet backbone providers would prevent the merged SBC/AT&T from being able to de-peer its larger rivals. The principal factors that the Commission relied on in reaching this conclusion were:

- SBC was not a Tier 1 Internet backbone provider;
- The share of broadband “eyeballs” that would be “controlled” by the merged firm compared to the many more “eyeballs” served by other broadband providers;
- The ability of large ISPs, particularly cable companies, to switch backbone providers; and
- The presence of non-vertically integrated Tier 1 Internet backbone providers to whom such large ISPs could readily turn.³⁴⁷

³⁴⁶ Moreover, despite the absence of competitive harm from this transaction, AT&T remains bound by the commitments embodied in the *SBC/AT&T Merger Order*.

³⁴⁷ *SBC/AT&T Merger Order* ¶¶ 127-132.

These same factors obviate any concerns with respect to AT&T's acquisition of BellSouth. BellSouth has settlement-free peering with only one Tier 1 Internet backbone provider and therefore is not a Tier 1 Internet backbone provider itself. Moreover, there will remain a sufficient number of strong Tier 1 rivals to dispel any other competitive concerns.

a. The Number of Tier 1 Competitors in the Relevant Market Remains Unchanged by the Proposed Merger

The Commission has determined that Tier 1 Internet backbone services constitute a relevant product market,³⁴⁸ and the relevant geographic market for Tier 1 services is national in scope.³⁴⁹ The Commission has identified the participants in the national Tier 1 market by reference to their size, geographic reach and interconnections. Specifically, "Tier 1 IBPs peer with all other Tier 1 IBPs on a settlement-free basis."³⁵⁰ Further, "purchasers of Tier 1 Internet backbone services generally need the ability to

³⁴⁸ See *id.* ¶ 112 (citing the Department of Justice Complaint in *WorldCom/Sprint*). The parties note that defining a Tier 1 market by relying on the DOJ *WorldCom/Sprint* Complaint does not adequately account for several key changes in the Internet backbone sector since 2000: (1) Tier 2 IBPs are no longer dependent on inferior MAEs and public interconnection points, given the sharp rise in high quality, privately hosted interconnection points as reflected in the businesses of Equinix, Switch & Data (formerly PAIX) and NAP of the Americas, and (2) the increased ease with which secondary peering can and does occur between Tier 2 IBPs, and with ISPs and content providers means that the dependence on Tier 1 providers has diminished. When these issues are considered, it is clear that a Tier 1 IBP does not possess market power when offering transit pricing to lower Tier IBPs. See *id.* ¶ 131 n.389 (noting downward trend in transit prices); *id.* ¶ 132 (finding that prices and terms of interconnection in the market will be competitive). Whether or not these factors alter the scope of the relevant product market, they are central to the competitive effects analysis of any merger involving a Tier 1 IBP.

³⁴⁹ *SBC/AT&T Merger Order* ¶ 114.

³⁵⁰ *Id.* ¶ 111.

connect at multiple locations throughout the United States,” and “all Tier 1 IBPs have extensive nationwide networks.”³⁵¹

Relying on the statements made by SBC’s expert, Dr. Marius Schwartz, the Commission concluded that:

Based on the record evidence, we find that there likely are between six and eight Tier 1 Internet backbone providers based on the definition of Tier 1 backbones that has been used in the past: AT&T, MCI, Sprint, Level 3, Qwest, Global Crossing, and likely SAVVIS and Cogent.³⁵²

Notably absent from this list is BellSouth, which is properly excluded because BellSouth: (a) does not have the geographic reach to meet the peering requirements of most Tier 1 providers; (b) purchases transit from two of the IBPs identified by the Commission as Tier 1 providers in the *SBC/AT&T Merger Order*, and (c) peers with only one Tier 1 provider.³⁵³ The merger thus does not remove a Tier 1 backbone provider from the market.³⁵⁴

b. The Merger Will Not Create the Possibility for Global or Targeted De-Peering

In the *SBC/AT&T Merger Order*, the Commission recognized the highly competitive nature of the Tier 1 backbone market, noting that “several Tier 1 competitors

³⁵¹ *Id.* ¶ 114.

³⁵² *Id.* ¶ 115 (citing to Schwartz Decl. ¶ 20). While the Department of Justice identified 15 IBPs as the appropriate universe when computing the market shares and calculating the competitive effects in *WorldCom/Sprint*, the European Commission indicated that WorldCom at the time of the merger had 11 settlement-free peers, and AT&T, prior to its merger with SBC, had 16 settlement-free peers. BellSouth was not on any of these broader lists.

³⁵³ *See* Smith Decl. ¶ 44.

³⁵⁴ *SBC/AT&T Merger Order* ¶ 124 (concluding that SBC’s acquisition of AT&T “does not remove an existing Tier 1 provider, as SBC does not appear to have yet attained that status”).

with significant market shares would remain in the market post-merger.”³⁵⁵ Further, market shares (specifically as measured by traffic) “have fluctuated over time, suggesting that the market is both competitive and dynamic.”³⁵⁶

The *SBC/AT&T Merger Order* made clear that a merger may “tip” the Internet backbone market only where it creates a single dominant Tier 1 Internet backbone provider with a market share that is overwhelmingly disproportionate to its rivals.³⁵⁷ Because the merger of SBC and AT&T would not create such a dominant firm, the Commission specifically found that the merged entity would be “unlikely to have the incentive and ability to de-peer a sufficient number of its backbone rivals to ‘tip’ the market to monopoly or duopoly.”³⁵⁸ In particular, the Commission noted that the merged entity would account for only 16 percent of all broadband “eyeballs,” that cable companies collectively controlled more broadband “eyeballs” than all of the incumbent LECs combined and that there were other Tier 1 backbones with access to significant numbers of their own “eyeballs” and plans to expand their customer bases.³⁵⁹

The Commission likewise found that the SBC/AT&T merger would not lead to the potential for “targeted de-peering,” noting:

- SBC/AT&T would lack the ability to target large IBP rivals, “all of which command significant revenue shares of the backbone market.”
- “Level 3 recently surpassed AT&T in backbone traffic volume.”

³⁵⁵ *Id.*

³⁵⁶ *Id.* (noting that Level 3’s share of traffic had surpassed AT&T’s).

³⁵⁷ *Id.* ¶ 125.

³⁵⁸ *Id.*

³⁵⁹ *Id.* ¶ 127 n.373.

- Qwest, as an integrated ILEC and Tier 1 IBP, “should continue to bring competitive heft to the backbone market.”
- Comcast, the largest cable ISP, has announced plans to build its own Internet backbone.³⁶⁰

Sprint Nextel’s recent partnership with cable companies to support a cable company “Quadruple Play,”³⁶¹ as well as Level 3’s acquisition of WilTel,³⁶² have further strengthened the positions of these non-vertically integrated Tier 1 Internet backbone providers, thus ensuring continued dynamic competition for Internet backbone customers.

Like the SBC/AT&T transaction, the proposed merger of AT&T and BellSouth does not alter the competitive dynamic in the Tier 1 IBP market. The table below provides the most current information available to the Applicants about broadband “eyeballs.”³⁶³

³⁶⁰ *Id.* ¶ 135 n.405.

³⁶¹ Press Release, Sprint Nextel, Sprint Nextel, Comcast, Time Warner Cable, Cox Communications and Advance/Newhouse Communications to Form Landmark Cable and Wireless Joint Venture (Nov. 2, 2005), *available at* http://www2.sprint.com/mr/news_dtl.do?id=8961.

³⁶² Press Release, Level 3 Commc’ns, Level 3 Completes WilTel Acquisition (Dec. 23, 2005), *available at* <http://www.level3.com/press/6650.html>.

³⁶³ *2005 was Another Record Year for High Speed Internet: 42.8 Million Subscribe to Broadband from Top Cable and DSL Providers*, Leichtman Research Group, Inc. (Mar. 20, 2006), *available at* <http://www.leichtmanresearch.com/press/030206release.html> (as modified by individual company reports).

Total Residential and Small Business Broadband Lines

<u>Name</u>	<u>Total Lines in Service</u>	<u>Percent of Total</u>
AT&T	6.92 million	16.15%
BellSouth	2.88 million	6.72%
Subtotal (1)	9.80 million lines	22.87%
Comcast	8.52 million	19.89%
Verizon	5.14 million	12.00%
Time Warner Cable	4.82 million	11.25%
Cox	2.80 million	6.53%
Charter	2.20 million	5.13%
Adelphia	1.70 million	3.97%
Cablevision	1.69 million	3.94%
Qwest	1.50 million	3.50%
Others	4.67 million	10.90%
Subtotal (2)	33.04 million lines	77.13%
Total	42.84 million lines	100.00%
“Others” include:		
Bright House	1,179,000	
Sprint	693,000	
Covad	567,000	
Mediacom	478,000	
Insight	461,000	
AllTel	398,000	
CenturyTel	249,000	
RCN	245,000	
Cable One	234,000	
Cincinnati Bell	163,000	

The addition of BellSouth’s less than 3 million DSL customers to AT&T’s 6.9 million DSL customers means the merged firm still will have less than 25 percent of the total

share of residential and small business broadband customers. Comcast alone (following its share of the Adelphia acquisition) will have over 20 percent of broadband customers, and the top five cable companies will have approximately 50% of broadband customers. The merger thus will not alter today's competitive landscape in which multiple Tier 1 Internet backbone providers with significant market shares compete aggressively for business. As the Commission has stated, "We are persuaded that Internet backbone customers have sufficient ability to switch backbones to provide a check on any potential strategy of targeted de-peering. Particularly given the sophistication of many Internet backbone customers, we find it unlikely that they would allow themselves to be 'locked in' to a particular provider."³⁶⁴

c. The Merger Will Not Lead to Coordinated Interaction
Among Tier 1 IBPs

The Commission noted in the *SBC/AT&T Merger Order* that coordinated interaction among Tier 1 competitors was unlikely to occur because "sufficient vigorous Tier 1 backbone competitors would remain" such that "the feasibility of such coordinated strategies is questionable."³⁶⁵ Any coordinated-effects analysis would require AT&T and one or more other Tier 1 IBPs to de-peer selectively enough Tier 1 IBPs to make coordinated effects more likely, a result that the Commission found to be "speculative at the very least."³⁶⁶

³⁶⁴ *SBC/AT&T Merger Order* ¶ 129 n.381.

³⁶⁵ *Id.* ¶ 137.

³⁶⁶ *Id.*

All of the Commission’s prior findings on all aspects of horizontal effects apply with at least equal, if not greater, force in this transaction. BellSouth’s role as an IBP is regional and minor. The incremental effect of the merger, however measured, provides no basis to alter the findings made by the Commission just a few months ago when it concluded that the Internet backbone market was dynamic and competitive. Following this merger, there will continue to be the same number of Tier 1 competitors, each with the robust businesses and strong incentives the Commission found would result in vigorous competition for ISP and DIA customers.³⁶⁷

2. The Merger Will Not Harm Competition in the Provision of Internet Access Services

The merger raises no competitive concerns regarding the provision of Internet access services. There is only an insignificant overlap in the merging parties’ provision of Internet access services to mass market customers, and there will continue to be vigorous competition from a host of providers.

a. Internet Access Services Offered by AT&T

AT&T offers a wide variety of Internet access services to both residential and business customers. AT&T’s residential services are primarily offered within the 13 states in which it is the incumbent local exchange carrier. These services, offered in conjunction with Yahoo!, include both broadband and dialup Internet access. Broadband

³⁶⁷ Any allegations of vertical effects, such as those made by opponents in *SBC/AT&T* of “packet discrimination” and “traffic degradation,” can be dismissed on the same basis as before. *SBC/AT&T Merger Order* ¶ 142 (“We are generally unpersuaded that the commenters’ concerns are sufficiently merger specific and that the merged entity is likely to pursue the alleged strategies.”); *id.* ¶ 142 n.418 (“Even if the merger were to increase the ability of the merged entity to engage in packet discrimination and degradation, the record indicates that such strategies are unlikely to be profitable in the long term.”).

services provide connection speeds of 384 kbps to 6.0 Mbps downstream, and up to 608 kbps upstream. Out of its region, AT&T also has a wholesale agreement with Covad, in which AT&T pairs its local services with Covad's DSL services. However, through this arrangement, AT&T has only a limited number of DSL customers, and is not a significant competitor outside of its 13 state region.³⁶⁸ AT&T also continues to offer narrowband ISP services through its AT&T Worldnet service. AT&T, however, is no longer engaged in active marketing of its AT&T Worldnet product through, for example, direct mail or other external advertising.³⁶⁹

AT&T also offers a wide variety of wholesale and dedicated Internet access services. These services provide ISP and business customers with dedicated, high capacity connections between a business customer's facilities and the AT&T global network. AT&T offers a variety of DIA services, including Frame Relay, Private Line, ATM, Metro Ethernet, IP/VPN and SONET, at a variety of speeds of up to full OC192.

b. Internet Access Services Offered by BellSouth

BellSouth provides Internet access services exclusively within its nine-state local telephone service territory. It offers three major types of Internet Access Services: Retail Dial Internet Service, FastAccess Digital Subscriber Line ("DSL") and Direct Internet Access ("DIA"). Retail Dial Internet Service, which is offered to both residential and business customers throughout the BellSouth region, provides Internet access at speeds up to 56 kbps in both directions. FastAccess DSL service, which also is offered to both

³⁶⁸ Kahan Decl. ¶ 50.

³⁶⁹ *Id.*

residential and business customers, provides connection speeds of up to 6 Mbps downstream and up to 512 kbps upstream. DIA Service provides a constant connection between a business customer's location and the Internet over a variety of underlying transport technologies, including Frame Relay, Private Line, ATM and Metro Ethernet, at a variety of speeds (T1, fractional and full DS3/OC3/OC12). DIA includes burstable and tiered billing options, as well as diverse routing and connection alternatives.³⁷⁰

BellSouth also offers wholesale DSL transport service. This service provides Internet service providers ("ISPs") and enterprise customers with connection speeds up to 6 Mbps downstream and up to 512 kbps upstream and connection through either BellSouth's ATM or IP networks to the customer-specified server location.³⁷¹

c. The Merger Will Not Substantially Reduce Competition for Internet Access Services

The competitive overlap in Internet access services is minimal, and the combined company will continue to face substantial competition from other DSL providers, as well as cable companies and broadband offerings from DBS providers. Both AT&T and BellSouth provide DSL and dial-up Internet access services almost exclusively in their ILEC service territories, which do not overlap. While AT&T continues to provide DSL services to a limited number of out-of-region customers through a resale arrangement with Covad, AT&T is not currently marketing this service.³⁷² In any event, out of region, there are other actual or potential non-facilities-based DSL suppliers who could enter,

³⁷⁰ Smith Decl. ¶ 6.

³⁷¹ *Id.* ¶¶ 5-7.

³⁷² Kahan Decl. ¶ 50.

and indeed may well have entered, into similar arrangements with Covad or others, and there will continue to be competition from both DSL and cable broadband providers. The merger thus will not result in any material increase in market share for the provision of Internet access services for the combined company in either of AT&T's or BellSouth's regions.

Similarly, on a national as well as regional or local basis, AT&T and Bell South face substantial competition in the provision of Internet access services. At the conclusion of 2005, Comcast was the clear leader in the provision of broadband Internet access services, with more than 8.5 million subscribers.³⁷³ AT&T ranked second, with approximately 6.9 million subscribers,³⁷⁴ followed by Verizon and Time Warner Cable. BellSouth, with 2.88 million DSL subscribers, was the fifth largest behind Verizon and Time Warner Cable, and on par with Cox Communications.³⁷⁵ In fact, even after the merger, the combined company will have less than one-fourth of the total broadband users nationwide.³⁷⁶

In addition to Internet access via DSL and cable modem, wireless broadband is increasingly available to both consumers and businesses as a third competitive Internet access option. These wireless broadband technologies offer Internet connection speeds that are comparable to those offered by DSL and cable modem, and can be more quickly

³⁷³ See Comcast, 2005 Annual Report 12 (2006), available at <http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-reportsAnnual#>.

³⁷⁴ See AT&T Inc., Annual Report (Form 10-K), Ex. 13 at 10 (Mar. 1, 2006), available at <http://www.sec.gov/Archives/edgar/data/732717/000073271706000008/form10k2005.htm>.

³⁷⁵ See Table "Total Residential and Small Business Broadband Lines," *supra* at p. 103.

³⁷⁶ See *id.*

and inexpensively deployed than wireline options.³⁷⁷ In fact, it is estimated that nearly 90% of all US homes are in areas that are of appropriate density for WiMax deployment.³⁷⁸ In many areas, wireless broadband access is already available. For instance, earlier this year Verizon announced that it had rolled out EV-DO wireless broadband to customers in 181 major U.S. metropolitan areas.³⁷⁹ In addition to Verizon, a number of other companies are also aggressively deploying wireless broadband technologies.³⁸⁰ Thus, while competition between DSL and cable modem Internet access providers is already extremely aggressive, wireless broadband technologies increasingly provide yet another competing option for both business customers and consumers.³⁸¹

3. There Is No Legal or Policy Justification for Imposing a New “Net Neutrality” Condition on the Merger

Undoubtedly, some opponents of the merger will urge the Commission to impose a new “net neutrality” condition on the merger. There is no justification for doing so.

³⁷⁷ See Eric Manton, *WIMAX: The Rebel Broadband*, In-Stat, Dec. 2004, at 5.

³⁷⁸ *Id.*

³⁷⁹ See Press Release, Verizon, Verizon Business Unveils Integrated Wireless and Wired Solutions (Jan. 23, 2006), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93218>.

³⁸⁰ Sprint Nextel, for instance, has announced that its Power Vision EV-DO wireless service is now available in more than 141 major metropolitan areas, and will be accessible to 150 million people in over 220 major markets in early 2006. See Press Release, Sprint Nextel, Business Mobility Benefits Follow Expansion of Sprint Power Vision(SM) Mobile Broadband Service (Nov. 8, 2005), available at http://www2.sprint.com/mr/news_dtl.do?id=9020.

³⁸¹ In addition, other alternative Internet access technologies are currently under development. In particular, a number of companies are developing technologies to provide broadband access over the nation’s existing electric power grid. As former FCC Chairman Michael Powell was quoted as saying, because virtually every building has a power plug, this technology "could simply blow the doors off the provision of broadband [access services]." See Associated Press, *Broadband Over Power Lines?*, Wired News, Feb. 9, 2003, available at <http://www.wired.com/news/technology/0,1282,57605,00.html>.

Because the merger will not create or enhance market power in either the Internet backbone or Internet access markets, there is no merger-specific concern that could justify special “neutrality” requirements that would apply only to the merged company. Indeed, the proponents of more regulation have made clear in other contexts that they seek “neutrality” requirements of general applicability, for reasons that have nothing to do with this merger.

“Neutrality” requirements would be especially harmful if imposed on a single network in the form of merger conditions. The history of the Internet conclusively demonstrates that competition and innovation are best served by letting the marketplace decide what products, services and terms will be offered, rather than constraining market forces by government regulation. Any departure from that principle would profoundly affect the future of the Internet, and should be considered, if at all, only in proceedings of industry-wide applicability, in which all interested parties may participate. There is no reason for the Commission to address such complex policy matters in this proceeding, where there is no merger-related effect on competition.

E. The Merger Will Not Adversely Affect Competition in the Provision of International Services

The merger will not reduce competition in international telecommunications traffic or otherwise adversely affect that already competitive segment of the telecommunications industry. BellSouth does not have any holdings in any foreign carrier,³⁸² does not hold an equity interest in any satellite provider, and its international

³⁸² BellSouth has a contract to operate a telephone system for a four-building complex in Shanghai, China. The contract expires in May 2008, at which time the system will be turned over to the Shanghai telephone company. BellSouth is in the process of

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facilities are limited to small equity interests in two international submarine cables and an IRU in 12 miles of a third submarine cable.³⁸³ BellSouth's total international traffic amounts to only a small percentage of both total U.S. minutes of originating voice international traffic and total international U.S. data circuits. Consequently, the addition of the relatively limited number of BellSouth customers to the existing AT&T international customer list will not reduce competition in this segment of the industry. There will remain, after the merger, a large number of international carriers serving the United States and the BellSouth region. The loss of BellSouth as an independent provider will neither affect competition for that business nor deprive any customer of a wide choice of providers.

F. The Combination of the Incumbent LEC Operations in the AT&T and BellSouth Regions Will Have No Adverse Effect on the Public Interest

The AT&T-BellSouth merger will combine incumbent LECs with distinct, non-overlapping incumbent territories. In its orders approving the SBC/Ameritech and Bell Atlantic/GTE mergers, the Commission expressed two related concerns with respect to the combination of large incumbent LECs: (1) that the expansion of the merging incumbent LECs' "footprints" would increase their incentive to harm competition by discriminating against rivals in providing "bottleneck" facilities and (2) that such mergers

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dissolving BSI International ACCESS UK, Ltd., a licensed carrier in the United Kingdom, which has been inactive since December 31, 2002.

³⁸³ BellSouth holds small equity interests in the MAYA-1 and TAT-14 cables, and an IRU in Global Crossing's South American Crossing cable, from Miami to 12 miles offshore.

would eliminate “benchmarks” that were then “critical” to the Commission’s regulation of incumbent LECs.

Conditions have changed dramatically since the Commission’s approval of those prior incumbent LEC mergers in 1999 and 2000. The Commission’s findings in those prior merger proceedings (and the conditions it imposed) were premised on concerns that in a “one wire” world those earlier incumbent LEC mergers might interfere with efforts to implement the new market opening provisions of the 1996 Act or otherwise impede developing intramodal competition. The predicted harms never materialized; indeed, the exact opposite has occurred. The 1996 Act has been fully implemented, the Commission found that the BellSouth and legacy SBC local exchanges are irreversibly open to competition, and, although the SBC/Ameritech and Bell Atlantic/GTE merger conditions expired years ago, competition is flourishing in all customer segments, prices continue to fall, quality has dramatically improved, and both mass market and business customers have never had more or better choices.

As detailed above, incumbent LECs now face vigorous mass market competition not only from many strong intramodal competitors, but from a range of *intermodal* competitors that do not even use incumbent LEC loops to provide service. As the Commission recognized in the *SBC/AT&T Merger Order*, for example, “SBC faces competition from a variety of providers of retail mass market services. These competitors include not only wireline competitive LECs and long distance services providers but also . . . facilities-based and over-the-top VoIP providers, and wireless

carriers.”³⁸⁴ In the few years that they have been offering telephone services, the cable companies have made extraordinary inroads. Cable companies have approximately 5.5 million telephone subscribers³⁸⁵ and are expected to have 22 million subscribers within four years.³⁸⁶ Wireless calling now *exceeds* wireline calling,³⁸⁷ with nearly 10% of wireless users “cutting the cord” altogether.³⁸⁸ And the widespread deployment of DSL, cable modem and other broadband technologies has enabled competition from a host of “over-the-top” VoIP providers that today have millions of customers.³⁸⁹ In this robustly competitive environment, the BOCs lost nearly 8.6 million lines last year alone.³⁹⁰

Incumbent LECs face equally “robust” competition for their business services.³⁹¹ As detailed above and in the Commission’s SBC/AT&T and Verizon/MCI merger orders, “myriad providers are prepared to make competitive offers” to business customers, and such customers are likely to take full advantage of the choices available to them.”³⁹² “[F]oreign-based companies, competitive LECs, cable companies, systems integrators,

³⁸⁴ *SBC/AT&T Merger Order* ¶ 100; *see also id.* ¶ 104 (“As noted, we find that intermodal competitors, including facilities-based VoIP and mobile wireless providers, are likely to capture an increasing share of mass market local and long distance services.”); *id.* ¶ 150 (“In addition, the evidence shows that this industry segment faces increasing pressure from the migration of minutes to packet-switched voice services . . . and other technological substitutions.”).

³⁸⁵ *See VoIP Gathering Momentum* at 9.

³⁸⁶ *See id.* at 8.

³⁸⁷ *See Wireless Substitution Update* at 9.

³⁸⁸ *See id.* at 2.

³⁸⁹ *See VoIP Gathering Momentum* at 1, 3.

³⁹⁰ *See id.* at 5.

³⁹¹ *See SBC/AT&T Merger Order* ¶¶ 57, 73 n.223; *see also Verizon/MCI Merger Order* ¶ 74.

³⁹² *SBC/AT&T Merger Order* ¶ 73.

equipment vendors and value-added resellers,” among others, all compete vigorously in this space, and cable, VoIP and wireless providers, in particular, are dramatically expanding their presence.³⁹³ And much of this competition is from carriers that utilize their own last-mile fiber network facilities or that obtain them from another competitive carrier.³⁹⁴

For these and other reasons, neither of the concerns that the Commission identified six years ago in the *SBC/Ameritech* and *Bell Atlantic/GTE Merger Orders* (and some other ILEC merger orders of even older vintage) has any applicability to current conditions or to the AT&T/BellSouth merger. Combining the non-overlapping local operations of AT&T and BellSouth will have a straightforward result -- efficiencies that better position the merged company to compete.

³⁹³ *Id.* For example, cable companies that proclaim “[w]e’ve got everything we need to compete,” Ken Belson, *Not Just TV: Cable Competes for the Office Domain*, N.Y. Times, Aug. 3, 2005, at C1, available at 2005 WLNR 12179832, are leveraging their state-of-the-art networks to provide dedicated broadband transmission services to businesses. See also *SBC/AT&T Merger Order* ¶ 64. Overall, the Yankee Group estimates that cable providers sold \$1.2 billion in phone, data and video services to businesses in 2004, and expected that revenue reached \$2 billion in 2005. See *supra* Part VI.B.3.g.

³⁹⁴ See *supra* Part VI.B; *SBC/AT&T Merger Order* ¶ 73 (discussing enterprise competitors). As the Commission has now recognized, there is “substantial deployment of competitive fiber loops at the OCn capacity,” and “competitive carriers confirm that they are often able to economically deploy these facilities to the large enterprise customers that use them.” *Triennial Review Remand Order* ¶ 183. Also, “there does not appear to be any evidence of demand for incumbent LEC OCn level unbundled loops.” *Triennial Review Order* ¶ 315. These facilities can be used to offer not just OCn-level services to high demand customer locations, but also, through channelization, DSn-level services, and, in any event, DSn-level access remains available on a nondiscriminatory basis through regulated special access and unbundled network element offerings. And, as detailed above and in the attached declaration of Professor Carlton and Dr. Sider, CLECs have blanketed BellSouth’s major metro markets with thousands of miles of local fiber, have connected thousands of individual buildings to these local fiber networks and have established fiber-based collocation in scores of BellSouth wire centers that can be used to reach other commercial buildings in BellSouth’s region. See Carlton/Sider Decl. ¶¶ 123-29.

1. Greater Geographic Scope

The Commission expressed concern in the prior orders that the combination of incumbent LECs serving different regions might increase the risk of anticompetitive discrimination. The Commission found that “discriminatory conduct by an ILEC in its region affects competitors in areas both inside and outside of the incumbent’s region,” and that combinations of SBC and Ameritech, and Bell Atlantic and GTE, might therefore increase the extent to which they “internalize” these “spillover” effects, thus increasing their incentive to engage in discriminatory conduct.³⁹⁵ Whatever the merit of the Commission’s “spillover” theory in the competitive context in which it was developed, it cannot rationally be applied to the AT&T/BellSouth merger.

Preliminarily, the analysis set forth in these prior orders was entirely theoretical and rested upon a series of unexplored and untested assumptions.³⁹⁶ In an econometric

³⁹⁵ *SBC/Ameritech Merger Order* ¶¶ 192-93; *see also Bell Atlantic/GTE Merger Order* ¶¶ 177-78. Although the Commission found that these prior mergers would increase the likelihood of non-price discrimination, it rejected the claim that the mergers would increase the incentive and ability to undertake price squeezes. *SBC/Ameritech Merger Order* ¶¶ 231-35; *Bell Atlantic/GTE Merger Order* ¶¶ 196-98.

³⁹⁶ As Professor Carlton explained, four conditions must hold before one could reasonably conclude that the combination of two ILECs would have anticompetitive “spillover” effects:

First, sufficiently large external effects must affect CLECs’ investment incentives so that discrimination in one area will be significantly affected by discrimination in other areas. Second, the internalization of external benefits of discrimination resulting from a merger-related increase in an ILEC’s footprint must be sufficiently large to significantly affect an ILEC’s actions. Third, the theory requires that regulators will not identify increased discrimination by a merged ILEC. Finally, the decline in CLEC activity resulting from the increased discrimination must be sufficient to result in price increases.

Dennis Carlton, *Case Study: ILEC Mergers*, in *Econometrics: Legal, Practical, and Technical Issues* 378 (Am. Bar. Ass’n Section of Antitrust Law, ed. 2005).

study, Professor Dennis Carlton tested the Commission's hypothesis that the merger of neighboring large incumbent LECs would increase the likelihood of discrimination. To do so, Dr. Carlton tracked CLEC activity in various regions over time and then, using standard econometric techniques, evaluated the effect of the incumbent LEC mergers on that competitive activity. His analysis showed that there was *no* reduction in competition in areas served by merged incumbent LECs, that there was no significant decrease (or less growth) in CLEC activity in those incumbent LECs' regions compared to other regions and that CLEC activity in small LATAs served by larger incumbent LECs is higher than that in areas served by smaller, independent incumbent LECs that should, under the "spillover" theory, have less incentive to engage in discrimination.³⁹⁷

But there is no need here to resolve this theoretical debate, because the market conditions that were central to the Commission's conclusions in the prior merger orders no longer exist. Foremost, the Commission's prior analysis rested on the now inapplicable premise that SBC/Ameritech and Bell Atlantic/GTE had the ability successfully to discriminate against rivals because they then had "market power" over "bottleneck" inputs necessary for local, long distance and advanced services

³⁹⁷ *Id.* at 381-392. More specifically, claims that the SBC/Ameritech merger might cause the merged firm to reduce investment or degrade service quality have been proven wrong. In the five state region of the former Ameritech, SBC invested hundreds of millions of dollars after the merger to upgrade its telecommunications network to benefit customers. Between July 2000 and October 2001, SBC hired and trained more than 800 new network organization employees and 150 customer service employees in that region. As a result, service quality increased dramatically in that region. SBC likewise continued its commitment to community service and accelerated its contributions in many areas. And in the intervening years SBC (and now AT&T) has continued to invest heavily in its network to improve service quality and enable new services and features in a highly competitive environment.

competition.³⁹⁸ However, as the Commission expressly recognized, emerging competition is “the one sure remedy for the ILEC’s threat of discrimination.”³⁹⁹ The market-opening provisions of the 1996 Act now have been “fully implemented,”⁴⁰⁰ and all of the relevant local markets have now long been irreversibly and fully “open” to competition.

Indeed, as explained above, the Applicants’ local markets are not just “open” to competition, but the Applicants face existing and growing competition from an expanding array of intra- and intermodal competitors. And what is true of “traditional” services is equally true of the “advanced services” that were a focus of the Commission’s analysis.⁴⁰¹ In its recent *Title I Broadband Order*, the Commission concluded that a “mandatory common carrier broadband transmission requirement” was *not* necessary to ensure that unaffiliated providers “obtain wireline broadband transmission that meets their needs at reasonable prices.”⁴⁰² Rather, the Commission found that existing competition provided the BOCs with “business incentives [that] will compel [the BOCs]

³⁹⁸ See, e.g., *SBC/Ameritech Merger Order* ¶ 202 (“In addition, competitors often are totally dependent on incumbent LECs for last mile wireline access to end users”); *id.* ¶ 208 (the ILECs have “monopoly control over loops”); *id.* ¶ 217 (“[G]iven their monopoly control over exchange access services, [ILECs] currently have the ability to discriminate against rivals providing interexchange services.”); *Bell Atlantic/GTE Merger Order* ¶ 176 (“Incumbent LECs’ ability to discriminate against retail rivals stems from their monopoly control over key inputs that rivals need in order to offer retail services.”).

³⁹⁹ *SBC/Ameritech Merger Order* ¶ 230. In addition, these competitors would also capture many of the “benefits” of harming rivals.

⁴⁰⁰ *Qwest Omaha Forbearance Order* ¶ 51.

⁴⁰¹ See, e.g., *SBC/Ameritech Merger Order* ¶ 117 (“Having a significant number of independent points of observation is especially crucial for regulators and competitors in decisions regarding new services and innovative technologies.”).

⁴⁰² *In re Consumer Prot. in the Broadband Era*, WC Dkt. No. 05-271, 2005 WL 2347773, at *24 ¶ 75 (2005) (“*Title I Broadband Order*”).

to offer broadband transmission on a commercially reasonable basis . . . and will motivate [the BOCs] to negotiate mutually acceptable rates, terms, and conditions.”⁴⁰³

Further, in the prior merger orders, the Commission concluded that it lacked the means to detect adequately discrimination by incumbent LECs. With respect to mass market local services, the Commission observed that “competitive LECs have little experience in successful provision of local exchange services to mass market customers,” and thus “there exist few examples of incumbent LECs’ best practices in provisioning inputs for competitive LECs to use for serving mass market customers that could be used as benchmarks to detect discriminatory and unreasonable behavior.”⁴⁰⁴ But the Commission then expressly recognized that “on a going forward basis, as SBC and Ameritech receive section 271 authority, their ability to discriminate successfully against rival local service providers should diminish.”⁴⁰⁵

There is no longer any basis for concerns that such discrimination would be difficult to detect. Sections 251 and 271 are now “fully implemented,” and regulators and the industry have many years of experience with those arrangements. Further, as a result of the section 251 and section 271 proceedings, BellSouth and AT&T are subject to comprehensive “performance standards” and self-executing remedy plans that ensure continued compliance with section 251 in all of their incumbent states. These plans establish standards for BellSouth’s and AT&T’s performance with respect to pre-ordering, ordering, provisioning, billing and maintenance, and repair of network

⁴⁰³ *Id.*

⁴⁰⁴ *SBC/Ameritech Merger Order* ¶ 240.

⁴⁰⁵ *Id.* ¶ 242.

elements, and measure their performance in meeting such standards. If BellSouth's or AT&T's performance fails to meet these standards, these performance remedy plans subject BellSouth and AT&T to automatic penalties.

Special access and switched access provisioning are likewise accomplished through processes that are now quite mature, and, as the Commission has recognized, the many Commission performance audits that have been conducted since the prior BOC mergers were approved have disclosed no substantial problems in these areas.⁴⁰⁶ There can be no legitimate concerns about switched access *rate* discrimination given that those rates are now capped by CALLS, and the Commission's pending reform of intercarrier compensation. And, as the Commission has repeatedly recognized, "the *Special Access NPRM* is the appropriate proceeding to address . . . arguments concerning special access competition and rates."⁴⁰⁷

Further, there have been important intervening structural changes in the industry. For example, at the time of these earlier mergers, the merging BOCs did not have any significant out-of-region operations, and the Commission relied upon that fact in hypothesizing that the mergers would increase the merged ILECs' incentives to discriminate. The Commission reasoned that, before the mergers, the merging companies

⁴⁰⁶ *OI&M Order* ¶ 21 ("Section 272 audit reports that have been concluded to date have identified certain compliance issues but generally have not disclosed systemic or significant issues."); *id.* ¶ 21 n.68 ("[T]here is no indication [of] . . . systemic discrimination by the BOCs in favor of their long distance affiliates.").

⁴⁰⁷ *In re Application for Waiver of Pricing Flexibility Rules for Fast Packet Servs.*, Memorandum Opinion and Order, FCC 05-171 ¶ 13 (Oct. 14, 2005); *see also SBC/AT&T Merger Order* ¶ 55 ("[T]o the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors . . . such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing.").

would derive no out-of-region benefit from in-region discrimination against national competitors. It therefore took the view that reducing each merging company's out-of-region area while increasing the combined company's in-region area would increase the incentives to discriminate. But today, AT&T, Verizon and Qwest all provide enterprise services nationwide. In light of these companies' current operations, the Commission's earlier theory that mergers would create new incentives is outdated even on its own terms.

In short, because of the competition that has developed in mass market and business services, because of the structural changes that have occurred in the nation's incumbent LECs and because the market-opening requirements of sections 251 and 271 of the 1996 Act have now been fully implemented, the concerns that the Commission previously expressly about combinations of large incumbent LECs that serve different regions have no application to the AT&T/BellSouth merger.

2. Benchmarks

The Commission also expressed concern in the prior merger orders that those combinations would harm the public interest by reducing the opportunities for “comparing” the practices of large incumbent LECs and using one LEC's practices as a “benchmark.”⁴⁰⁸ It found that each of these incumbent LECs was then a monopoly provider of local exchange and exchange access services in its region and that each had the ability and the incentive to act to prevent competitive alternatives from developing.⁴⁰⁹

⁴⁰⁸ *SBC/Ameritech Merger Order* ¶ 104; *Bell Atlantic/GTE Merger Order* ¶ 130.

⁴⁰⁹ *See, e.g., SBC/Ameritech Merger Order* ¶ 107 (reasoning that benchmarking was necessary because incumbent LECs “have strong economic incentives to preserve their traditional monopolies over local telephone service” (and thus to resist unbundling-based

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The Commission specifically relied on the fact that it and state utility commissions were then in the process of trying to define and implement the new wholesale “sharing” requirements that the 1996 Act imposed on incumbent LECs,⁴¹⁰ and the Commission found that the existence of multiple independent incumbent LEC “benchmarks” had proven valuable in the initial attempts to define the obligations to provide number portability, unbundled loops, cageless collocations and other then novel wholesale arrangements.⁴¹¹

However, in these earlier orders, the Commission also recognized that this situation would not last forever. It “agree[d]” that the marketplace is highly dynamic and could reasonably be expected to “evolve” in ways that would eliminate the “acute” need for the “benchmarks” that multiple independent incumbent LECs theoretically offer.⁴¹² The Commission’s expectations have now been fully realized, and the AT&T/BellSouth merger does not remotely raise the benchmarking-related concerns identified in the prior orders.

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intramodal competition)); *id.* ¶ 104 (“The loss of this more efficient method of oversight can only serve to further entrench the large incumbent LEC’s substantial market power.”); *Bell Atlantic/GTE Merger Order* ¶ 154 (finding benchmarking necessary prior to “the transition to full competition in local markets”).

⁴¹⁰ See, e.g., *SBC/Ameritech Merger Order* ¶¶ 106-07; *Bell Atlantic/GTE Merger Order* ¶ 154.

⁴¹¹ See, e.g., *SBC/Ameritech Merger Order* ¶ 131 (technical feasibility of interconnection); *id.* ¶¶ 132-33, 137, 142 (collocation); *id.* ¶¶ 139, 141, 142 (number portability); *id.* ¶ 142 (loop testing); see also *id.* ¶ 107 (noting incumbent LEC’s “greater incentive to deny special accommodations required by competitive LECs seeking to offer innovative advanced services that the incumbent may not even offer”); *id.* ¶ 109 (“Comparative practices analyses are perhaps the regulators’ and competitors’ best means of staying abreast of such rapid technological advances, particularly in assessing the technical feasibility of novel access and interconnection configurations . . .”).

⁴¹² *Bell Atlantic/GTE Merger Order* ¶ 154.

First, in stark contrast to the 1999-2000 period, the legal requirements of the 1996 Act have been concretely defined. In particular, section 271 authorization has been granted in all states; local markets are fully and irreversibly open to competition; and the industry and regulators now have many years of experience with unbundling, interconnection and other section 251 arrangements.⁴¹³ Thus, the areas that the Commission identified as candidates for BOC-to-BOC benchmarking comparisons (for example, loop testing and provisioning, number portability and cageless collocation) are the subject of performance plans that specify the standards that both BellSouth and AT&T must meet. Furthermore, disputes about such matters have largely disappeared – indeed, access to incumbent LEC local facilities is now more commonly accomplished through individually negotiated commercial arrangements, without state commission participation, than through arbitrated dispute resolution. For these reasons, the Commission has now concluded that sections 271 and 251 have been “fully implemented.”⁴¹⁴

Second, there have been fundamental changes in the BOCs and their incentives, for they now operate as both purchasers and sellers of access and interconnection. In

⁴¹³ Further, in the 1999 and 2000 merger orders, the Commission largely based its findings that BOC-to-BOC benchmarking was important on a perceived need for tools to assess an incumbent LEC’s performance in meeting section 251 obligations to provide competitors with new access arrangements that were *superior* to the arrangements that the ILEC provided to itself or its affiliates. See, e.g., *SBC/Ameritech Merger Order* ¶¶ 107, 109. The Commission has since clarified that competitive parity is the appropriate standard and that ILECs are not obligated to modify their networks or provide innovative forms of access or interconnections that the LECs or their affiliates do not enjoy. *Triennial Review Order* ¶ 632 (holding that ILECs are required only to “make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed”).

⁴¹⁴ *Qwest Omaha Forbearance Order* ¶ 51.

1999-2000, each BOC's wireline services were essentially confined to its own incumbent service territory, and the merger orders rested on concerns that, as a result, incumbent LECs had unconstrained incentives to resist interconnection and other market-opening arrangements to protect their dominant in-region positions. But AT&T, Verizon and Qwest have subsequently each merged with national interexchange carriers, and each is now a national (and international) service provider that is a substantial *consumer* of access and interconnection outside of its historical incumbent LEC region. Thus, whatever alleged incentives these BOCs may have had in 1999 to adopt similar policies of opposition to pro-competitive policies no longer exist.⁴¹⁵

Third, today's converged marketplace, in contrast to the marketplace of 1999-2000, is characterized by robust intermodal competition across *all* services and customer segments that not only removes any basis for competitive concerns, but also provides additional "benchmark" companies to which regulators could turn if there remained any need for benchmarking comparisons. As noted above, facilities-based CLECs, cable companies, international carriers and others have deployed alternative wireline and wireless connections to many thousands of business locations throughout AT&T's and BellSouth's territories. In addition, competition for retail mass market customers from cable companies, VoIP providers and wireless carriers abounds, and continues also to be provided by competitors who use UNEs or UNE-P replacements (or rely on other voluntary wholesale access arrangements). And, just as the Commission predicted in its prior merger orders, the full nationwide implementation of the competitive checklist has

⁴¹⁵ Cf. *SBC/Ameritech Merger Order* ¶¶ 156-58.

eliminated any basis for the Commission's earlier concerns that mergers of incumbent LECs could lead to undetected discrimination against such competitors.

This competition provides adequate market incentives for AT&T and BellSouth to reach reasonable wholesale arrangements to avoid losing the business altogether to the intermodal competitor.⁴¹⁶ The proof is in the pudding. AT&T and BellSouth now provide voluntary wholesale UNE-P to scores of carriers that use these arrangements to serve millions of lines. Likewise, both AT&T and BellSouth offer heavily discounted contract tariffs and other arrangements to special access customers to ensure that traffic stays on their networks.

In sum, it is now abundantly clear that the enlarged "footprint" and benchmarking concerns identified in prior incumbent LEC mergers have no rational application to current conditions or to the AT&T/BellSouth merger.

VII. RELATED GOVERNMENTAL FILINGS

In addition to filings with the Commission, AT&T and BellSouth are taking steps to satisfy the requirements of other governmental entities with respect to the merger. First, the Department of Justice will conduct its own review of the competitive aspects of this transaction pursuant to the Hart-Scott-Rodino Antitrust Improvement Act of 1976 and the rules promulgated thereunder. Second, certain state commissions may review the merger. Third, local franchising authorities in certain jurisdictions in which BellSouth holds cable television franchises may review the transfer of control of certain cable franchise agreements effected by this merger. Finally, AT&T and BellSouth will make

⁴¹⁶ *Title I Broadband Order* ¶ 75.

certain notifications to or filings with competition authorities in a few foreign countries as required by applicable law. The Applicants fully expect that these reviews will confirm that the merger of AT&T and BellSouth is in the public interest and not anticompetitive.

VIII. MISCELLANEOUS REGULATORY ISSUES

In addition to seeking the Commission's approval of the transfers of control of the FCC authorizations and *de facto* transfer spectrum leases covered in these applications, the Applicants also request the additional authorizations described below.

A. After-Acquired Authorizations

While the list of call signs and file numbers referenced in each application is intended to be complete and to include all of the licenses, authorizations and *de facto* transfer spectrum leases held by the respective licensees or lessees that are subject to the transaction, BellSouth and Cingular licensees or lessees may now have on file, and may hereafter file, additional requests for authorizations for new or modified facilities which may be granted or may enter into new spectrum leases before the Commission takes action on these transfer applications. Accordingly, the Applicants request that any Commission approval of the applications filed for this transaction include authority for AT&T to acquire control of: (1) any authorization issued to the respective licensees/transferors during the pendency of the transaction and the period required for consummation of the transaction; (2) any construction permits held by the respective licensees/transferors that mature into licenses after closing; (3) any applications that are pending at the time of consummation; and (4) any *de facto* transfer leases of spectrum

into which BellSouth or Cingular subsidiaries enter as lessees during the pendency of the transaction and the period required for consummation of the transaction. Such action would be consistent with prior decisions of the Commission.⁴¹⁷ Moreover, because AT&T is acquiring BellSouth and Cingular and all of their FCC authorizations and *de facto* transfer leases of spectrum, AT&T requests that Commission approval include any authorizations that may have been inadvertently omitted.

B. Trafficking

To the extent any authorizations for unconstructed systems are covered by this transaction, these authorizations are merely incidental, with no separate payment being made for any individual authorization or facility. Accordingly, there is no reason to review the transaction from a trafficking perspective.⁴¹⁸

C. Blanket Exemption to Cut-Off Rules

The public notice announcing this transaction will provide adequate notice to the public with respect to the licenses involved, including any for which license modifications are now pending. Therefore, no waiver needs to be sought from sections 1.927(h) and 1.929(a)(2) of the Commission's rules to provide a blanket

⁴¹⁷ *SBC/AT&T Merger Order* ¶ 212; *Cingular/AT&T Wireless Merger Order* ¶ 275; *SBC/SNET Merger Order* ¶ 49; *Bell Atlantic/ NYNEX Merger Order* ¶¶ 246-56; *In re Applications of Pac. Telesis Group & SBC Commc'ns Inc.*, Memorandum Opinion and Order, 12 FCC Rcd. 2624, 2665 ¶ 93 (Jan. 31, 1997); *In re Applications of Craig O. McCaw & AT&T*, Memorandum Opinion and Order, 9 FCC Rcd. 5836, 5909 ¶ 137 n.300 (Sept. 19, 1994), *aff'd sub nom. SBC Commc'ns Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995), *recons. in part*, 10 FCC Rcd. 11786 (Oct. 30, 1995).

⁴¹⁸ *See* 47 C.F.R. § 1.948(i) (2004) (noting that the Commission *may* request additional information regarding trafficking if it appears that a transaction involves unconstructed authorizations that were obtained for the principal purpose of speculation); *id.* § 101.55(c)-(d) (permitting transfers of unconstructed microwave facilities, including Local Multipoint Distribution Service, that are "incidental to a sale of other facilities or merger of interests").

exemption from any applicable cut-off rules in cases where the Applicants file amendments to pending applications to reflect the consummation of the proposed transfers of control.⁴¹⁹

D. Miscellaneous Pro Forma Issues

AT&T's acquisition of BellSouth's portion of Cingular is a pro forma transfer of negative control. Currently, as discussed above, AT&T holds roughly 60 percent of the equity of Cingular Wireless LLC while BellSouth holds roughly 40 percent. AT&T and BellSouth own equal shares of and have equal voting rights in Cingular Wireless Corporation, which manages and exercises *de facto* control of Cingular Wireless LLC. Therefore, both AT&T and BellSouth are deemed to have negative control of Cingular.⁴²⁰ Under longstanding Commission precedents, when one party with negative control of a licensee transfers its interest to the other party with negative control, thereby giving the second party affirmative control, the Commission treats the transaction as pro forma.

*Barnes*⁴²¹ is the leading case for this principle. In that case, two stockholders each held 50 percent of the licensee's stock. Thereafter, they filed a short-form application⁴²² in which they each proposed to assign five percent of their stock to an employee, which would result in a 45-45-10 ownership structure. The Commission

⁴¹⁹ See *In re Applications of Ameritech Corp. & GTE Consumer Servs. Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 6667, 6668 ¶ 2 n.6 (Aug. 20, 1999); *In re Applications of Comcast Cellular Holdings, Co. & SBC Commc'ns Inc.*, Memorandum Opinion and Order, 14 FCC Rcd. 10604, 10605 ¶ 2 n.3 (July 2, 1999).

⁴²⁰ See, e.g., *Cingular/AT&T Wireless Merger Order* ¶ 26.

⁴²¹ *In re Application of Barnes Enters., Inc.*, Memorandum Opinion and Order, 55 F.C.C.2d 721 (Oct. 2, 1975) ("*Barnes*").

⁴²² In the broadcast services, a Form 316 (or "short-form application") is used for pro forma transfers of control. See 47 C.F.R. § 73.3540(f).

concluded that the use of a short-form application was appropriate because the transaction was not “substantial” (*i.e.*, it was pro forma). It reached this conclusion because neither 50 percent or more of the stock was being transferred nor did a party whose ownership of the licensee had not yet received FCC approval wind up with 50 percent or more of the stock. Of particular relevance, however, the Commission recognized that the case where one 50-percent owner transfers to the other 50-percent owner is an exception to the rule that the transfer of 50 percent or more of the stock is a substantial transaction. The FCC declared that such 50-percent-to-100-percent transactions are pro forma.⁴²³

Although the key precedents have arisen in the context of small broadcast transactions, the Commission has extended them to large telecommunications transactions as well. Indeed, in the applications for Cingular’s acquisition of AT&T Wireless Services, Inc., the parties characterized the transfer of the Roadrunner joint venture licenses⁴²⁴ from evenly divided control between Cingular and AT&T Wireless to

⁴²³ *Barnes*, 55 F.C.C.2d at 725 ¶ 8 n.4 (“As an exception to this general requirement, consent to a transaction involving a 50% stock transfer whereby an existing stockholder with negative (50%) control acquires positive control, is allowed to be filed for on a Form 316.”); *In re Applications of Grace Missionary Baptist Church, Emerald Commc’ns, Inc. & The Jones Co. for Constr. Permit*, Memorandum Opinion and Order, 80 F.C.C.2d 330, 336 n.16 (Sept. 8, 1980); *In re Application of Don & Shirley Lovelace Transferors & Raymond & Bright Parker Transferee for Transfer of Control of Gaffney Broad., Inc.*, Memorandum Opinion and Order, 35 Rad. Reg. 2d (P&F) 1607 (Jan. 16, 1976) (approving the use of a short-form application where one married couple, which already held 50 percent of Gaffney’s stock, acquired the other 50 percent from another married couple).

⁴²⁴ Roadrunner was a joint venture between Cingular and AT&T Wireless to extend CMRS service along highways in various rural areas. Each joint venturer contributed partitions (and, in some cases, disaggregations) out of its PCS licenses to the joint venture entities. One of these entities also held an international Section 214 authorization.

100-percent holdings of Cingular as a pro forma transaction.⁴²⁵ The Commission accepted that characterization without comment either in the public notice accepting the applications for filing or in its order approving the transaction.⁴²⁶

In light of these precedents, it is clear that the transfer of BellSouth's interest in Cingular is a pro forma transaction. For pro forma transactions, the Commission's rules permit post-consummation notifications, instead of applications for advance consent, for virtually all of Cingular's authorizations and leases.⁴²⁷ Faced with a similar situation for the Roadrunner joint venture licenses in the Cingular/AT&T Wireless applications, the parties merely stated that they would provide post-consummation notifications for those licenses.⁴²⁸ The Commission did not object to that statement either formally in the public

⁴²⁵ *In re Applications of AT&T Wireless Servs., Inc. & Cingular Wireless Corp.*, Description of Transaction, Public Interest Statement and Waiver Request, WT Dkt No. 04-70, at 61 (Mar. 18, 2004), available at http://www.fcc.gov/transaction/cingular-att_wireless.html#appdocs (“*Cingular/AT&T Wireless Application*”).

⁴²⁶ *See also Int'l Authorizations Granted*, Public Notice, 20 FCC Rcd. 2477, 2479 (Feb. 10, 2005) (approving a pro forma transfer of control when one half owner bought out the other half owner while noting that “each party held a 50 percent membership interest and exercised negative control of Starpower”); *In re Applications of Central Dakota TV, Inc.*, Order on Reconsideration, 19 FCC Rcd. 21005, 21009 ¶ 11 (Oct. 25, 2004) (citing *Barnes* in finding that it was a pro forma transfer of control when one half owner of an MMDS licensee redeemed the other half owner's interest); *In re Applications of Vodafone AirTouch, Plc & Bell Atl. Corp.*, Memorandum Opinion and Order, 15 FCC Rcd. 16507 (Mar. 30, 2000) (concluding that the shift from negative to positive control of the PrimeCo properties caused by the Bell Atlantic/Vodafone merger was pro forma since both parties continued to have controlling interests (Vodafone's majority equity interest and Bell Atlantic's managerial control)).

⁴²⁷ *See* 47 C.F.R. § 1.948(c)(1) (common carrier wireless, including CMRS); *id.* § 63.24(f) (international Section 214 authorizations); *id.* § 1.9020(j) (spectrum leases); *id.* § 1.9030(i) (*de facto* transfer leases). Nevertheless, the Applicants recognize that they need to seek advance consent for the roughly two dozen Part 90 private land mobile and Part 5 experimental licenses held by Cingular. *See id.* § 1.948(c)(1) (stating that the post-consummation notification it authorizes only applies to common carrier wireless licenses); *id.* § 5.79 (requiring advance consent for assignments and transfers of control of experimental authorizations without an exception for pro forma transactions).

⁴²⁸ *See Cingular/AT&T Wireless Application* at 61.

notice accepting the applications for filing or the order approving the transaction or informally. Consequently, the Applicants respectfully submit that the Commission should permit the parties to take the same approach here.

Out of an abundance of caution, however, the Applicants are filing pro forma applications to transfer control of all of Cingular's authorizations to AT&T. Likewise, the Applicants have requested Cordova Wireless, Muskegon Cellular Partnership, and St. Joseph CellTelCo to file pro forma transfers of control of Cingular's minority interests from BellSouth to AT&T in those general partnerships although the practice in past transactions has been to permit post-consummation filings in similar circumstances.⁴²⁹ Should the Commission conclude that these applications for advance consent to the pro forma transfer of Cingular's authorizations and interests in these general partnerships were unnecessary (except to the extent they cover private land

⁴²⁹ Under the relevant partnership agreements, Cingular is precluded from exercising control over these partnerships, and the relevant state partnership laws permit parties to contract around the default presumption that each general partner has a right to participate in management and governance. In a similar instance, the staff approved post-consummation notifications. *See Wireless Telecomms. Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications & Spectrum Manager Lease Notifications Action*, Public Notice, Rep. No. 1756, at 14 (Feb. 25, 2004) (approving ULS File No. 0001529630); *Wireless Telecomms. Bureau Assignment of Authorization & Transfer of Control Applications Accepted for Filing*, Public Notice, Rep. No. 1695, at 25 (Dec. 17, 2003) (approving ULS File No. 0001534079); *see also Wireless Telecomms. Bureau Complete Review of Proposed Inv. by Teléfonos de México, S.A. de C.V. in Parent of Cellular Commc'ns of P.R.*, Public Notice, 15 FCC Rcd. 1227, 1227-28 (Oct. 22, 1999) (concluding that a transfer of an interest that is defined under the Commission's rules as a controlling interest only requires a pro forma notification if the interest holder, by contract, cannot exercise control) ("*Cellular Commc'ns of P.R.*"). Therefore, the Applicants believe that the transfer of these interests is a pro forma transfer of control subject to forbearance under Section 1.948(c)(1) of the Commission's rules. *See* 47 C.F.R. § 1.948(c)(1). Nevertheless, the Applicants have requested the three partnerships to waive forbearance and file transfer applications in advance out of an abundance of caution.

mobile licenses or experimental licenses), the Applicants request that the pertinent filing fees be refunded.⁴³⁰

Cingular also holds interests of 50 percent or more in the following designated entities: ABC Wireless, L.L.C.; Arnage Wireless, L.L.C.; Cascade Wireless, LLC; Edge Mobile, LLC; Indiana Acquisition, L.L.C.; Lone Star Wireless, L.L.C.; Panther Wireless, L.L.C.; Royal Wireless, L.L.C.; Sabre Wireless, L.L.C.; Salmon PCS Licensee LLC; Southwest Wireless, L.L.C.; THC of Houston, Inc.; THC of Melbourne, Inc.; THC of Orlando, Inc.; THC of San Diego, Inc.; THC of Tampa, Inc.; Wireless Acquisition LLC; Zuma/Lubbock, Inc.; and Zuma/Odessa, Inc. By definition, those interests are non-controlling; otherwise, the companies in question would not qualify as designated entities.⁴³¹ Consequently, a transfer of such an interest – even though of 50 percent or more – is a pro forma transaction.⁴³² Because the interests are being transferred from one non-designated entity to another, unjust enrichment concerns are not implicated by this transaction. Therefore, the Applicants believe that advance consent is not required by Section 1.948(c)(1)(i) of the rules.⁴³³ Nevertheless, the staff has requested that the

⁴³⁰ See 47 C.F.R. § 1.1113(a)(1) (“The full amount of any fee submitted will be returned or refunded, as appropriate, under the authority granted at § 0.231. (1) When no fee is required for the application or other filing.”).

⁴³¹ See 47 C.F.R. § 1.2110; *In re Amendment of Part 1 of the Comm’n’s Rules – Competitive Bidding Procedures, Fifth Report and Order*, 15 FCC Rcd. 15293, 15323-28 ¶¶ 58-69 (Aug. 14, 2000) (“We will adopt as our general attribution rule a ‘controlling interest’ standard for determining which applicants qualify as small businesses.”) (subsequent history omitted).

⁴³² *Cellular Commc’ns of P.R.*, 15 FCC Rcd. at 1227-28 (generally concluding that a transfer of an interest that is defined under the Commission’s rules to be a controlling interest in licensees but that, by contract, cannot exercise control of the licensees is a pro forma transfer of control of the licensees).

⁴³³ See 47 C.F.R. § 1.948(c)(1)(i).

designated entities file applications for advance consent for the transfer of these interests, and the Applicants understand that the designated entities are doing so.

E. The Merger Does Not Create Any Competitive Overlaps of Spectrum Used for CMRS (Response to Question on Form 603)

This transaction will not create any geographic overlaps of spectrum used to provide mobile wireless voice or data services.⁴³⁴ Although both AT&T and BellSouth have WCS or BRS spectrum, neither uses this spectrum for mobile services. Moreover, AT&T's and BellSouth's spectrum holdings do not overlap with one another. While they do overlap with Cingular's CMRS licenses, each parent already was attributed with Cingular's spectrum as a controlling party. Therefore, even if the WCS or BRS spectrum were to be used for mobile services, this transaction would not "create a geographic overlap with another license(s) in which the Assignee/Transferee already holds direct or indirect interests (of 10 percent or more), either as a licensee or spectrum lessee/sublessee."⁴³⁵

Likewise, because AT&T already owns 60 percent of Cingular, it holds "direct or indirect interests (of 10 percent or more) in an[] entity that already has access to 10 MHz or more spectrum in the Cellular Radiotelephone, broadband PCS, or Specialized Mobile Radio (SMR) services through license(s), lease(s), or sublease(s) in the same geographic

⁴³⁴ See *In re Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Dev. of Secondary Mkts.*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd. 17503, 17517-19 ¶ 26 (Sept. 2, 2004) (stating that only overlaps of spectrum "to be used to provide mobile telephony service" require competitive analysis prior to approval).

⁴³⁵ *FCC Wireless Telecomms. Bureau Application for Assignment of Authorization or Transfer of Control*, FCC Form 603, Main Form, Item 13 (emphasis added) ("FCC Form 603").

area[s]”⁴³⁶ where BellSouth has similar interests by virtue of its 40 percent stake in Cingular. The important point, however, is the answer to Item 14b: The transaction will not reduce the number of entities providing cellular, broadband PCS, or SMR services in those areas.⁴³⁷

IX. CONCLUSION

For the foregoing reasons, the Commission should conclude that the merger of AT&T and BellSouth serves the public interest, convenience and necessity and should expeditiously grant the applications to transfer control of BellSouth’s FCC authorizations to AT&T.

⁴³⁶ *Id.* at Item 14a; *see also* *FCC Wireless Telecomms. Bureau Application or Notification for Spectrum Leasing*, FCC Form 603-T, Schedule E, Item 3b (“FCC Form 603-T”).

⁴³⁷ *See* FCC Form 603, Main Form, Item 14b; *see also* FCC Form 603-T, Schedule E, Item 3c.