

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**COMMENTS ON BEHALF OF THE
NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE**

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I. INTRODUCTION.

The New Jersey Division of the Ratepayer Advocate (“Ratepayer Advocate”) welcomes the opportunity to submit comments in response to the Public Notice released by the Federal Communications Commission (“FCC” or “Commission”) regarding the application for the proposed transfer of control filed by AT&T Inc. (“AT&T”) and BellSouth Corporation (“BellSouth”) (collectively, “Applicants”).¹ As these comments and the accompanying declaration of Susan M. Baldwin and Sarah M. Bosley (“Baldwin/Bosley Declaration”) demonstrate, the proposed merger is not in the public interest, and therefore should be rejected. Any approval of the proposed merger should be conditioned upon explicit commitments, which would mitigate the harm and increase the chance of benefits flowing to consumers.

¹ / Commission Seeks Comment on Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corporation, WC Docket No. 06-74, Pleading Cycle Established, DA 06-904, April 19, 2006.

A. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings. The above captioned proceeding is germane to the Ratepayer Advocate's continued participation and interest in implementation of the 1996 Act.² The Ratepayer Advocate submitted comments in several recent merger proceedings, including the investigation of the proposed SBC/BellSouth, Verizon/MCI, and Sprint/Nextel-mergers.³ The outcome of the pending proceeding affects the national telecommunications industry and, therefore, the options, quality, and price of telecommunications services offered to consumers throughout the nation, including consumers in New Jersey.

B. SCOPE OF THE PROCEEDING

The Commission must make a determination as to whether the proposed transaction will serve the public interest, convenience, and necessity. As the Commission stated in its order

²/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

³/ *In the Matter of Transfer of Control Filed by SBC Communications Inc. and AT&T Corp.*, FCC WC Docket No. 05-65, Comments of the New Jersey Division of the Ratepayer Advocate, April 25, 2005 and Reply Comments of the New Jersey Division of the Ratepayer Advocate, May 10, 2005; *In the Matter of Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Comment of the New Jersey Division of the Ratepayer Advocate, May 9, 2005, Reply Comments of the New Jersey Division of the Ratepayer Advocate, May 24, 2005; *Applications of Nextel Communications., and Sprint Corporation, for Consent to the Transfer of Control of Entities Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, FCC WT Docket No. 05-63, Petition to Deny filed March 30, 2005 and Reply to the Opposition to Deny filed April 18, 2005.

approving SBC's acquisition of AT&T:

If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against the potential public interest benefits. The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.⁴

C. BACKGROUND

The merger would irrevocably eliminate potential competition among Bells.

AT&T and BellSouth announced an Agreement and Plan of Merger on March 5, 2006.⁵ The Boards of Directors of BellSouth and AT&T have approved the merger, and stockholders of the two companies must also approve the merger.⁶ The Applicants submitted an application, public interest statement, and six declarations in support of their proposed transaction with the FCC on March 31, 2006.⁷

AT&T reports pro forma operating revenues (*i.e.* reflecting combined revenues of AT&T Corp. and SBC Communications Inc. as if they were merged for the entire year of 2005) of \$66.2

⁴ / *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, *Memorandum Opinion and Order*, released November 17, 2005 (“SBC/AT&T Merger Order”), at para. 16, note omitted.

⁵ / “A Reborn AT&T to Buy BellSouth,” *Wall Street Journal*, March 6, 2006, A1.

⁶ / http://www.sbc.com/Common/files/doc/Merger_Fact_Sheet.doc.

⁷ / *See*, www.fcc.gov/transaction/att-bellsouth.html. The following submitted declarations in support of the merger: James S. Kahan (Senior Executive Vice President – Corporate Development, AT&T), Christopher Rice (Executive Vice President, Network Planning and Engineering, AT&T), William Smith, Barry L. Boniface (Chief Strategy & Development Officer for BellSouth), Robert W. Bickerstaff (Vice President, Data Product Management, BellSouth), Dennis W. Carlton and Hal S. Sider. Carlton and Sider submitted a joint declaration.

billion for 2005.⁸ BellSouth reported \$20.5 billion in operating revenues (excluding its proportional interest in Cingular) for 2004.⁹ Cingular reported total operating revenues of \$34.4 billion in 2005.¹⁰

According to the Preliminary Joint Proxy Statement, Form S-4, filed with the Securities and Exchange Commission (“SEC”) on March 31, 2006, the total operating revenues for the Combined Pro Forma AT&T Inc. are estimated to be \$117.5 billion.¹¹ Before any staff reductions, the merged entity would employ approximately 317,000 people.¹²

As Bells, AT&T and BellSouth possess unique resources and capabilities to compete. The merger, therefore, would irrevocably eliminate potential competition between these two major telecommunications carriers.

II. IMPACT OF MERGER ON COMPETITION AND THE PUBLIC INTEREST

AT&T’s acquisition of BellSouth would further diminish the prospect of mass market competition.

Legacy SBC’s back-to-back acquisitions of its archrival, AT&T, and now of a fellow RBOC greatly diminish the prospect of mass market competition. Furthermore, the total synergies from these two mergers, estimated at approximately \$36 billion,¹³ will benefit shareholders and

⁸ / *In the Matter of BellSouth Corporation and AT&T Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission’s Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T Inc.*, WC Docket No. 06-74, Application for Consent of Transfer of Control, filed March 31, 2006 (“Application”), Attachment 1, “Description of Transaction, Public Interest Showing and Related Demonstration,” (“Public Interest Statement”), Appendix A, at A-2.

⁹ / *Id.*, at A-3.

¹⁰ / *Id.*, at A-4.

¹¹ / Form S-4: Preliminary Proxy Statement and Prospectus of AT&T Inc. and Preliminary Proxy Statement of BellSouth Corporation (“Preliminary Joint Proxy Statement”), March 31, 2006, at 94. Total Assets are estimated to be \$276 billion. *Id.*, at 95.

¹² / *Id.*, at 12.

executives¹⁴ and certainly render obsolete the need for such subsidies as the non-rural high cost fund.

The implications for consumers, however, are bleak. It is essential for the FCC and state public utility commissions to re-assert regulatory oversight to protect mass market consumers, particularly those who are most vulnerable to monopoly practices, *e.g.*, those in rural areas, those who do not seek “bells and whistles,” those who do not want bundled services, and those with low and moderate incomes. Baldwin/Bosley Declaration, at para. 12

The merger exposes consumers to harm such as service quality deterioration, excessive rates, aggressive sales practices, the loss of competitive choice, and further threat to net neutrality. The merger would not, however, provide offsetting benefits. Absent significant conditions, the merger is not in the public interest. Baldwin/Bosley Declaration, at para. 13.

Bells have been given regulatory relief based on a pretense of competition that has yet to materialize.

Consumers now have the worst of both worlds – a pretext of competition that justified the unleashing of regulation and now CLECs either fleeing the local market or merging with their rivals.

¹³ / Public Interest Statement, at iv (estimates total efficiencies of \$18 billion for AT&T/BellSouth merger); SBC/AT&T Public Interest Statement, at 44 (estimated total synergies from SBC/AT&T merger of \$15 billion); AT&T now expects merger synergies resulting from merger of SBC and AT&T to exceed the predicted synergies. See, Kahan (AT&T), at 19, citing AT&T Analyst Meeting Presentation, January 31, 2006, at 51; AT&T Investor Update: 1Q06 Earnings Conference Call, April 25, 2006 (revised synergy estimates accruing from SBC/AT&T merger from \$15 to \$18 billion).

¹⁴ / The estimated cash value of severance packages to which BellSouth executives would be entitled upon termination of employment within two years of the merger: F. Duane Ackerman (Chairman and CEO), \$9,213,750; Mark L. Feidler (President and COO), \$5,197,500; W. Patrick Shannon (CFO), \$3,150,000, for example. Form S-4: Preliminary Proxy Statement and Prospectus of AT&T Inc. and Preliminary Proxy Statement of BellSouth Corporation (“Preliminary Joint Proxy Statement”), March 31, 2006, at 55. At a January 2006 AT&T Analyst Conference the company projected “double-digit adjusted EPS [Earnings per Share] growth over each of the next three years.” AT&T Analyst Meeting Slide Presentation, January 31, 2006, New York, NY, at 143, available at http://library.corporate-ir.net/library/11/113/113088/items/181348/analyst06_b.pdf (accessed June 1, 2006).

Since apparently neither AT&T nor MCI could make a go of it on its own, and now AT&T and BellSouth cannot or will not compete in each other's territory, the outlook is poor for mass market consumers, particularly those that do not seek bundled offerings.¹⁵ It is time to rethink the regulation of Bells, particularly for the services they offer mass market consumers. Baldwin/Bosley Declaration, at para. 14.

Bell operating companies started the trend of acquisition rather than competition in the 1990s. As was the case eight years ago, buying out the competition continues to be the RBOCs' strategy. Although this tactic might serve shareholders' interests and executives' pension plans, the Applicants have not demonstrated how this strategy helps residential and small business consumers. Baldwin/Bosley Declaration, at para. 15.

The proposed merger is not in the public interest.

The proposed merger should be considered within the context of today's telecommunications industry and market structure. In his statement accompanying the Commission's decision regarding SBC's most recent acquisition of an actual and potential competitor,¹⁶ Commissioner Copps aptly

^{15/} As of January 2006, 32 percent of U.S. households do not have access to the Internet and an additional 27% of households still use dial-up, according to the American Consumer Institute. American Consumer Institute (ACI), *Who Uses Information Technology Services? A Demographic Analysis of American Consumers*, March 14, 2006. ACI also reports that about 91 percent of U.S. households with incomes of more than \$75,000 have Internet access, but the share is 49.8 percent for those with household incomes under \$25,000.

^{16/} Legacy SBC (re-named to AT&T) acquired Pacific Telesis in 1997, Southern New England Telephone Company in 1998, Ameritech in 1999, and legacy AT&T in 2005. Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries, Report No. LB-96-32, Memorandum Opinion and Order, 12 FCC Rcd 2624 (1997) ("SBC/PacTel Merger Order"); Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor To SBC Communications, Inc., Transferee, CC Docket No. 98-25, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21306, para. 29 (1998) ("SBC/SNET Merger Order"); Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control, Memorandum Opinion and Order, CC Docket No. 98-141, 14 FCC Rcd 14712, 14737, para. 48 (1999) ("SBC/Ameritech Merger Order"); In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, WC Docket No. 05-65, Memorandum Opinion and Order, released November 17, 2005 ("SBC/AT&T Merger Order").

stated:

The mergers before us are about more than the union of this country's largest telecommunications carriers. They are about consumers' phone bills, the availability of competitive broadband options and the future of the Internet. But in a sense, these mergers can also be seen as an epitaph for the competition that many of us thought we would enjoy as a result of the Telecommunications Act of 1996. That legislation, I am convinced, envisioned a vastly different communications landscape than the one we find ourselves living in today.¹⁷

The Applicants have failed to demonstrate that the proposed merger is in the public interest.

The risks to consumers of further and irrevocable market concentration, which would thwart the goal of competition set forth in the Telecommunications Act of 1996,¹⁸ outweigh the speculative benefits that the Applicants describe. Although the achievement of the predicted merger synergies seems probable, the savings will flow to shareholders and managers, and not to consumers. The Applicants fail to address declining telephone subscribership and deteriorating basic service quality.

The exit of legacy AT&T and MCI from the mass market, Bells' refusal to compete out-of-region, and consumers' continuing reliance on Bells' local service expose the mass market to the risk of price increases, service quality decline, and cross-subsidization of the Applicants' entry into new lines of business. The lure of IPTV and other speculative benefits do not mitigate the irrevocable harm that would ensue as a result of the proposed increase in market concentration. The Commission should reject the proposed merger as it is presently structured. Baldwin/Bosley Declaration at paras. 16-18.

As the attached declaration states:

¹⁷ / *SBC/AT&T Merger Order*, Statement of Commissioner Michael J. Copps, Concurring ("Copps Statement"), at 137.

¹⁸ / *See* footnote 2 above.

Mr. Kahan contends that the “rapid pace of change in the telecommunications industry has required AT&T to continually reinvent itself.” Indeed, AT&T’s method of “re-inventing itself” has been to gradually re-monopolize the market through a series of acquisitions of its potential and actual rivals. AT&T’s other road to “re-invention” is its substantial investment in IPTV so that it can compete with cable companies. This sidetracking further away from the more mundane, but nonetheless, essential provision of basic telephone service at just and reasonable rates, offered at reasonable levels of service quality may benefit AT&T’s shareholders, but it is less evident that AT&T’s forays into these video services will benefit the basic consumer of regulated services.

Baldwin/Bosley Declaration, at paras. 32-33, citing Kahan (AT&T), at para. 12.

The attached declaration also concludes:

In summary, the Applicants describe general purported benefits but fail to demonstrate consumer demand for these new services and fail to demonstrate that they could not occur absent the merger. The speculative benefits do not outweigh the risks to consumers of neglected basic telephone service, a more concentrated market, a dominant provider with yet more resources to control consumers’ access to the Internet, and a heightened incentive to cross-subsidize AT&T’s entry into unregulated lines of business with revenues from an embedded customer basis of unrivalled size and scope.

Baldwin/Bosley Declaration, at para. 59.

AT&T and BellSouth dominate local markets, and the proposed merger would further entrench their monopoly position.

Incumbent carriers dominate over 80 percent of the nation’s local markets.¹⁹ Furthermore, CLECs’ demand for UNE-P has peaked and is now declining, in the wake of the expiration of UNE-P offered at TELRIC-based prices.²⁰ AT&T’s UNE-P lines plummeted 20% in one year, from

¹⁹ / Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of June 30, 2005* (April 2006), at Table 7. CLECs provided 34,114,396 end-user access lines nationally, the vast majority (19,188,870) provided through the use of UNEs. CLECs also relied on resold lines (5,853,928) and provided just 9,071,598 facilities-based lines. *Id.*, at Table 11. Approximately 50% of the facilities-based lines were provided by CLECs over coaxial cable connections. *Id.*, at 2.

²⁰ / The FCC reports that the number of UNE loops with switching (*e.g.* UNE-P) fell 12% between December 2004 and June 2005. *Id.*

6,886,338 in June 2004 to 5,499,890 in June 2005. BellSouth's UNE-P lines declined 17%, from 2,949,388 in June 2004 to 2,454,335 in June 2005.²¹ Baldwin/Bosley Declaration, at para. 69.

The RBOCs' retail market share will likely climb as demand for UNE-P declines. As the FCC has stated, a "high market share does not necessarily confer market power, but it is generally a condition precedent to a finding of market power."²² ILECs continue to control the "last mile" to customers, and, as a result, dominate local markets and adjacent markets for related telecommunications products. Baldwin/Bosley Declaration, at para. 62.

The prospect of competitive choice among suppliers of basic local telecommunications services for mass market consumers has already suffered serious setbacks. The FCC's approvals of legacy SBC's entry into the long distance market in twelve jurisdictions and BellSouth's long distance entry in nine jurisdictions²³ has enabled these Bells to leverage their unique position in the local market to enter new markets by bundling local and long distance services for consumers. Furthermore, the FCC decided to eliminate the requirement of regional Bell operating companies to

²¹ / FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Selected RBOC Local Telephone Data, (June 2003 through June 2005 versions).

²² / *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC WC Docket No. 05-25; RM-10593, *Order and Notice of Proposed Rulemaking*, Released January 31, 2005 ("Special Access NPRM"), at para. 103, citing U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, issued April 2, 1992, revised April 8, 1997 ("Horizontal Merger Guidelines"), § 1.11.

²³ / Section 271 long distance approvals were granted for 21 of the BellSouth and legacy SBC states between 2000 and 2003. SNET did not require long distance authority because it was not one of the Bells. http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/.

share their broadband.²⁴ Without detailed accounting, which is subject to regulatory audit, it is difficult to detect and to prevent cross-subsidization of Bells' entry into broadband and IPTV markets with revenues from non-competitive services. Baldwin/Bosley Declaration, para. 64.

Despite the Applicants' assertions to the contrary, they dominate local and long distance markets.

AT&T indicates that it is losing "thousands of access lines every day to alternative competitors."²⁵ Mr. Kahan fails, however, to indicate the percentage of this loss that is attributable to migration from AT&T's *additional* lines to services provided by competitors. AT&T's *Investor Briefing* of April 25, 2006, however, states that "retail access lines declined by 267,000 [in the quarter]. Additional lines, which reflect migration to DSL, accounted for nearly 40 percent of the total decline."²⁶ Mr. Kahan also fails to indicate the percentage of this loss that has migrated to AT&T's wholesale services (resale, UNE-P, UNE-L) or to AT&T-controlled Cingular service. Baldwin/Bosley Declaration, at para. 95.

BellSouth contends that it "faces intense competition for residential customers in its region," and states that as a result of such factors as wireless and VoIP growth that demand for wireline

²⁴/ In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33; Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket No. 01-337; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review –Review of Computer III and ONA Safeguards and Requirement, CC Docket Nos. 95-20, 98-10; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, WC Docket No. 04-242; Consumer Protection in the Broadband Era, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, rel. September 23, 2005 ("Broadband Sharing Order").

²⁵ / Kahan (AT&T), at para. 11. Mr. Kahan does not quantify nor provide cites for this assertion. *See*, also, Carlton and Sider (AT&T/BellSouth), at para. 31.

²⁶ / AT&T *Investor Briefing*, April 25, 2006, at page 5.

services “continues to decline.”²⁷ According to BellSouth, it lost more than 1.3 million access lines, including 4.8 percent of its retail residential access lines, between 2004 and 2005.²⁸ BellSouth also estimates that at the end of 2005, VoIP providers served approximately 5 percent of the residential market, which, it contends, had been 3 percent in 2004.²⁹ As the Pew Internet & American Life Project recently reported, however, over half of all VoIP users maintain traditional wireline service.³⁰ Baldwin/Bosley Declaration, at para. 96.

The Applicants overstate their line losses, and fail to acknowledge that a substantial portion of line losses are attributable to migration to DSL connections. Baldwin/Bosley Declaration, at paras. 97, 126.

Intermodal alternatives do not yet provide economic substitutes for consumers of wireline services across all market segments.

The attached declaration demonstrates comprehensively that intermodal alternatives do yet provide economic substitutes for basic service, and therefore do not constrain AT&T’s and BellSouth’s market power. The Applicants insistence that “local markets are irreversibly open to competition”³¹ and that increasing availability of intermodal alternatives to mass market consumers provides effective competition does not hold up to scrutiny. The technologies do not represent affordable substitutes for wireline basic exchange service at this time and predictions about the

²⁷ / Boniface (BellSouth), at para. 32.

²⁸ / *Id.*, at para. 32.

²⁹ / *Id.*, at para. 34.

³⁰ / Pew Internet & American Life Project, *Home Broadband Adoption 2006*, May 28, 2006, at page 15.

³¹ / Application, Exhibit 1, at 9. *See, also*, Carlton and Sider, at para. 12.

future are of little value. Furthermore, RBOC “loss” of non-primary (or additional) access lines is not an indicator of market power, particularly when the evidence suggests that additional lines are being replaced by RBOC-provided services such as DSL. Baldwin/Bosley Declaration, at paras. 110-138.

Facilities-based voice-over-Internet-protocol (or “VoIP”) and “over-the-top” VoIP services are not viewed as substitutes by mass market consumers and, in many cases, are simply not comparable in terms of cost. Cable-based telephony raises³² concerns with respect to safety issues³² and is not comparable in terms of price³³ and customer satisfaction. As recognized by the Commission in its *SBC/AT&T Merger Order*, “over-the-top” VoIP services may not be economical because of the requirement for purchasing broadband and customers who already subscribe to broadband may still not view the services as substitutes depending on “the attributes of the service and the consumer’s willingness to trade offer service characteristics for lower prices.”³⁴ Baldwin/Bosley Declaration, at paras. 113-117. Similarly, wireless service should not be considered a substitute, and, in fact, is a complement to wireline service in most cases. The wireless penetration

³² / Time Warner Cable provides the following FAQ on its website: “Q: Can I call 911 using Digital Phone? A: Yes, absolutely. Safety is an important consideration and enhanced 911 service is provided. *Please note that Digital Phone Service does not include back-up power and, as is the case with a cordless phone, should there be a power outage, Digital Phone Service, including the ability to access 911 services, will not be available until the power is restored.*” (emphasis added) Available at: <http://www.timewarnercable.com/nc/products/digitalphone/faq.html>. Accessed June 1, 2006. Comcast makes the following statement on its website: Comcast Digital Voice “(including 911/emergency services) may not function during an extended power outage, network congestion, network/equipment failure, or another technical problem.” http://www.comcast.com/Support/Corp1/FAQ/FaqDetail_2790.html, accessed June 1, 2006.

³³ / As demonstrated in the Baldwin/Bosley Declaration, at para. 114, prices for cable telephony are much higher than a basic exchange wireline if a consumer does not want to purchase of bundle of multiple services.

³⁴ / Baldwin/Bosley Declaration, at para. 116, citing *SBC/AT&T Merger Order*, at para. 88.

rate is 62%,³⁵ yet the FCC estimates that only 6% of consumers have chosen to rely on wireless service for all of their telecommunications needs.³⁶ Finally, the Applicants clearly consider wireline and wireless to be complementary services as illustrated by their plans to jointly market wireline and wireless services to consumers.³⁷ Baldwin/Bosley Declaration, at paras. 118-124.

The analysis in the attached Baldwin/Bosley Declaration suggests that ILEC claims regarding the purported “loss” of access lines and declining market share should be viewed with caution. Any “loss” in the number of wirelines served by AT&T and BellSouth has been accompanied by dramatic increases in DSL and video subscriptions. The companies report increasing revenues per line to investors and, furthermore, are poised to control a significant portion of the intermodal market by virtue of their long-standing connection with consumers through their connection to the basic exchange phone line. Baldwin/Bosley Declaration, at paras. 125-129.³⁸

In assessing the claims of the Applicants with respect to intermodal alternatives, the Commission should be informed by the analysis of state regulators given their knowledge of local markets. For example, in New Jersey, the Board of Public Utilities recently found that intermodal

³⁵ / *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, FCC WT Docket No. 05-71; *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Tenth Report, Rel. September 30, 2005 (“Tenth Annual CMRS Competition Report”), at 195.

³⁶ / *SBC/AT&T Merger Order*, at para. 90.

³⁷ / Carlton and Sider, at para. 10 (emphasis added). *See, also, Id.*, at para. 52, stating “The proposed transaction eliminates impediments to developing innovating marketing strategies involving wireless services. Such bundles enable customers to have a single point of contact for a broader range of services.”

³⁸ / *See, also*, Baldwin/Bosley Declaration, at Section III.

technologies do not currently serve as an economic substitute for wireline services in New Jersey's local market for either enterprise or mass market customers.³⁹ Baldwin/Bosley Declaration, at paras. 135-137. The Commission should bear in mind that the availability, and consumer adoption, of intermodal alternatives differs substantial by geographic region, by demographic group, and consumer needs. Baldwin/Bosley Declaration, at paras. 130-131.

Furthermore, intramodal competition is dead on arrival since no reasonably efficient competitors have been able to enter the local markets and serve mass market customers. BellSouth has switches out of region, as does AT&T, but neither company are competing out of region against one another for mass market customers. This undercuts the FCC's reliance on its reasonably efficient competitor construct that served as the basis for elimination of UNE-P. The FCC should reverse course and re-impose UNE-P.

The emerging cable-telco rivalry represents, at best, a duopoly, which does not provide effective competition.

The attached declaration demonstrates that the emerging rivalry between cable and telco companies, which seek to offer customers bundles of video, data, and voice, represents at best a duopoly. A duopoly is not an effective form of competition. Baldwin/Bosley Declaration, at paras. 139-147.

Cable companies do not discipline the prices, quality, and terms of conditions of basic telecommunications services offered to customers that do not seek bundles. Furthermore, even those customers who are willing and able to pay for bundled packages of voice, data, and/or video services

^{39/} *In the Matter of the Joint Petition of Verizon Communications Inc. and MCI, Inc. for Approval of Merger*, New Jersey Board of Public Utilities Docket No. TM05030189, *Order of Approval*, April 12, 2006 ("NJ BPU Verizon/MCI Merger Order"), at 33-35, 36.

confront high transaction costs to migrate from one supplier to another. Transaction costs and lock-in tactics include the time and financial outlay for installation of services, equipment, and an e-mail address change. Baldwin/Bosley Declaration, at paras. 141-142.

In discussing its analytical framework for its review of the SBC/AT&T merger, the Commission cited its reasoning in the *EchoStar/DirectTV Order*:

Unilateral effects arise when the merging firm finds it profitable to alter its behavior following the merger. Examples of unilateral effects include a merging firm's raising its price or reducing the quantity it supplies. Coordinated effects, in contrast, arise when competing firms, recognizing their interdependence, take actions "that are profitable for each of them only as a result of the accommodating reactions of others." Because coordinated effects generally are more likely the smaller the number of firms in a market, mergers may significantly increase the likelihood of coordinated effects by reducing the number of firms. Examples include explicit collusion, tacit collusion, and price leadership.⁴⁰

The Commission also noted in its *SBC/AT&T Merger Order*:

It is generally recognized that the likelihood of coordinated effects depends on a number of factors, including the ease with which firms can reach tacit agreement, the incentive of firms to cheat, and the ability of the remaining firms to detect and punish such cheating.⁴¹

The Commission should deny the merger because it would facilitate coordinated effects among the major carriers.

⁴⁰/ *SBC/AT&T Merger Order*, at fn 85, citing *EchoStar/DirectTV Order*, 17 FCC Rcd at 20609, para. 152.

⁴¹/ *Id.*, at para. 52, citing Jean Tirole, *The Theory of Industrial Organization* 239 (1988); George Stigler, "A Theory of Oligopoly," in *The Organization of Industry* 39 (1968); Alexis Jacquemin and Margaret E. Slade, "Cartels, Collusion, and Horizontal Merger," in *The Handbook of Industrial Organization* 415 (1989).

As the attached Declaration states:

A landmark Commission decision in 2005, which determined that wireline broadband Internet access services are information services, and which eliminated ILECs' requirement to share their DSL lines, further reinforced the emerging cable/telco duopoly.⁴² The Commission should not rely on this duopoly to protect consumers from AT&T's exercise of its monopoly power.

Baldwin/Bolsey Declaration, at para. 145

In its order approving SBC's merger with AT&T, the Commission determined that the transaction would not increase the probability of coordinated interaction among suppliers of telecommunications services:

We also find that SBC's acquisition of AT&T is unlikely to result in anticompetitive effects through coordinated interaction among remaining competitors. Given our finding that AT&T is not a significant market participant, we find no indication that the proposed acquisition increases the likelihood of coordinated interaction for the relevant products. Moreover, the increasing trend toward bundled service offerings likely decreases the possibility of coordinated interaction. Because of the complexity and variety of the bundled local and long distance service offers, competitors will find it difficult to coordinate on prices.⁴³

The Commission's optimism regarding the competition in the market should not extend to the Bells' coordinated market dominance. The Commission should reject the proposed transaction because, by eliminating an actual and potential competitor, the Commission would facilitate the coordinated interaction among the remaining suppliers. Indeed, at a recent analyst conference,

⁴² *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review –Review of Computer III and ONA Safeguards and Requirement*, CC Docket Nos. 95-20, 98-10; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242; *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, *Report and Order and Notice of Proposed Rulemaking*, rel. September 23, 2005.

AT&T Chairman and CEO Ed Whiteacre suggested that there would not be a “price war” between cable and telephone companies, stating “We’re not going to chase that down.” Instead, Whiteacre suggested that the companies would compete on the basis of who offers more services in their packages.⁴⁴

The Bells’ failure to compete out of region undermines the theory that reasonably efficient competitors could profitably enter local markets and/or is evidence of tacit collusion among the Bells.

The Bells’ efforts to compete out-of-region have been lackluster, indicating either that competing in ILEC-dominated local markets is more difficult than the Applicants assert, or indicating that Bells have tacitly decided to avoid inter-Bell competition. In its assessment of the Applicants’ filing, the Commission should examine SBC’s prior promises regarding out-of-region competition. Baldwin/Bosley Declaration, at paras. 166-175.

As discussed above, if the reasonably efficient competitor construct has any remaining viability – which the Ratepayer Advocate doubts – the fact that there is switch deployment by BellSouth out of region would indicate the ability to compete out of region. The fact that they do not compete undercuts the entire reasonably efficient competitor construct.

The transaction would significantly increase market concentration.

If AT&T acquires BellSouth, the HHI would increase from 3,075 to 4,199, an increase that vastly exceeds the 100-point threshold of concern set forth in the Merger Guidelines.⁴⁵

⁴³/ SBC/AT&T Merger Order, at para. 106, notes omitted.

⁴⁴/ Roger Chang, “AT&T CEO Backs View of Double-Digit Adjusted EPS Growth,” *The Wall Street Journal Online*, May 31, 2006.

⁴⁵ / U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, issued April 2, 1992, revised April 8, 1997 (“Horizontal Merger Guidelines”).

Baldwin/Bosley Declaration, at paras. 177-178. The speculative benefits that the Applicants describe do not offset the significant harm to consumers from this significant increase in market concentration.

The loss of BellSouth as an ILEC stakeholder in various telecommunications proceedings would be significant as evidenced by recent differences among stakeholders.

As the number of major carriers in the telecommunications markets dwindles, the Commission loses important perspectives that could otherwise inform policy making and regulation.

Baldwin/Bosley Declaration, at paras. 199-212.

The concerns that the Commission expressed in 1997, when it examined the merger between Bell Atlantic and NYNEX, apply to the proposed SBC/AT&T merger:

Further reductions ... become more and more problematic as the potential for coordinated behavior increases and the impact of individual company actions on our aggregate measures of the industry's performance grows ... [thus] further reductions in the number of Bell Companies or comparable incumbent LECs would present serious public interest concerns.⁴⁶

Legacy AT&T stated, in rebuttal to SBC's and Ameritech's claim that the number of RBOCs is unimportant:

Applicants' claim that there is "no regulatory significance" to the number of RBOCs, is thus astonishing. That claim is particularly egregious in light of the fact that the Applicants have themselves repeatedly emphasized the importance of benchmarking when it has suited their purposes. For example, Ameritech has stated that "[n]o amount of sophistry can suppress the importance of benchmarks," and that "division of the local exchange networks among seven independent companies has greatly enhanced the detectability of any monopoly abuses and the effectiveness of regulation." Likewise, SBC opined that seven benchmarks provided "an effective deterrent against even subtle attempts to abuse any advantage which might arise from ownership of local exchange communications facilities." Now, of course, SBC seeks to

⁴⁶ *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985 (1997) ("Bell Atlantic/NYNEX Merger Order"), at para. 156.

reduce this number to four.⁴⁷

Legacy AT&T elaborated further on the value of benchmarking:

Not only will the reduction of the number of RBOCs from seven to four make benchmarking much more difficult, it will also make the direct regulation of the remaining RBOCs -- especially the two super-RBOCs -- almost impossible. As the Commission recognized in the *BA-NYNEX Merger Order*, the RBOCs' "collective interest" is often best served when "they all cooperate[] minimally with regulators and competitors during the process of opening their local markets." *BA-NYNEX Merger Order 154*. The greater the number of RBOCs, and the greater the regional diversity of the RBOCs, the more likely it is that on a particular issue a RBOC will "break ranks" thereby allowing regulators to "speed[] the pro-competitive process." *Id.* The Ameritech/SBC merger, however, reduces the number of RBOCs as well as the regional diversity of the RBOCs, thereby giving the remaining RBOCs even greater incentive to continue their strategy of non-cooperation with the regulatory process.⁴⁸

SBC's acquisition last year of AT&T conveniently silences this dissenting perspective on the value of benchmarking to the public interest.

The proposed merger jeopardizes net neutrality, and, therefore, the Commission should condition any approval of the proposed transaction on a commitment to net neutrality, without a sunset provision.

The Commission should reject the Applicants' argument that net neutrality is irrelevant to this proceeding. Contrary to their assertion, the transaction bears directly on large carriers' ability to restrict open, nondiscriminatory access to the Internet. The proposed merger would further concentrate market power in a dwindling number of providers, which control households' and businesses' access to the Internet. This disturbing monopoly over transmission *and* potentially content would jeopardize the free market evolution of the Internet and the diverse and innovative applications that have developed. Baldwin/Bosley Declaration, at para. 215.

⁴⁷ / Petition of AT&T Corp. To Deny Applications, *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control*, CC Docket No. 98-141, October, 1998, at 28-29.

⁴⁸ / Petition of AT&T Corp. To Deny Applications, *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control*, CC Docket No. 98-141, at 30-31.

Post-merger, AT&T would control approximately half the nation's telephone lines. Absent enforceable commitments to net neutrality, this market concentration would stifle innovation, thwart the development of Internet applications, and unreasonably limit consumer choice. Allowing a single company to gain unfettered control over an essential input to the nation's information infrastructure would irrevocably harm consumers. Baldwin/Bosley Declaration, at para. 217. *See* generally Baldwin/Bosley Declaration, at paras. 214-226.

As stated in the attached declaration:

The Commission should prevent this scenario wherein a few powerful telephone companies control the nation's access to information. Furthermore, carriers should not be allowed to give preferential treatment to their own affiliates and/or discriminate against unaffiliated carriers. We oppose a "tiered" Internet where large carriers could act as gatekeepers to the flow of information. Under such a scenario, the economy and society risk being captive to the whims of the telco-cable duopoly, which has a compelling incentive to control consumers' access to information and entertainment, and to extract monopoly profits from such access. Discrimination would create inefficient barriers, unduly limit consumers' choices, and likely raise consumers' prices.

Baldwin/Bosley Declaration, at para. 219. The Ratepayer Advocate urges the Commission to impose net neutrality as a condition of any approval of the proposed merger.

Service quality in AT&T's and BellSouth's territory is declining, and the merger would heighten their incentives to neglect their core mission.

Service quality is declining in AT&T and BellSouth regions. Among the areas where the Applicants' service quality is declining is the AT&T-served state of Kansas, the same state where AT&T recently announced plans to deploy infrastructure for IPTV. An illustrative analysis of BellSouth's service quality shows deteriorating performance, as measured by the length of time BellSouth takes to install basic telephone lines in Florida. Baldwin/Bosley Declaration, at paras. 235-237.

The proposed transaction will provide yet further incentive for AT&T to relegate basic telephone service to the back seat as it pursues new lines of business. The Commission should seek and analyze detailed service quality data from the Applicants before rendering a decision in this proceeding, and furthermore, should impose sanctions if standards (set jointly with state commissions) for basic service are not met. Baldwin/Bosley Declaration, at paras. 235-241.

III. CONDITIONS

The Commission has, in prior merger proceedings, approved the transactions subject to conditions intended to mitigate the potential harms to consumers, competitors, and telecommunications markets.⁴⁹ If the Commission approves AT&T's acquisition of BellSouth, it should condition such approval on specific, measurable, and enforceable commitments that do not sunset, but rather that expire only at such time as the Commission explicitly determines that they are no longer necessary. Baldwin/Bosley Declaration, at para. 264.

The conditions that the Commission set forth in its order approving SBC's acquisition of AT&T should be considered, a minimum, or a jumping off point. The Commission should further require commitments from the Applicants that enable ratepayers – who have substantially financed the deployment of the telecommunications network infrastructure – to benefit from the \$18 billion in expected merger synergies. Baldwin/Bosley Declaration, at paras. 268, 271.

The Ratepayer Advocate submits that the proposed transaction is not in the public interest for the reasons outlined above and in the accompanying Baldwin/Bosley Declaration. However, if the

⁴⁹ / See, e.g., *SBC/AT&T Merger Order*, at Appendix F; *Verizon/MCI Merger Order*, at Appendix G; *In re: Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control*, FCC CC Docket No. 98-141, *Memorandum Opinion and Order*, released October 8, 1999 (“SBC/Ameritech Merger Order”), at paras. 398-399, Appendix E.

Commission approves the proposed acquisition of BellSouth by AT&T, the FCC should adopt the following conditions for the reasons set forth in the accompanying Baldwin/Bosley Declaration:

- The Commission should ensure that the Applicants make firm commitments to increase telephone subscribership.
- The Applicants should commit to the deployment of affordable broadband throughout their region.
- Absent compelling information to the contrary, based on the substantial merger synergies and the Commission's recent decision to extend the separations freeze (which results in overstated intrastate costs), the FCC should require AT&T to provide broadband at POTS prices throughout its serving territory within three years of the merger closing.
- Net neutrality conditions are essential to protect consumers and competitors from undue control of access to the Internet.
- The Applicants should commit to unbundled DSL until such time as AT&T demonstrates to the Commission that the market has evolved to a point where the commitment is no longer necessary.
- The Applicants should offer UNE-P at TELRIC rates until markets are sufficiently competitive.
- The Commission should require an audit of AT&T's interaffiliate transactions and sales practices and provide comprehensive customer education.
- The Commission should require AT&T and BellSouth to submit service quality data and should adopt sanctions for reductions in service quality.
- AT&T should relinquish competitive classification of basic local exchange service unless and until concerted out-of-region entry and effective competition materializes.
- The FCC should impose conditions to ensure consumers benefit from merger synergies and should establish an adequate X-factor, consider rate regulation and take account of estimated merger synergies in its forthcoming decisions in ongoing proceedings.
- The Applicants should not receive assistance from the non-rural high-cost fund.
- The Commission should ensure that legacy AT&T customers in BellSouth's territory are not harmed.

- The Applicants should submit quarterly reports that provide, on a geographically disaggregated basis (*i.e.*, wire center basis) quantities of total retail lines; UNE-P lines; UNE-L lines; resale lines; demand for each of the bundled services they offer; demand for DSL; demand for unbundled DSL; and price changes.

IV. CONCLUSION

The Applicants have failed to meet their burden of proof that the proposed transaction is in the public interest. The Ratepayer Advocate recognizes that the Commission may issue a data and information request to the Applicants, similar to that propounded in WC Docket Nos. 05-65 and 05-75 regarding the SBC/AT&T and Verizon/MCI mergers. The Ratepayer Advocate intends to supplement its analysis of the proposed merger's impact on consumers after the Applicants make available relevant data.

Based on the information that the Applicants have provided and the status of today's telecommunications markets, the Ratepayer Advocate urges the Commission to deny the proposed transaction. The irrevocable and significant market concentration would expose consumers to significant harm of monopoly power without offsetting benefit. If, nonetheless, the Commission decides to approve the transaction it should condition its approval on enforceable commitments identified herein in order to minimize the risk of harm to consumers and to increase the probability of specific benefits flowing to consumers in the mass market.

Respectfully submitted,

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