Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Inc. and BellSouth Corp.	)	WC Docket No. 06-74
Applications for Approval of	)	
Transfer of Control	)	
	)	

COMMENTS OF MOBILE SATELLITE VENTURES SUBSIDIARY LLC

Henry Goldberg
Devendra T. Kumar
GOLDBERG, GODLES, WIENER & WRIGHT
1229 19th St., N.W.
Washington, DC 20036
(202) 429-4900 – Telephone
(202) 429-4912 – Facsimile

Of Counsel to Mobile Satellite Ventures Subsidiary LLC

Jennifer A. Manner
Vice President, Regulatory Affairs
MOBILE SATELLITE VENTURES SUBSIDIARY LLC
10802 Parkridge Boulevard
Reston, VA 20191
(703) 390-2700 – Telephone

Dated: June 5, 2006

SUMMARY

The Commission should carefully consider the potential negative impact of the proposed merger of AT&T Inc. ("AT&T") and BellSouth Corporation ("BellSouth") and approve it only with certain conditions that will protect competition in the marketplace. The proposed merger would result in a level of concentration in the telecommunications marketplace not seen since the break-up of the Bell system in the early 1980s. While Incumbent Local Exchange Carriers AT&T and BellSouth face mass market competition from intermodal competitors such as wireless carriers and VoIP providers, such competitors typically depend upon bottleneck facilities controlled by AT&T and BellSouth within their respective service areas. For example, wireless carriers and other facilities-based competitors rely upon region-wide special access services provided by AT&T and BellSouth within their respective service areas, and have no meaningful choice with respect to providers of such special access services.

The proposed merger threatens competition in the marketplace for special access services by removing a potential competitor and, more significantly, by increasing the incentive and ability of the merged entity to discriminate against non-affiliated carriers and in favor of affiliated Cingular. The Commission should address these competitive concerns by imposing the following conditions on the merger:

- The Commission should require the merging parties to commit affirmatively to continue to provide the special access tariffs and rates described in the merger application.
- The Commission should prohibit the merging parties from discriminating in favor of Cingular and against non-affiliated carriers with respect to the provision of special access services.
- The Commission should impose a "most favored nation" provision under which the merged entity would be required to offer special access services

under the same rates, terms and conditions which it offers equivalent services to Cingular.

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Inc. and BellSouth Corp.	)	WC Docket No. 06-74
Applications for Approval of	)	
Transfer of Control	)	
	)	

COMMENTS OF MOBILE SATELLITE VENTURES SUBSIDIARY LLC

Mobile Satellite Ventures Subsidiary LLC ("MSV")[1] urges the Commission to consider carefully the potential negative impact on competition of the proposed merger of AT&T Inc. ("AT&T") and BellSouth Corporation ("BellSouth"), and to approve the merger only with the imposition of certain practical conditions that will protect competition in the telecommunications marketplace. In particular, if the Commission approves the merger, it should impose conditions on its approval that ensure that the merged company does not discriminate against competitors with respect to special access services.

[1] MSV is the entity authorized by the Commission in 1989 to construct, launch, and operate a U.S. mobile satellite service ("MSS") system in the L-band. In November 2004, MSV became the first entity licensed to operate an Ancillary Terrestrial Component ("ATC"). MSV is developing the first hybrid cellular-satellite communications network, which will create a new category of wireless services and reshape the telecommunications industry through the delivery of ubiquitous, transparent and seamless coverage of North America to conventional handsets. When completed, the MSV network will transform communications through the delivery of advanced emergency response, aviation and transportation services as well as content-rich entertainment services to consumers through interoperable, user-friendly voice, video and high-speed data services.

As a provider of Mobile Satellite Service ("MSS"), MSV uses special access services provided by ILECs to connect its ground stations to its switching center and to interconnect to the PSTN. However, as MSV rolls out its next generation integrated satellite/terrestrial network, it will be far more dependent on special access services and tariffs offered on just, reasonable and nondiscriminatory rates, terms and conditions. As MSV rolls out the terrestrial component of its network, it will rely on special access services provided by AT&T and BellSouth within their respective territories for backhaul links from its towers to its local switching centers and other aggregation facilities. Accordingly, MSV has an important interest in the outcome of this proceeding.

I. THE COMMISSION MUST ANALYZE THE IMPACT OF THE PROPOSED MERGER IN THE CONTEXT OF INCREASING CONCENTRATION IN THE WIRELINE MARKET

The proposed merger of AT&T and BellSouth would be the latest in a series of mergers of large wireline telecommunications companies that will result in a level of concentration in the telecommunications marketplace last seen prior to the break-up of the AT&T-owned Bell System in the early 1980s. The proposed merger would combine two of the nation's three largest telephone companies, representing the dominant provider of telecommunications services in twenty-two states with almost two-thirds of the nation's population.[2] The merged company would encompass four of the seven original Regional Bell Operating Companies ("RBOCs") — Ameritech, Pacific Telesis, Southwestern Bell and BellSouth — as well as AT&T, the dominant interexchange carrier ("IXC") at the time of the Bell System break-up.

[2] While incumbent local exchange carriers ("ILECs") such as AT&T and BellSouth are not the only providers of telephone service in their respective service areas, ILECs account for over 85 percent of facilities in their local regions. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the*

Furthermore, the proposed merger would result in a marketplace in which the two largest companies — the merged company and Verizon — would be the dominant telecommunications service providers in thirty-four states with more than 85 percent of the nation's population, and would encompass six of the seven original RBOCs and the two largest IXCs at the time of the Bell System divestiture. In an economy in which robust competition in the marketplace is relied upon to protect the interests of consumers, regulators should be concerned with this level of concentration.

Of course, the telecommunications marketplace has changed since the break-up of the Bell System more than twenty years ago. Incumbent Local Exchange Carriers ("ILECs") face some competition from sources that did not exist two decades ago including wireless providers, cable companies and VoIP service providers. Unfortunately, all of these intermodal sources of competition depend upon the ILECs to provide access to what are effectively the ILECs' bottleneck facilities and services if they are to be effective sources of competition. For example, wireless providers represent the most meaningful source of intermodal competition to the ILECs today, but depend upon ILECs such as AT&T and BellSouth for special access services that are critical to wireless providers' networks. (Note that competition from wireless carriers is also less significant that it might appear because over sixty percent of the wireless market is controlled by two wireless providers that are affiliated with ILECs — Cingular, jointly-owned by AT&T and BellSouth, and Verizon Wireless.) Similarly, VoIP service providers, which are relatively insignificant today but which may represent a significant source of competition

---

Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-26, para. 660, 18 FCC Rcd 16,978, 17,388 (2003) ("BOCs control 85.9 percent of incumbent LEC local switched access lines.").

to ILECs in the future, are largely dependent on ILECs for the broadband access services over which consumers access VoIP services.

As discussed below, the merger of two of the three largest telephone companies in an already concentrated market threatens to harm consumers by having an adverse impact on competition from wireless carriers, cable companies and VoIP providers. The Commission should therefore approve the merger only if it imposes conditions on the merger that enable the continued viability of intermodal competition. Such conditions, discussed in greater detail below, should at minimum include requirements that the merged company: (1) not discriminate against non-affiliated service providers in the provision of special access services, and (2) not require bundling of its voice services with broadband access service (*i.e.*, that it provide stand-alone or "naked" DSL and EVDO).

A. The Proposed Merger of AT&T and BellSouth Threatens Competition in the Wireline Telecommunications Marketplace

AT&T and BellSouth are two of the three largest ILECs in the United States, and together represent the dominant carriers in twenty two states with almost two-thirds of the nation's population. While the applicants claim that "[t]here is little competitive overlap between the two companies" and the merger "involves virtually no increase in horizontal concentration in any relevant market,"[3] the Commission should be concerned about the merger's effect on competition for the same reasons it was concerned about earlier mergers of two ILECs.

[3] AT&T Inc. and BellSouth Corporation, *Description of Transaction, Public Interest Showing and Related Demonstration* at iv-v (filed Mar. 31, 2006) ("AT&T BellSouth Public Interest Statement").

In the Order approving the merger of SBC and Ameritech, which imposed significant conditions and included voluntary commitments, the Commission made it very clear that the proposed merger threatened competition and the Commission's "ability to fulfill [its] statutory mandate" even though there was no significant overlap between the service areas of SBC and Ameritech.[4] The proposed merger of AT&T and BellSouth presents the same threats to competition as those acknowledged by the Commission in the SBC/Ameritech merger — particularly in light of the increased concentration in the marketplace in recent years.

First, the proposed merger would eliminate AT&T and BellSouth as potential competitors in each other's market areas.[5] As the Commission acknowledged in the SBC/Ameritech Order, ILECs are among the few potential competitors with the wherewithal to compete in out-of-region markets, whether in the mass market for consumers or in the market for special access services that are bundled together and offered to enterprise customers. As the Commission recognized, ILECs "also bring particular expertise to the process of negotiating and arbitrating interconnection agreements between incumbent and competitive [carriers]."[6] If permitted to merge, AT&T and BellSouth will each remove as a competitor one of the few telecommunications companies that can engage it in negotiations on an equal footing.

---

[4] *Ameritech Corp. and SBC Communications Inc., Applications for Consent to Transfer of Control*, Memorandum Opinion and Order, 14 FCC Rcd 14,712, 14,741 (1999) ("SBC/Ameritech Order"); *id.* at 14,741-14,825. The Commission used a similar analysis while approving the Bell Atlantic/GTE merger. *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer of Control*, Memorandum Opinion and Order, 15 FCC Rcd 14,032, 14,086-14,130 (2000) ("GTE/Bell Atlantic Order").

[5] *See* Phillip Areeda et al., *Antitrust Analysis: Problems, Texts, and Cases*, at 782 (discussing the harm caused by eliminating potential competition, and distinguishing between competition from actual future entry and the present competitive effect of possible future entry).

[6] SBC/Ameritech Order at 14,741.

Second, even if AT&T and BellSouth would not enter into each other's local markets, the presence of each ILEC in its region nevertheless plays an important role in providing benchmarks for ILEC practices. For example, in deciding whether special access rates charged by AT&T within its region were just and reasonable, an appropriate benchmark would be the rates charged for similar services by BellSouth in its region. The Commission has acknowledged the importance of such benchmarking or comparative practice analyses.[7] As the Commission noted in the SBC/Ameritech Order:

> Another harm of the merger is that the larger combined entity will have a greater incentive to unify the practices of its separate operating companies to affect the outcome of both best practices and average practices benchmarking by regulators and competitors, resulting in an overall loss of diversity at the operating-company level. The proposed merger of SBC and Ameritech would also directly increase the incentive and ability if remaining incumbent LECs to coordinate their behavior to resist market-opening measures. As the number of relevant independently-owned incumbent LECs shrinks to a small few, the probability of coordination significantly increases.[8]

The Applicants attempt to counter the Commission's analysis in the SBC/Ameritech Order by arguing that conditions have "changed dramatically" since the Commission's approval of the prior ILEC mergers, and that BellSouth and AT&T local exchanges are open to competition from wireless carriers, VoIP providers and others.[9] While it is may be true that ILECs such as AT&T and BellSouth face greater competition than they did six to seven years ago with respect to some segments of the local exchange market, this is not true with respect to all services offered by the erstwhile monopoly ILECs. Specifically, as described in greater detail below, with respect to special access services offered to competing carriers such as independent wireless carriers, ILECs such

[7] *Id.* at 14,741-42.
[8] *Id.* at 14,742.
[9] AT&T BellSouth Public Interest Statement at 111-13.

as AT&T and BellSouth still possess dominant market power and have the ability and incentive to harm competition by discriminating against competitors with respect to the provision of these bottleneck facilities.

Similarly, the Applicants claim that competitive benchmarks are no longer important to the Commission because the "1996 Act has been fully implemented." However, as the SBC/Ameritech Order notes, competitive benchmarks are crucial not just to the Commission in exercising its role as a regulator, but also to competitors who are better able to negotiate competitive terms when competitive benchmarks are available.[10]

B. The Proposed Merger Will Harm Competition by Consolidating Ownership of Cingular

Even though Cingular is currently jointly owned by AT&T and BellSouth, the proposed merger will nonetheless threaten competition by consolidating ownership of Cingular. A settled principle of antitrust law is that a joint venture between competitors (or potential competitors) is typically preferable to a merger of the competitors because the former preserves some form of competition between the participants in the joint venture while the latter eliminates competition between the merging parties.[11] The Order approving the creation of the SBC/BellSouth joint venture specifically noted that

[10] SBC/Ameritech Order at 14,742 (noting that the merger of SBC and Ameritech could adversely affect "best practices and average practices benchmarking by regulators *and competitors*") (emphasis added). Note that saying that competitors need competitive benchmarks to enable them to negotiate with ILECs merely restates the basic principle of economics that the competitive process and negotiations between buyers and sellers in a competitive market work more efficiently when parties to the negotiation have accurate information regarding market conditions.

[11] Federal Trade Commission and The U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, at 5 (Apr. 2000) ("Most mergers completely end competition between the merging parties in the relevant market(s). By contrast, most competitor collaborations preserve some form of competition among the participants.").

competition that would be preserved, and indeed potentially fostered, by the joint venture.[12]

The Applicants' own statements suggest that consolidating ownership in Cingular will further reduce competition in the marketplace, despite the fact that Cingular is already jointly-owned by AT&T and BellSouth. In arguing that the proposed merger would result in operational and marketing efficiencies, the Applicants acknowledge that "the merger will enable the combined company to integrate Cingular offerings in ways that are not possible with Cingular subject to joint ownership and control."[13] The Applicants state that consolidating ownership of Cingular will lead to greater convergence of wireline and wireless services offered by AT&T, BellSouth and Cingular, including "a migration of some minutes *off* the wireless network and onto the lower-cost broadband network."[14] The Applicants also acknowledge that the merger will also lead to increased joint marketing and common branding and billing. In short, the Applicants support the general principle that a merger of two parties lessens competition in the marketplace to a greater extent than a commonly-owned joint venture between two independent parties.

Moreover, the proposed merger would only increase the incentives and the ability of the merged entity to discriminate against competitors, including wireless carriers that more directly compete with Cingular. The Commission recognized a similar concern in

---

[12] *SBC Communications Inc. and BellSouth Corp., Applications for Consent to Transfer of Control*, Memorandum Opinion and Order, 15 FCC Rcd 25,459, 25,471 (Wireless Tel. Bur., Int. Bur. 2000) ("SBC/BellSouth Order") ("There is also nothing in the joint venture agreement that would limit competition outside of wireless markets …. The joint venture may actually provide each Applicant with an increased ability to use wireless assets to launch out-of-region wireline service. . . . In BellSouth territory, SBC will be permitted to resell [Cingular] service under the name of SBC[, and vice versa].").

[13] AT&T BellSouth Public Interest Statement at 18.

[14] *Id.* at 8-10.

the SBC/Ameritech Order, noting that the merged company, with a larger local service region, would have greater incentive and ability to discriminate against competing carriers that depend upon inputs controlled by the merged company in order to provide services and effectively compete in the marketplace.[15] This incentive and ability to discriminate is particularly worrisome with respect to the special access marketplace, in which the merged company would be likely to discriminate in favor of Cingular and against competing wireless carriers. As discussed below, other carriers depend upon access to special access services from SBC and BellSouth at reasonable and nondiscriminatory rates, and would not be able to effectively compete if the merged company discriminated in favor of Cingular.

II. THE COMMISSION SHOULD ENSURE THAT THE PROPOSED MERGER DOES NOT HARM COMPETING CARRIERS BY FURTHER LIMITING COMPETITION IN THE SPECIAL ACCESS MARKETPLACE

A. Intermodal Competition Promises to Mitigate the Adverse Effects of ILEC Consolidation, But Only If a Competitive Market for Special Access Services is Preserved

The Applicants argue that competition from intermodal competitors such as wireless carriers and VoIP providers lessens the adverse effects of the proposed merger of two large ILECs. While VoIP providers are still relatively new, there is no doubt that wireless carriers in particular offer significant competition with respect to consumer-focused mass market services. While the top two wireless carriers — Cingular and Verizon Wireless — are owned by ILECs, independent wireless providers such as Sprint

[15] SBC/Ameritech Order at 14,742-43 ("The increase in the number of local areas controlled by SBC as a result of the merger will increase its incentive and ability to discriminate against carriers competing in retail markets that depend on access to SBC's inputs in order to provide services. . . . Because SBC after the merger would realize more of the gains from what are presently 'external' effects, it would have a greater incentive to engage in discrimination than the combined incentives that the two individual companies would have had in their smaller regions.").

Nextel and T-Mobile offer consumers services that compete with the services offered by the merging parties. Moreover, companies such as MSV promise to add to competition in the market by offering new innovative integrated satellite/terrestrial services. MSV is developing an integrated satellite and terrestrial communications network to provide ubiquitous wireless voice and broadband services in North America. Using an all-Internet Protocol ("IP") architecture, MSV expects its network to provide significant benefits over existing wireless networks, including faster data speeds, lower costs per bit and flexibility to support advanced technologies on a broad scale. The Commission should especially welcome the intermodal competition offered by entrants such as MSV who are more likely to offer next generation services because of the new technologies that underlie their service offerings.

Intermodal competition from independent wireless carriers, however, is only feasible if special access services are available at reasonable and nondiscriminatory rates. Independent wireless carriers, and in particular new entrants such as MSV, cannot simply replicate nationwide networks that took ILECs decades to build when they were monopoly service providers. Instead, such intermodal competitors depend on special access services as a critical input for connecting their networks to ILECs and other carriers and for interoffice transport.[16] MSV will rely heavily on special access service links to interconnect its network to that of ILECs and other existing carriers. MSV

[16] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, FCC 05-183, para. 24 (rel. Nov. 17, 2005) ("SBC/AT&T Order"); *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, FCC 05-18, para. 3 (rel. Jan. 31, 2005) ("*Special Access NPRM*") ("[C]ommercial mobile radio service (CMRS) providers . . . use special access services as a key input in many of their . . . service offerings."); T-Mobile Reply Comments in WC Docket No. 05-65 at 9-11 (filed May 10, 2005) (discussing critical importance to competition of last-mile links between T-mobile base stations and ILEC central offices and interoffice transport connecting ILEC central offices).

expects that the amount it will pay for such links will comprise a substantial portion of its overall operating costs that in turn will affect the prices it ultimately charges its customers. In short, MSV will not be able to compete effectively with existing wireless and wireline carriers unless special access services remain available to it at reasonable and nondiscriminatory rates.

B. The Proposed Merger Will Harm the Already Limited Competition in the Market for Special Access Services

As discussed above, the proposed merger threatens to harm competition in the provision of special access services.[17] The merger of AT&T and BellSouth will increase their service area footprint dramatically and also will increase substantially the ability and the incentive for the merged companies to discriminate against competitors, including wireless competitors of affiliated Cingular.

The proposed merger would increase the ability of the merged entity to leverage its relative dominance in the special access market to negatively impact competition in the more competitive wireless market by favoring its own affiliated wireless carrier Cingular over smaller, independent carriers. Because special access services are a critical input for wireless carriers, independent wireless carriers will not be able to compete effectively with Cingular in the merged AT&T/BellSouth service region if the former is able to obtain special access services under terms and conditions that are not available to competitors.

The Applicants argue that the market for special access services is competitive and that any fears of reduced competition in the special access marketplace are therefore unwarranted. However, much of the Applicants' discussion of competition with respect

[17] *See infra* Section I.

to special access services is with respect to services offered to large business or enterprise customers. While competing special access service providers do provide services to some densely-populated business districts, no providers of special access services besides the ILECs provide such services across entire large regions that competing carriers need to provide region-wide services.[18]

In fact, AT&T has been known to leverage its region-wide coverage by insisting that customers enter into exclusive agreements for region-wide special access services, thereby forestalling any potential competition from competitive special access service providers who serve specific routes or smaller regions.[19] Thus, competing wireless carriers such as MSV are in the unfortunate position of having to depend on AT&T and BellSouth for special access services within their service regions, with the ILECs having the incentive and ability to discriminate against them in favor of competing wireless carrier Cingular.

In the Order approving the AT&T Wireless/Cingular merger, the Commission alluded to the potential for ILECs to discriminate in favor of an affiliated wireless carrier in the provision of special access services.[20] There, the Commission noted that existing Title II laws prohibit ILECs from discriminating against other carriers, including wireless providers.[21] However, especially given the continued uncertainty of Title II regulation of

[18] T-Mobile Reply Comments in WC Docket No. 05-65 at 7 & n.15 ("As a general matter, for special access services in an ILEC's service area, T-Mobile relies on services provided by that ILEC, with very limited competitive services available.").
[19] *Id.* at 10 n.29.
[20] *AT&T Wireless Services, Inc. and Cingular Wireless Corp., Applications for Consent to Transfer of Control*, Memorandum Opinion and Order, WT Docket No. 04-70, FCC 04-255, para. 183, 19 FCC Rcd 21,522, 21,592 (2004) ("AT&T Wireless/Cingular Order").
[21] *Id.* at 21,592, para. 183; *see also id.* at 21,656 (Separate Statement of Comm. Kathleen Q. Abernathy) ("[S]ection 202 of the Act squarely prohibits SBC and BellSouth from according Cingular preferential treatment . . . . I am committed to stringent enforcement of this statutory

ILECs,[22] and the difficulty of filing successful complaints of discrimination under Section 202 of the Act,[23] MSV urges the Commission to impose affirmative conditions to protect competition in the provision of special access services, as discussed further below.

Finally, the Applicants also argue that issues involving special access competition and rates should be addressed in the *Special Access* proceeding, referring to the FCC proceeding which has been pending since January 2005.[24] While MSV agrees that the Commission should address in a comprehensive fashion general issues of competition and rates in the special access marketplace, it does not follow that the Commission should defer consideration of all special access-related issues until it issues an Order in the *Special Access* proceeding. MSV has demonstrated above how the proposed merger will result in *merger-specific* threats to competition in the special access marketplace, and such threats should be addressed in this merger review proceeding rather than in a general rulemaking proceeding.

C. If It Approves the Proposed Merger, the Commission Should Impose Conditions That Limit Opportunities for Discrimination in the Provision of Special Access Services

As discussed above, intermodal competitors, including independent wireless carriers, depend upon ILEC-provided special access services in order to provide effective competition in the marketplace. The proposed merger would give AT&T and BellSouth

---

provision.); *id.* at 21,660 (Separate Statement of Comm. Michael J. Copps) ("I welcome my colleagues' assertion that Section 202 already prohibits such [discriminatory] behavior.").

[22] *See, e.g.*, News Release, *Verizon Telephone Companies' Petition for Forbearance from Title II and* Computer Inquiry *Rules with Respect to their Broadband Services Is Granted by Operation of Law*, WC Docket No. 04-440 (Mar. 20, 2006).

[23] *See* AT&T Wireless/Cingular Order at 21,660 (Separate Statement of Comm. Michael J. Copps) (noting the discouraging history of Commission use of Section 202 to combat discrimination and stating a preference for explicit conditions that would serve as a more powerful tool against discrimination).

[24] AT&T BellSouth Public Interest Statement at 119. *See Special Access NPRM*.

the ability and the incentive to discriminate in favor of Cingular and against competing wireless carriers. Accordingly, the Commission should impose certain enforceable conditions on the merging parties if it approves the merger.

First, the Commission should require the merging parties to commit affirmatively to continuing to provide the special access tariffs and rates they describe in their application. The Applicants mention that special access customers may avail themselves of BellSouth's ACP tariff for DS1 or lower capacity circuits, its TPP plan for DS3 or greater capacity circuits, and its TAP "overlay" tariff for wholesale customers who agree to a certain spending commitment.[25] However, the Applicants make no promises with respect to continued availability of such tariffs. Accordingly, the Commission should, at minimum, require the merged company to continue to make available the special access tariffs and rates described in the application. The Commission should also require the merged company to commit to providing similar tariffs and rates in the present AT&T service region.

Second, the Commission should impose a condition prohibiting the merging parties from discriminating in favor of Cingular and against non-affiliated carriers with respect to the provision of special access services. In effect, this condition would ensure the continued application of Section 202's nondiscrimination rule to the merged company with respect to special access services offered to Cingular vis-à-vis non-affiliated carriers. The Commission should also consider alternative methods for enforcing this nondiscrimination requirement, including alternative dispute resolution approaches such as arbitration.

[25] AT&T BellSouth Public Interest Statement at 61 n.179.

Third, the Commission should impose a "most favored nation" provision, under which the merged ILEC would be required to offer special access services under the same rates, terms and conditions which it offered equivalent services to its affiliate Cingular.[26] The Commission has previously used a similar "most favored nation" condition in its approval of the SBC/Ameritech and Bell Atlantic/GTE mergers.[27] Such a condition, if readily enforceable, would perhaps obviate the need for the nondiscrimination requirement proposed above, and would have the salutary aspect of requiring less oversight by the Commission. Most importantly, such a condition would address perhaps the most significant threat to competition posed by the proposed merger — the ability and incentive of the merged ILEC to favor Cingular and discriminate against wireless competitors.

III. THE COMMISSION SHOULD FURTHER PROTECT INTERMODAL COMPETITION BY IMPOSING CONDITIONS PROHIBITING DISCRIMINATION AGAINST VOIP SERVICE PROVIDERS

As discussed above, the negative impact of the proposed merger will be mitigated as long as intermodal competition from wireless carriers and VoIP providers remains viable. While VoIP providers are relatively new, they have demonstrated that they can be significant forces for competition in the telecommunications marketplace and can exercise significant competitive discipline on an otherwise consolidating

[26] In approving the merger of AT&T and SBC, the Commission adopted a "most favored nation" condition with respect to the provision of special access services by the merged entity, but limited such application to wireline affiliates. SBC/AT&T Order at Appendix F.

[27] SBC/Ameritech Order at 14,859-14,864 (requiring the merging companies to establish a separate affiliate for the provision of advanced services and requiring that unaffiliated carriers receive nondiscriminatory rates, terms, and conditions vis-à-vis the separate affiliate); GTE/Bell Atlantic Order at 14,148-14,156 (same).

telecommunications marketplace.[28] However, just as independent wireless carriers depend upon ILEC-provided special access services to compete effectively, VoIP providers depend upon broadband access services being offered to consumers. ILECs comprise one of the two main consumer options for broadband access; together with cable companies, they serve more than 98% of broadband consumers.[29] In areas where cable penetration is low and cable modem service is not available, ILECs may be a consumer's only option for broadband access.

In light of the ability and incentive of the merged company to discriminate against competing VoIP providers,[30] the Commission should impose certain conditions on the merging parties if it decides to approve the merger. The Commission should require the merged company to provide unbundled or "naked" DSL. In other words, consumers should be able to obtain DSL service from the merged company without being coerced into purchasing bundled voice services. Such a condition was agreed to by SBC and AT&T during their merger; the time period for this voluntary commitment should be extended to run a minimum of two years from the closing date of the proposed merger. Moreover, as wireless broadband access is gaining greater acceptance in the marketplace, the Commission should require the merged company to provide "naked" EVDO service as well.

* * *

[28] Note that while MSV does not plan to provide VoIP services to consumers, it nevertheless believes that healthy competition in the telecommunications marketplace and transparency with respect to pricing of different services benefits all competitive carriers.

[29] FCC Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of June 30, 2005*, Table 3 & Chart 6 (April 2006), *available at* http://www.fcc.gov/wcb/stats.

[30] Providers of VoIP compete not only against AT&T and BellSouth's local phone service offerings, but also against AT&T's VoIP service offerings.

While the proposed merger would result in the combination of two of the nation's three largest local telephone companies, and the proposed merged entity would be the dominant provider of telecommunications services to almost two-third of the U.S. population, the effect of such consolidation is mitigated if intermodal competition is possible. Existing wireless carriers and new competitors such as MSV can offer competitive choices to consumers, but only if special access services are available at just, reasonable and nondiscriminatory rates. Accordingly, the Commission should ensure that the proposed merger does not further limit competition for special access services within the AT&T and BellSouth service regions.

Respectfully submitted,

/s/ Henry Goldberg
Henry Goldberg
Devendra T. Kumar
GOLDBERG, GODLES, WIENER & WRIGHT
1229 19th St., N.W.
Washington, DC 20036
(202) 429-4900 – Telephone
(202) 429-4912 – Facsimile

Of Counsel to Mobile Satellite Ventures Subsidiary LLC

/s/ Jennifer A. Manner
Jennifer A. Manner
Vice President, Regulatory Affairs
MOBILE SATELLITE VENTURES SUBSIDIARY LLC
10802 Parkridge Boulevard
Reston, VA 20191
(703) 390-2700 – Telephone

Dated: June 5, 2006