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

In the Matter of	)	
	)	
Application for Consent	)	WC Docket No. 06-74
To Transfer of Control Filed by	)	
AT&T Inc. and BellSouth Corporation	)	
	)	

PETITION TO DENY OF EARTHLINK, INC.

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EarthLink, Inc. ("EarthLink"), one of the largest independent nationwide Internet service providers ("ISPs"), with over 5.5 million customers, hereby files this Petition to Deny in accordance with the schedule set forth in the Commission's Public Notice dated April 19, 2006. For the reasons discussed herein, the Commission may not conclude that grant of the application as filed would serve the public interest. Inasmuch as the burden is on AT&T, Inc., and BellSouth (collectively, the "Applicants") to demonstrate that the merger is in the public interest, the Commission must deny the petition, or at a minimum must impose significant conditions to remedy the public interest harms that will result from the proposed merger.

INTRODUCTION AND SUMMARY

The combination of two of the nation's largest incumbent local telephone companies will have a significant impact on the competitive landscape for both new and emerging voice and data services. The unprecedented creation of a coast-to-coast incumbent local exchange carrier ("LEC") will significantly harm competition, undermine innovation, and increase prices. While the merging parties claim that the merger will provide "a stronger network, enable more research and development, enhance service quality and lower costs for consumers"[1] and will bring "clear

[1] *In the Matter of BellSouth Corp. and AT&T Inc. Application for Consent to Transfer Control of BellSouth Corp. to AT&T Inc.*, WC Dkt. 06-74 (filed Mar. 31, 2006) ("*AT&T/BellSouth*

and specifically identifiable public interest benefits,"[2] the facts show that only by imposing specific, effective and enforceable conditions upon any approval of the merger can the public interest possibly be salvaged from this transaction.

The Communications Act requires the merger applicants to demonstrate affirmative public interest benefits. This mega-merger of two of the four remaining Bell Operating Companies ("BOCs"), however, threatens to irreparably damage the prospects for achieving the competition goals of the Act.[3] AT&T and BellSouth are both the most likely entrants into each other's incumbent regions, with each company having extensive capabilities to provide both narrowband and broadband services. As a result of the merger, the loss of potential entry from either BOC into the other's region will strike one more serious blow to narrowband local competition and the Section 706 facilities-based broadband competition goals of the Act. Especially after the loss of competition from MCI and the former AT&T, the Commission should be extremely skeptical of claims that the public will be served by an additional concentration of market power in last-mile telecommunications networks.

The proposed merger will also drastically impair the Commission's ability to function by destroying benchmarking of incumbent LECs – a valuable regulatory tool that provides incentives for companies to improve their services to meet "best practices" as well as incentives for increased innovative offerings. By eliminating one of two similarly-situated companies, the proposed merger will eliminate these incentives to the disadvantage of consumers, competitors and regulators.

Merger Application"), Description of the Transaction, Public Interest Showing, and Related Demonstrations, p. iv ("*AT&T/BellSouth Public Interest Statement*").

[2] Id.

[3] Communications Act of 1934, *as amended*, 47 U.S.C. § 151 et seq. ("Act").

To the further detriment of competition, the proposed merger will enhance the incentives and ability of the post-merger AT&T to engage in exclusionary access policies against competitors through both tacit collusion and unilateral anticompetitive actions. The merger will increase AT&T's control over both ends of interstate calls, which will give the company an increased ability to skirt regulatory oversight, thus reducing the merged companies' incentives to lower access charges. In addition, both companies have a history of violating the FCC's rules, including violations of numerous merger-related conditions. As such, the Applicants' current hat-in-hand promises of a better tomorrow for consumers post-merger must be substantially discounted, if not rejected outright.

DISCUSSION

I. LEGAL STANDARD FOR MERGER REVIEW

In reviewing the proposed merger, the Commission must conduct a public interest analysis pursuant to sections 214(a) and 310(d) of the Communications Act to determine whether the Applicants have demonstrated that the public interest would be served by the merger.[4] The Commission must weigh the potential public interest harms resulting from the merger against the potential public interest benefits "to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessity."[5] The burden of proof is on the Applicants to demonstrate by a preponderance of the evidence that the merger serves the public interest.[6] Unlike the Department of Justice, the Commission does not conduct a public interest analysis to

[4] 47 U.S.C. §§ 214(a), 310(d) (2005).

[5] *In the Matter of Intelsat, Ltd. and Zeus Holdings Limited Consolidated Application for Consent to Transfers of Control*, Order and Authorization, 19 FCC Rcd. 24820, ¶ 15 (2004) ("*Intelsat/Zeus Merger Order*").

[6] *See In the Matter of Application of Ameritech and SBC Communications Inc. for Consent to Transfer of Control*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶ 48 (1999) ("*SBC/Ameritech Merger Order*").

determine whether the merger will *harm* competition. Instead, in order to find that a merger in is the public interest, the Commission must be "convinced that it will *enhance* competition" and provide public interest benefits.[7]

> Specifically, the Commission has examined mergers for four overriding factors:
>
> (1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes; and (4) whether the merger promises to yield affirmative public interest benefits.[8]

Finally, the Commission analyzes the potential competitive effects of the merger under antitrust principles.[9] If the Commission is unable to find that the proposed transaction would serve the public interest for any reason, or if the record presents any substantial and material questions of fact, section 309(e) of the Act requires the Commission to designate the application for hearing.[10]

For the reasons discussed more fully below, the Applicants have failed to meet their burden of proof to demonstrate that the merger is in the public interest. In fact, the merger as currently proposed, without conditions designed to remedy the public interest harms resulting from the merger, would have significant detrimental effects for the American public.

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[7] *In the Matter of NYNEX and Bell Atlantic For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd. 19985, ¶ 2 (1997) ("*Bell Atlantic/NYNEX Merger Order*") (emphasis added).

[8] *See SBC/Ameritech Merger Order* at ¶ 48.

[9] Id. at ¶ 49.

[10] 47 U.S.C. § 309(e); *See also In the Matter of Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corporation to WorldCom, Inc*., Memorandum Opinion and Order, 13 FCC Rcd 18025, ¶ 202 (1998).

II. THE PROPOSED MERGER DISSERVES THE PUBLIC INTEREST BY NEGATIVELY IMPACTING BROADBAND AND NARROWBAND COMPETITION

The Commission must analyze the merger's effect on both *actual* and *potential* competition.[11] With regard to the merger's effect on actual (*i.e.*, current) competition in broadband transmission markets, the Applicants have claimed "AT&T has only a limited number of DSL customers, and is not a significant competitor outside of its 13 state region."[12] However, the Applicants say absolutely nothing about the proposed merger's effect on *potential* competition in the retail mass market for broadband services.[13] That omission renders the application facially deficient and requires denial of the application as it currently stands. The omission is all the more striking because AT&T offered as one of the primary benefits of the SBC/AT&T merger that that transaction would "produce a flagship U.S. carrier that will offer the most efficient, highest quality capabilities to government, business, and residential customers

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[11] *See In the Matter of Applications of Nextel Commc'ns Inc. and Sprint Corp. For Consent to Transfer of Control,* Memorandum Opinion and Order, 20 FCC Rcd. 13967, ¶ 22 (2005). *See also In the Matter of GTE Corp. and Bell Atlantic Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 23 (2000) ("*Bell Atlantic/GTE Merger Order*").

[12] *AT&T/BellSouth Public Interest Statement* at p.106.

[13] To be sure, the Applicants attempt to piggy-back on the argument that the "old" AT&T employed in the SBC/AT&T merger, namely, that AT&T had withdrawn from providing mass market services. *See AT&T/BellSouth Public Interest Statement* at 83-86. Whatever the merits of that argument might have been in the prior proceeding, the facts are entirely different here. Whereas the SBC/AT&T merger was the result of AT&T's inability to continue to compete with BOCs that had been freed from in-region long distance restrictions, the "new" AT&T is the largest telecommunications company in the world, and either currently competes or has plans to compete vigorously with respect to virtually every service in the modern communications marketplace. To the extent that the Applicants are suggesting that the scope of the merged company's future out-of-region activities should be judged on the basis of the historical activities of the "old" AT&T, the suggestion is entirely without merit. The current proceeding, which raises a horizontal competition issue that was largely absent from the SBC/AT&T transaction with respect to mass-market broadband services, is fundamentally different from the predecessor transaction, which raised primarily vertical competition issues with respect to those services.

nationwide."[14] In light of its promises to compete out-of-region upon the approval of that previous transaction, the absence of any discussion of even the possibility of such competition in the current application is more than curious; it is fatal.

EarthLink is most concerned about the market for broadband transmission services. Broadband transmission is a necessary input for broadband Internet access service, which is one of EarthLink's core offerings. Broadband Internet access service is also a critical platform for voice-over-Internet-protocol ("VoIP"), another major EarthLink product. Today, in any given geographic area in the United States, over 95% of broadband connections are provided either by an incumbent LEC or by the (usually sole) cable company serving that region.[15] Therefore, aside from certain statistically insignificant exceptions, broadband today in the United States is, according to the Commission's own numbers, at best, a duopoly. Because the ability to access broadband transmission capability is now or soon will become the price of entry to *all* mass market communications markets (*e.g.*, voice, Internet access, video), and because that transmission capacity today operates under duopoly conditions at most, the merger of two broadband network providers in this already highly concentrated market raises serious concerns about the future of broadband competition in the United States.

Moreover, AT&T and BellSouth represent the most likely competitors in each other's regions for local narrowband services, including UNE-L based competitive services for residences and businesses. As the FCC has noted, not only do companies of this scale have

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[14] *In the Matter of AT&T Corp. and SBC Commc'ns Inc. Application for Consent to Transfer Control of AT&T Corp. to SBC Commc'ns Inc.*, WC Dkt. 05-65 (filed Feb. 21, 2005) Description of the Transaction, Public Interest Showing and Related Demonstrations, p. iv.

[15] *See* "High-Speed Services for Internet Access: Status as of June 30, 2005," at pp. 2-3 (rel. Apr. 2006) ("June 2005 High-Speed Report") (indicating that of total high-speed lines, 55.8% were cable and 39.8% were DSL, with incumbent LECs controlling 96.2% of DSL lines).

access to needed capital and related resources to enter into each other's territories, thereby promoting the local competition that was a predicate of the Telecommunications Act of 1996 ("1996 Act"), but they fuel the culture of competition, enhancing the ability of all current and future competitors to serve the public.

A. The Application Fails to Disclose the Extent to Which AT&T Currently Competes With BellSouth in the Broadband Transmission Market

The Applicants take the position that they do not compete significantly today in the mass-market broadband transmission market.[16] At the outset, the Applicants have a duty to provide something more than vague, conclusory statements regarding the actual level of broadband competition between AT&T and BellSouth. In May 2005, while the SBC/AT&T merger was under review by the Commission, SBC and AT&T issued a joint press release in which they hailed an agreement with Covad as an important step in expanding out-of-region competition post-merger:

> **Covad will extend broadband access to merged companies, to enable expansion of VoIP services out-of-region, promote vigorous competition in telecommunications industry**
>
> **San Antonio, May 5, 2005** – SBC Communications Inc. (NYSE: SBC) and AT&T Corp. (NYSE: T) together have reached a services agreement under which Covad Communications Group Inc. (OTCBB: COVD) would extend broadband access to the merged companies, which would help the combined entity expand Internet protocol (IP) services, including voice-over-Internet-protocol (VoIP), out-of-region to consumers and businesses. The deal, effective upon completion of the SBC and AT&T merger, demonstrates the parties' commitment to promoting vigorous competition in the telecommunications industry among product and service providers.
>
> "Consumers will continue to benefit from competition in the provision of telecommunications services, making them the real winners here," said Mark Keiffer, senior vice president-business marketing for SBC. "And agreements such as these will be especially important in enabling SBC, post-merger, to become a more effective out-of-region competitor. We look forward to working

[16] *See AT&T/BellSouth Public Interest Statement* at p. 105.

> with Covad not only in offering services to consumers and businesses outside of our territory, but in building on the excellent relationship that exists between AT&T and Covad today to work to bring additional services to the market, post-merger."[17]

Given AT&T's explicit statement of intent to compete out-of-region with respect to VoIP and other broadband services, the Applicants here must provide specifics about the number of customers they actually serve out-of-region and about their out-of-region plans pre- and post-merger (with respect to SBC/AT&T and AT&T/BellSouth), including all intra- and inter-company communications on that subject. Instead of providing that information, however, the Applicants brush off the Covad deal by stating that AT&T only provides "DSL services to a limited number of out-of-region customers through a resale agreement with Covad. . . ."[18] Absent specific information about the actual competition that the Applicants acknowledge exists, but about which they have provided no facts, the application must be denied.[19]

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[17] *See* "SBC, AT&T Reach Services Agreements with Covad," SBC/AT&T Press Release (rel. May 5, 2005), available at http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21667&phase=check (attached as Exhibit A).

[18] *AT&T/BellSouth Public Interest Statement* at p. 107.

[19] Those facts are necessary not only to measure the current level of broadband competition that AT&T provides in BellSouth territory, but also to measure the potential for such non-facilities-based competition by others. For example, on pp. 107-108 of the *AT&T/BellSouth Public Interest Statement*, the Applicants argue that "[i]n any event, out of region, there are other actual or potential non-facilities-based DSL providers who could enter, and indeed who 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." This is a most curious statement. On the one hand, AT&T claims that its previously much-touted Covad deal is competitively insignificant in BellSouth territory. On the other hand, the Applicants offer up the possibility of similar deals as evidence of the existence of substantial competition to BellSouth and the cable companies from non-facilities-based DSL providers. Assuming that the capabilities under various potential resale deals with Covad are similar across those deals, then AT&T's competitive impact through those deals cannot be *de minimis* at the same time another, similarly situated DSL provider's competitive impact is significant.

B. The Proposed Merger Will Eliminate a Significant Potential Mass Market Broadband Competitor in BellSouth and AT&T Territory

Even if one were to take at face value the Applicants' assertion that that they are not actual competitors in any meaningful way (a course not open to the Commission in light of the existing evidence to the contrary), the proposed merger would still result in substantial anticompetitive effects, and would not be in the public interest. This is the case because the merger threatens to remove the single most likely significant potential entrant into the broadband transmission market in BellSouth territory. Accordingly, unless the Commission is willing to accept the proposition that a broadband duopoly without the possibility of near-term, facilities-based competition is acceptable for American consumers, then it must either deny the application or impose conditions that will replace the potential competition that the merger will permanently foreclose.

The Commission has discussed the role of potential competition in at least two previous BOC-to-BOC mergers. In the *Bell Atlantic/NYNEX Merger Order*, the Commission introduced its concept of "most significant market participants," which builds upon the antitrust theory of "actual potential competition." There, the Commission explained its analysis this way:

> In determining the most significant market participants from the universe of actual and precluded competitors, we identify the market participants that have, or are likely to speedily gain, the greatest capabilities and incentives to compete most effectively and soonest in the relevant market. Some of these capabilities are basic to the operation of a local telephone company, relatively technical, and concern access to the necessary facilities, "know how," and operational infrastructure such as sales, marketing, customer service, billing and network management. Other capabilities are less tangible. They include brand name recognition in the mass market, a reputation for providing high quality, reliable service, existing customer relationships, or the financial resources to obtain these intangible assets. Another factor is whether the actual or precluded competitor had plans to enter the relevant market or was engaged in such planning. Such plans would be probative evidence of a perception of possession of capabilities and incentives necessary to affect the market.

> In evaluating the relative significance of market participants, we also consider matters that would be material to the entry of all precluded competitors as a class, but not to any one entity in particular. Such factors would include whether the relevant market is expanding, prevailing prices in the relevant market, and the availability of capital both generally and in the relevant market.
>
> The foregoing factors are similar to those factors used in cases applying the antitrust doctrine of actual potential competition to determine whether firms proposing to merge would have entered relevant markets with capabilities equivalent to those of other potential entrants. And, as in actual potential competition cases, in deciding whether a given precluded competitor has the capabilities and incentives to be a market participant, probative evidence may be documents from the precluded competitor's files showing it would likely have entered the relevant market. Documents, if they demonstrate serious consideration of entry, may create an inference of a capability to affect the market without a detailed examination of the competitor's capabilities and incentives.
>
> Finally, in determining the most significant market participants from among the actual and precluded competitors, it is particularly relevant to identify which competitors, other than the merging parties, are likely to be as significant a competitor as the lesser of the merging parties. If one of the merging parties has the same capabilities and incentives as a large number of other competitors, then the loss of that one participant may be unlikely to remove much individual discipline from the market. But, to conclude that a merger would have little or no competitive effect on these grounds, the number of similar (i.e., most significant) market participants must be large.[20]

The Commission further explained in the *SBC/Ameritech Merger Order* that, in the context of the Act and the specialized communications industry, the Commission's merger analysis, although premised on the antitrust concept of actual potential competition, did not require strict adherence to each prong of the actual potential competition test:

> As explained in the *WorldCom/MCI Order*, our framework for analyzing these transitional markets reflects the values of, and builds upon, but does not attempt to copy, the "actual potential competition" doctrine established in antitrust case law. Under the actual potential competition doctrine, a merger between an existing market participant and a firm that is not currently a market participant, but that would have entered the market but for the merger, violates antitrust laws if the market is concentrated and entry by the nonparticipant would have resulted in deconcentration of the market or other pro-competitive effects. As the case law indicates, one obstacle facing parties bringing an actual potential competition case

[20] *Bell Atlantic/NYNEX Merger Order* at ¶¶ 62-65 (citations omitted).

> is to demonstrate that the acquired firm would have entered the relevant market absent the merger. The transitional markets framework set forth in the *Bell Atlantic/NYNEX Order*, which is well-tailored to the Commission's unique role as an expert agency and its statutory obligation to promote competition and to open local markets, identifies as "most significant market participants" not only firms that already dominate transitional markets, but also those that are most likely to enter soon, effectively, and on a large scale once a more competitive environment is established. The Commission seeks to determine whether either or both of the merging parties are among a small number of these most significant market participants, in which case its absorption by the merger will, in most cases, if not offset by countervailing positive effects, harm the public interest in violation of the Communications Act.

As discussed above, the generally prevailing duopoly structure for broadband services means that, in any given geographic market, consumers may choose at most between incumbent MSO-provided cable modem service and incumbent LEC-provided DSL for broadband transmission service. Although satellite broadband service is generally available nationwide, it is considerably more expensive than either cable or DSL, has topographical limits on its availability, and it has latency characteristics that make it unsuitable for voice. Broadband-over-powerline ("BPL"), WiMax, and other emerging technologies may one day present a challenge to cable and DSL, but their very small market share (approximately 2% combined for satellite, wireless, and BPL)[21] indicates that they are competitively insignificant for the purposes of evaluating competitive conditions in the relatively near term (1-5 years).[22] With respect to

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[21] *See* June 2005 High-Speed Report at p. 2.

[22] It is no answer to the fact that none of these technologies has become a serious competitor to say that they might someday present a meaningful competitive alternative to cable and DSL. Although the Commission has some leeway to use its expertise to predict outcomes that may be less than certain, that discretion must be exercised based on the application of articulable assumptions applied to demonstrable facts. In other words, it is not enough for the Commission merely to say that it believes, for example, that wireless and BPL broadband transmission will soon rival DSL and cable. If the Commission makes such predictions, it must say *why* it believes the predicted behavior will in fact occur. Moreover, in addition to providing a reasoned explanation of why the Commission expects certain conditions to develop in the industry, it must say *when* it expects those conditions to develop. The possibility of competition in five years is a much different thing than the possibility of competition in six months or two years.

current competitors, cable and incumbent LEC-provided DSL are the beginning and the end of the market for purposes of competition analysis.

Moreover, in many communities, the FCC's data shows that AT&T and BellSouth are broadband monopolists and face not even a duopoly market.[23] Similarly, in Georgia and Louisiana, the State Public Utility Commissions have determined that BellSouth is dominant in the provision of broadband services.[24] Nor is this dominance likely to be remedied in the near future since, as the FCC has recognized, "no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market."[25]

As is described in the excerpts quoted above from the *Bell Atlantic/NYNEX Merger Order* and *SBC/Ameritech Merger Order*, the relevant analysis involves determining how many

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[23] For example, according to a California Public Utilities Commission staff study, 35% of Californians live in communities where DSL is the only broadband service choice, while 21% of Californians live in communities that have neither cable modem nor DSL service. Reply Comments of the People of the State of California and the California Public Utilities Commission, CC Dkt. 01-337, at p. 14 (Apr. 22, 2002) (footnotes omitted), and Appendix A (pie chart of DSL, cable and other in California). *See also*, *In the Matter of Carrier Current Systems, including Broadband over Power Line Systems*, Notice of Proposed Rulemaking, 19 FCC Rcd. 3335, Concurring Statement of Chairman Powell (2004) ("Despite increasing access to broadband services, significant areas of the country still lack any type of broadband access or competition among broadband service providers."). *See also In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion,* Third Report, 17 FCC Rcd. 2844 at App C, Table 9 (2002) (showing that in many areas, BOCs' retail DSL offerings face no cable competition).

[24] *Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration,* Georgia Public Service Commission, Order on Complaint, Dkt. No. 11901-U, at p. 6 (Nov. 13, 2003); *In re: BellSouth's Provision of ADSL Service to End-users over CLEC Loops,* Louisiana Public Service Commission, Order R-26173, at p. 7 (Dec. 18, 2002).

[25] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶ 233 (2003) ("*Triennial Review Order*") *as modified by* Errata, 18 FCC Rcd. 19020 (2003) *vacated and remanded in part, aff'd in part,* United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

realistic, "most significant market participants" exist pre-merger, how many will exist post-merger, and how that change is likely to affect the future competitive landscape. Here, the analysis is simple. Cable already participates in both AT&T and BellSouth territories, so the question of what other significant players exist in the broadband transmission marketplace turns on which of the incumbent LECs may be likely participants in those territories. The only companies with the financial wherewithal, technical expertise, geographic proximity, and brand name recognition to compete with BellSouth for the provision of broadband transmission services in its historical region are AT&T and Verizon. By the same token, only Verizon and BellSouth have the realistic capability to compete with AT&T with respect to those services in AT&T's historical region.[26]

When one examines the most likely new entrants in BellSouth territory, it is readily apparent that AT&T is more likely to enter than is Verizon. All other things being equal (technical expertise, brand name recognition, access to capital, size of customer base) between AT&T and Verizon, AT&T's geographic position on the western edge of BellSouth's territory makes it the more likely of the two entrants. There are six AT&T states that border BellSouth states, and four BellSouth states that border AT&T states. This geographic adjacency was one of

[26] Qwest does not appear to be a realistic competitor primarily because of its significant debt position. Moreover, Qwest has not unveiled fiber deployment plans that are anywhere near as aggressive as those announced by AT&T and Verizon. That lack of aggressive fiber roll-out plans indicates that Qwest probably has not reached the economies of scale that would allow it to expand its fiber plant beyond its historical geographic boundaries. In addition, at least with respect to possible competition in BellSouth territory, the geographic separation between BellSouth and Qwest makes Qwest a less realistic potential competitor to BellSouth. Finally, as demonstrated by the demise of the largest and best known of the competitive LECs, "old" AT&T and MCI, there is no realistic new entrant for mass-market broadband transmission services that is likely to emerge from the CLEC ranks any time soon. With respect to competition in the historical region of either AT&T or BellSouth, therefore, there are at most two "most significant market participants," both of which are BOCs -- AT&T and Verizon in BellSouth territory, and BellSouth and Verizon in AT&T territory.

the factors that led the Commission in the *Bell Atlantic/NYNEX Merger Order* to conclude that the merger was likely to preclude cross-border competition that would otherwise occur.[27] The only meaningful geographic contact between BellSouth states and Verizon states occurs on the Virginia/North Carolina border, with minimal additional contact in southern West Virginia and far southeastern Virginia. AT&T, therefore, appears to be a more likely potential entrant in BellSouth territory than does Verizon.[28]

There can be no doubt that AT&T has the financial and technical strength to compete for broadband service customers in BellSouth territory. Indeed, if AT&T, the largest and (according to its own self-evaluation) most technologically advanced communications company in the world, cannot go head-to-head with BellSouth, then no company can. If the Commission were to reach the conclusion that entry by AT&T into BellSouth territory is not feasible, that would amount to a conclusion by the Commission that there will not be *any* meaningful additional facilities-based competition in any broadband market in the foreseeable future, a conclusion that would sharply undercut the justification for the most recent Verizon/MCI and AT&T/SBC mergers. Assuming, then, that the Commission concludes that AT&T is capable of entering the mass-market broadband transmission market in BellSouth territory, the question becomes whether it is reasonable to believe that, absent the merger, AT&T is in fact likely to do so.

In determining whether a potential entrant is likely actually to offer service in a new market, the Commission relies both on internal documents from the potential entrant and also on

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[27] *See, e.g., Bell Atlantic/NYNEX Merger Order* at ¶ 78.

[28] With respect to the mirror-image issue of the possibility of BellSouth entry into AT&T territory, a possibility that would also be foreclosed by the merger, the analysis is largely the same, with the caveats that Verizon is a larger company than BellSouth (although BellSouth has an exceptionally strong balance sheet), and Verizon does not face the same geographic barriers to entering AT&T territory that it does to entering BellSouth territory.

objective indications that such entry would be profitable.[29] As to the first source of evidence – company documents – there is no indication that any have been produced or, at this stage, requested. EarthLink urges the Commission to instruct AT&T and BellSouth to produce all documents such as studies, plans, proposals, feasibility studies, e-mails, economic analyses, market studies, etc., that would shed light on the Applicants' plans to compete out-of-region with respect to broadband transmission services. EarthLink attaches as Exhibit B a list of suggested questions and document requests for the Applicants.

With respect to objective indications that AT&T would enter, the Commission has previously found with respect to "greenfield" fiber deployments that the revenue opportunities associated with services that may be offered over fiber provide a sufficient incentive for companies to move into new markets.[30] When that profit incentive is combined with the fact that AT&T already has a nationwide long-distance customer base, a cellular customer base in BellSouth territory through Cingular, and a nationwide (and international) Tier I Internet backbone network, it appears that all of the necessary pieces are in place for AT&T to enter BellSouth's territory for the purpose of offering broadband transmission and the associated services that can be transmitted over a broadband network. Indeed, the stated purposes of the SBC/AT&T combination was to allow the merged company to "assemble a true *nationwide* end-to-end broadband network"[31] in order to "offer the most efficient, highest quality capabilities to

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[29] *See SBC/Ameritech Merger Order*, ¶ 75.

[30] *See Triennial Review Order*, ¶ 274. The associated findings in that section of the 2003 *Triennial Review Order* to the effect that competitive LECs are more likely to build significant fiber-to-the-home systems for mass-market use have, of course, been proven wrong in the intervening three years. Only the BOCs have announced plans to build such systems on a broad scale.

[31] *AT&T/SBC Public Interest Statement* at p. iii (emphasis added).

government, business, and residential customers *nationwide*."[32] The Applicants in that previous merger went so far as to state explicitly that "the merger will *enhance* competition outside of SBC's region . . . ."[33] Moreover, as discussed *supra* at 7-8, SBC and AT&T in May of 2005 announced a deal with Covad that had the express purpose of providing out-of-region broadband competition. The fact that the Applicants here seek to belittle the very arrangement that they announced with such vigor during review of the prior merger must give the Commission cause to investigate AT&T's out-of-region plans in greater depth, not give it cause to assume that those plans do not exist.

Summarizing the analysis, then, in BellSouth territory there are, at most, currently two major broadband service providers – BellSouth and the cable provider in each applicable geographic market. In addition, there are two potential entrants, AT&T and Verizon. Of the two, AT&T is the more likely entrant. Accordingly, post-merger, assuming for the sake of argument that AT&T is not considered an actual broadband competitor in BellSouth territory, the competitive landscape changes from one in which there are at best two actual competitors and

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[32] Id. at p. iv (emphasis added).

[33] Id. at p. v (emphasis in original). Just as it is clear that AT&T justified its merger with SBC on the premise that the combination would create a company with the scope and capability to bring broadband competition to the entire nation, it is equally clear that its out-of-region plans did not depend on any further mergers. In a November 7, 2005, interview, in response to the question "Is it a possibility that SBC would acquire BellSouth?" SBC CEO Edward Whitacre answered that: "It sure would be nice, but it doesn't have much chance of happening because of market power, size, etc. I think it would be real hard to do. I don't think the regulators would let that happen, in my judgment." *Online Extra: At SBC, It's All About "Scale and Scope*," BusinessWeek online, Nov. 7, 2005, available at http://www.businessweek.com/print/magazine/content/05_45/b3958092.htm?chan=gl (last visited May 8, 2006). However accurate Mr. Whitacre's predictions regarding the regulatory treatment of the current merger might be in the end, it is clear that the nationwide broadband competition that he envisioned as arising from the SBC/AT&T combination did not depend on any future combination with BellSouth, but instead that such competition was intended to result solely from the SBC/AT&T merger.

two potential competitors, to one in which there are at most two actual competitors (AT&T/BellSouth and cable) and one potential competitor (Verizon). Given the size (in numbers of customers, revenues, and geographic reach) of the proposed merged company and the geographic insulation that the merger would bring, the remaining potential competitor (Verizon) would likely become a substantially less viable potential competitor in BellSouth territory post-merger than it is today.

The Commission has found that BOC-to-BOC mergers that would have created less concentration than this merger were not in the public interest absent significant conditions. In the *Bell Atlantic/NYNEX Merger Order*, for example, the Commission found that the merger of two of the five most significant market participants would not be in the public interest.[34] Here, of course, the merger is between two of only four participants, with one of the merging parties being the stronger of two potential competitors. The net effect of the merger would be to transform the mass-market broadband transmission market in BellSouth territory from a duopoly at best with two actual potential competitors (AT&T and Verizon) one with only a single, substantially weakened actual potential competitor (Verizon). That is a situation that indicates real competitive concerns both under traditional antitrust potential competition theory[35] and also

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[34] *Bell Atlantic/NYNEX Merger Order*, ¶ 70; *see also SBC/Ameritech Merger Order*, ¶¶ 87, 95 (merger of two of five most significant participants not in public interest).

[35] Under a traditional antitrust potential competition theory, all five elements of the test for when removal of a potential competitor through merger significantly threatens competition are met. *See Bell Atlantic/NYNEX Merger Order* at ¶ 138 and cases cited therein. First, the market in question is highly concentrated (duopoly). Second, few other potential entrants are equivalent to the proposed merging company (only Verizon comes close). Third, AT&T is reasonably likely to enter the broadband market in BellSouth territory absent the merger (indeed, it has already done so, and has stated such entry as one of the purposes of its prior merger). Fourth, AT&T has a means of entry other than through merger (direct entry through fiber build-out and entry through Covad arrangement). Fifth, AT&T's non-merger means of entry would likely result in substantial de-concentration of the broadband market in BellSouth territory (such entry would increase the number of substantial facilities-based competitors from two to three). Given that

under the Commission's related "most significant market participant" framework. Accordingly, the application for transfer of control must either be denied or the Commission must impose substantial conditions that have a realistic chance of replacing the broadband transmission competitive options that the merger will foreclose.

C. The Proposed Merger will Undermine Local Competition Generally in AT&T and BellSouth Regions

In addition to the adverse competitive impact of the proposed merger on broadband services, the merger would also damage the competitive landscape for wireline voice competition. Not only is AT&T a current provider of such services throughout BellSouth's region,[36] the merger represents the loss of one of the most likely significant potential entrants providing mass market voice services to business and residential consumers in each of the Applicants' regions, including through UNEs, resale, acquisition of smaller out-of-region competitors, and VoIP. Indeed, the former SBC is a self-proclaimed "leader in IP communications" for voice, having launched a significant residential VoIP initiative in November 2004 and VoIP services for business customers in 1998, including a VoIP service spanning 110 cities across the country.[37] As the Commission recognized in the merger of Bell Atlantic and NYNEX, "[m]ergers between incumbent LECs will likely reduce experimentation

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even this more stringent traditional antitrust standard is met, the Commission's task clearly becomes one of determining whether there is a set of conditions that can realistically be expected to replace the competition that the merger would foreclose, such that the merger could still be found to be in the public interest. Any such conditions would, at a minimum, have to provide opportunities for companies with regional or national scope to provide competing broadband transmission services at a commercially reasonable cost.

[36] *See, e.g.*, BellSouth Corp., Form 10-K, filed with the Securities and Exchange Commission on Mar. 31, 2006 at 15 (noting that as of Dec. 31, 2005, AT&T, along with MCI, was one of its two most significant local service competitors).

[37] *See* "SBC Communications Announces Launch of Residential VoIP Service," SBC Press Release, (rel. Nov. 16, 2004), available at http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21461.

and diversity of viewpoints in the process of opening markets to competition"[38] and further noted the public interest harms that result when an incumbent LEC avoids competition by eliminating a potentially significant future competitor.[39]

Moreover, it is well recognized that the existence of a significant potential entrant enhances generally the ability of all competitors to compete, especially where the potential entrant is a market participant of the size of AT&T or BellSouth.[40] Just as the FCC has recognized in previous BOC mergers, the FCC must employ an analysis that accounts for the emerging nature of competition that is additive to the strictures of the "actual/potential competition" limits established in antitrust case law.[41] Certainly, there is no question that AT&T (as well as BellSouth) has the capabilities to expand its service base by offering out-of-region consumers a full-service suite of services including traditional voice, data and even video. Indeed, David W. Dorman, AT&T Chairman and Chief Executive Officer proclaimed upon consummation of the SBC/AT&T merger that the new company "will have all the capabilities necessary to compete successfully in serving a broad range of customers across the country and

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[38] *Bell Atlantic/NYNEX Merger Order*, ¶ 152.

[39] Id., ¶ 96

[40] Thus, the FCC has stressed that "the loss of even one significant market participant can adversely affect the development of competition." Id., ¶ 66. As just one example, the ability of one competitor to negotiate a strong interconnection agreement can redound to the benefit of all other competitors who may choose to add such favorable terms to their own agreements with the incumbent.

[41] *See Bell Atlantic/GTE Merger Order*, ¶ 97 n. 244. There, the FCC stressed its "statutory obligation to promote the development, and not merely prevent the lessening, of competition in telecommunications markets," citing, *SBC/Ameritech Merger Order*, ¶ 63. *See also SBC/Ameritech Merger Order*, ¶ 64 (noting that such a framework is well-tailored to the Commission's unique role as an expert agency and its statutory obligation to promote competition and to open local markets).

around the globe."[42] Given the grand scope of AT&T's plans to become an effective global communications company, but for the merger, it is highly likely that it would become a significant competitor in BellSouth's region.

Indeed, the FCC should be mindful that while broadband services are unquestionably critical for the American public, it is equally important under the goals of the Act that full-fledged traditional wireline voice competition is served in this proceeding as in all of the Commission's actions.[43] Thus, the FCC should heed its prior decisions that stressed the possible adverse consequences of eliminating a significant potential competitor in a BOC-to-BOC merger. Noting the incumbent LECs' incentive and ability to discriminate against competitors in all retail markets, the FCC has found that "the likelihood of increased harmful discrimination is particularly acute with respect to competitive providers of local exchange services to mass market customers (smaller businesses and residential customers)."[44] As experience since the 1996 Act has demonstrated, the fewer the number of competitors, the less likely true competition is to take hold as incumbent LEC actions to quash competition are more likely to succeed.[45]

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[42] "SBC to Acquire AT&T," SBC/AT&T Press Release, (rel. Jan. 31, 2005), available at http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21566.

[43] While there has been some fulfillment of the Act's local competition goals, the fact is that competitors still account for a small share of local wireline voice services today. Thus, according to the FCC's most recent data published in June 2005, incumbent LECs have over six times the revenue of competitive LECs for local service and serve roughly 82% of local customer lines. *See* "Trends in Telephone Service," at Tables 8-1, 8.5, 8.7, and Chart 8-5 (rel. Jun. 21, 2005) available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend605.pdf. Moreover, given the loss of the former AT&T and MCI as competitors, it is highly likely that more recent measures of incumbent local market share will increase rather than decrease.

[44] *Bell Atlantic/GTE Merger Order,* ¶ 175; *SBC/Ameritech Merger Order,* ¶ 188.

[45] Indeed, anticompetitive conduct can be compounded through "spillover" effects whereby the level of discrimination engaged in by the combined entity in each region within the combined

Consumers and competitors are already feeling the loss of the former AT&T as a robust competitor; approval of the merger as proposed, however, will only add to the likelihood that the goals of the 1996 Act for local voice competition will never become the reality.

III. THE PROPOSED MERGER INCREASES THE INCENTIVES AND ABILITY FOR THE MERGED COMPANY TO ENGAGE IN EXCLUSIONARY AND ANTICOMPETITIVE ACCESS PRACTICES WITH RESPECT TO COMPETITORS

Competing carriers and service providers in today's marketplace rely on AT&T and BellSouth for a range of last-mile access services including UNE-L, other unbundled elements, and broadband services, to serve American businesses and residences. As the Commission has repeatedly recognized, unbundled access to incumbent LEC UNE-L copper loops is critically important to meet the continuing goals of the 1996 Act. AT&T and BellSouth also continue to hold and exert market power in the provision of switched and special access services in their regions. But for effective regulatory oversight, either AT&T or BellSouth alone could engage in discriminatory**,** unreasonable and excessive access pricing from competitors, as well as other anticompetitive conduct, whereby access is delayed, denied or degraded. Indeed, the evidence gathered in ongoing proceedings shows that anticompetitive conduct, including above-cost and discriminatory pricing and other practices already exists, harming competition and American business productivity; approval of the proposed merger would enhance the ability and incentives to engage in such anticompetitive conduct, substantially disserving the public interest.

A. The Merger Will Increase Collusion Among Incumbent LECs and Impede Progress Towards Cost-Based Access and Robust Competition

As proposed, the merger would hinder the goals of the Commission and the 1996 Act to bring this country's incumbent LEC access services – UNEs, switched access, and special access

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territory would be greater than the sum of the level of discrimination engaged in by the two individual companies in their own, separate regions, absent the merger. *See e.g., SBC/Ameritech Merger Order,* ¶ 192; *Bell Atlantic/GTE Merger Order,* ¶ 177.

– to cost-based prices and reasonable terms and conditions by enhancing the incumbent LECs' ability to quash competition in these incumbent LEC-dominated local markets. Indeed, this unprecedented incumbent LEC concentration would result in just two significant wireline incumbent carriers (AT&T and Verizon) serving the vast majority of U.S. consumers. Under these circumstances, the likelihood of tacit collusion on access pricing and practices between the post-merger AT&T and Verizon will be greatly enhanced, subverting the public interest.

The FCC has long recognized that a potential anticompetitive effect of horizontal incumbent LEC mergers such as here is the enhanced ability of the remaining market participants to engage in effective coordination of anticompetitive activities.[46] Indeed, the Commission has further found that the potential for anticompetitive coordination between parties post-merger is of sufficient concern to tip the balance against the necessary public interest finding in the

[46] As recently as the *SBC/AT&T Merger Order* (¶ 20) the Commission has recognized that because the merger Applicants "provide critical inputs, particularly special access services, to various communications markets, we need to consider the potential vertical effects of the merger -- specifically, whether the merged entity will have an increased incentive or ability to injure competitors by raising the cost of, or discriminating in the provision of, inputs sold to competitors." *In the Matter of SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290 (2005) ("*SBC/AT&T Merger Order*") *See also, In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation,* Memorandum Opinion and Order, 19 FCC Rcd. 21522, ¶ 150 (2004):

> In markets where only a few firms account for most of the sales of a product, those firms may be able to exercise market power by either explicitly or tacitly coordinating their actions. Accordingly, one way in which a merger may create or enhance market power or facilitate its exercise is by making such coordinated interaction among firms more likely, more successful, or more complete. For example, by reducing the number of firms necessary to control a given percentage of total supply, a merger may lower the difficulties and costs of reaching and enforcing the terms of an agreement to restrict output.

See also, Bell Atlantic/GTE Merger Order, ¶¶ 142, 172.

absence of offsetting and remedial merger conditions.[47] Nowhere are these concerns more apparent than with the proposed merger that proposes to reduce drastically the number of significant incumbent LECs serving the American public.[48]

Moreover, both Congress and the Commission have recognized that, even among incumbent LECs, the BOCs hold significant additional market power that can be inimical to the public interest unless addressed specifically. For instance, the FCC has underscored that "[d]ue to the continued and extensive market dominance of the BOCs in their regions, Congress chose to maintain certain of the MFJ's [Modification of Final Judgment] restrictions on the BOCs . . . as provided in section 271 of the Act."[49] As the Commission has explained, Congress chose to counter anticompetitive conduct of the BOCs not only with Section 251(c) rights for competitors,

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[47] *In the Matter of Applications for Consent to Transfer Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America OnLine Inc.*, Memorandum Opinion and Order, 16 FCC Rcd. 6547, ¶ 266 (2001) ("We find that the merger increases the likelihood of coordinated action by AOL Time Warner and AT&T to discriminate in favor of AOL's ISP service. The proposed merger will increase AOL Time Warner's incentive and ability to obtain agreements with AT&T to favor AOL Time Warner's ISPs to the detriment of AOL Time Warner's competitors."); id., ¶ 267 ("Accordingly, because we conclude below that the benefits of the merger do not outweigh its harms, we find it necessary to impose remedial conditions that will prevent the potential harm arising from possible post-merger coordination between AT&T and AOL Time Warner.")

[48] As the Commission recognized in the *EchoStar/DirecTV Merger Order*, "[b]ecause 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." *In the Matter of Application of EchoStar Commc'ns Corp., General Motors Corp., and Hughes Electronics Corp. (Transferors) and EchoStar Commc'ns Corp. (Transferee)*, Hearing Designation Order, 17 FCC Rcd. 20559, ¶ 152 (2002)("*Echostar/DirecTV Merger Order*").

[49] *In the Matter of Application of BellSouth Corporation*, Memorandum Opinion and Order, 13 FCC Rcd. 20599, ¶ 3 (1998). *See also In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, ¶¶ 10, 11 (1996) (sections 271 and 272 of the Act were enacted to address the BOCs' in-region market dominance, the attendant risk of cross-subsidization, and their "incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets").

but also with the Section 271 "competitive checklist" and performance penalty obligations on the BOCs in order to offset the additional potentials for harm to competition.[50] Similarly, the Commission has noted the BOCs' "substantial market power in providing network access" on numerous occasions, drafting myriad rules and policies designed in particular to address BOC anticompetitive practices, including discrimination, cross-subsidization and other conduct.[51] Given that this merger, were it to be approved, would leave only three BOCs remaining, the Commission must take cognizance of the historical wariness that legislators and regulators have rightly taken.

Specifically, the post-merger AT&T and Verizon would be able much more easily to coordinate pricing strategies designed to thwart competition. Thus, AT&T and Verizon could raise prices for switched and special access services in a coordinated fashion, or simply decline to lower prices as technology and other costs decline. This is especially likely given the lack of regulatory oversight due to recent forbearance grants[52] and Phase I and II special access deregulation, which have allowed substantial (and unwarranted) rate increases for many of the

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[50] *Triennial Review Order*, ¶ 655 (holding that Section 251 unbundling provides "a minimum level of openness in the local market," Section 271 unbundling provides assured access to loops, transport and switching and "reflect[s] Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market.").

[51] *See, e.g.*, *Third Computer Inquiry*, Report and Order, 104 FCC 2d 953, ¶ 129 (1986) (subsequent history omitted). *See also*, *Third Computer Inquiry*, Report and Order, 2 FCC Rcd. 3072, ¶ 203 (1987) (noting that the BOC is able to exercise greater "monopoly control in large regions of the country" and has greater opportunity "to use bottleneck control over local exchange facilities for anticompetitive purposes in the enhanced services marketplace to the detriment of competitive providers and their customers").

[52] "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," FCC Public Notice (rel. March 20, 2006).

vital services used by competitors.[53] While some may argue price caps will prevent such abuses, that well-worn argument ignores the fact that price caps does nothing to ensure that rates for individual services are just and reasonable.

Similarly, the incumbent LECs have engaged in well-known litigation strategies designed to delay and hamstring the implementation of the provisions of the 1996 Act and impede competitors.[54] With coordinated positions, which are readily available and transparent to the other through pleadings, AT&T and Verizon would be able more easily to stymie the efforts of competitors to obtain UNE access and other needed last-mile service inputs through litigation coordination and coordinated refusals to negotiate innovative interconnection agreements or private broadband transmission arrangements.

B. The Proposed Merger Will Create Additional Incentives for the Post-Merger AT&T to Thwart Progress Towards Cost-Based Access Rates

Given that the proposed merger would add the entire Southeastern United States to the geographic territory in which AT&T would be the primary incumbent LEC, the post-merger AT&T would control both the terminating and originating access ends to a striking share of the country's access lines. For example, if the merger is consummated, PSTN callers in San

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[53] *See, e.g.*, Petition for Rulemaking of AT&T, RM No. 10593, at pp. 4, 13, 34 (Oct. 15,2002) ("the notion that price caps were holding the Bells' rates below costs is preposterous. . . . it is striking that after most special access has now been removed from price caps, the Bells have not seen fit to respond to competition by lowering their rates in *any* of those MSA."); Comments of Ad Hoc Telecommunications Users Committee, WC Dkt. 05-25, at p. 2 (Jun. 13, 2005) (stating that the Commission's "inaction as the ILECs have steadily increased their rates" has been a "significant obstacle to the development of robust competition in telecommunications markets" and, further, that "the ILECs' ability to raise special access prices and earn supra-competitive profits without attracting competitive entry by alternative providers of special access calls into question many of the fundamental economic assumptions underlying the Commission's de-regulatory policies over the past several years.").

[54] *See, e.g.*, SBC Communs. v. FCC, 154 F.3d 226 (5th Cir. 1998) (Fifth Circuit rejected BOC arguments that Sections 271 through 276 of the Act constitute an unconstitutional bill of attainder).

Francisco, CA who call anywhere to the former BellSouth regions (*e.g*., Miami, FL, Atlanta, GA or Raleigh, NC) would be served by AT&T at both the originating and terminating ends of the call. With this greatly enhanced control over in-region calling on an end-to end basis, the merged AT&T would have a better ability to evade regulatory oversight since it would be the primary originating and terminating carrier on an end-to-end basis, making it easier to be even more effective at obstructing competitors.[55]

Similarly, by increasing its control of both ends of a call to an even more significant volume of interstate calls, the post-merger company will have little or no incentive to bring interstate switched and special access rates down to costs. Not only will this harm interstate interexchange competition, this distortion of economic incentives would also hamstring the ability of the industry and the FCC to address such vital issues such as how IP-enabled services should be treated and how existing intercarrier compensation should be reformed. Post-merger, AT&T would view rational and significant intercarrier compensation reform as an unmitigated loss, as it would stand to lose significant access charge revenues from both the AT&T and the BellSouth regions.

Moreover, unlike AT&T's position prior to this merger, the merger will help ensure for AT&T that an increasing amount of all interexchange traffic would begin and end within its immense mega-region. Under these circumstances, access charges become literally just an accounting matter for the post-merger AT&T – the charges move from one pocket to the other with consumers and competitors footing the bill. For AT&T's competitors, however, access

[55] Based on November 2005 common carrier statistics released by the FCC, post-merger, AT&T's number of access lines will increase from over 52 million to approximately 74 million. AT&T's revenues would also increase from $71.3 billion to $91.6 billion; $20 billion more than their next largest competitor, Verizon, and $77.8 billion more than their second largest competitor, Qwest. *See* FCC's *Statistics of Communications Carriers,* Table 1.1, p. 3 (rel. Nov. 7, 2005) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262086A1.pdf.

charges and other forms of intercarrier compensation have a real bottom-line impact and are likely to define what form of competition lives and dies in this country for at least the next decade. Thus, as proposed, the merger would significantly harm the public interest in consumer VoIP competition by establishing a mega-BOC incumbent whose interests are affirmatively antithetical to IP-based voice competition and who can pursue those commercial interests through above-cost intercarrier compensation for all others in the marketplace.

C. Merger Approval is Inappropriate in Light of the Applicants' History of Persistent FCC Rule Violations and Ongoing Malfeasance

As stated, the Applicants seek a determination from the FCC that the public interest would be best served by imparting to AT&T even greater control over this country's critical telecommunications infrastructure that is the central nervous system of the American economy, including greater control over the vast and essential last-mile access services used by all competitors that today serve the American public. Yet, the actions of AT&T and BellSouth have shown contempt for the public interest and the rule of law, with a demonstrated pattern and practice of violating FCC rules. These actions demonstrate the Applicants have bred an "above the law" corporate mentality that raises substantial character qualification issues and calls into question how such a merger could be found to serve the public interest.

Attached hereto as Exhibit C is a partial list of the numerous FCC violations by the Applicants, including violations of previous FCC merger orders. Without significant changes in corporate direction and attitude toward this country's competition laws, there should be no serious consideration given to ceding yet more power and authority into the hands of the AT&T corporate management. By all accounts, the malfeasance at AT&T continues even as this merger is pending.

Indeed, the actions of both AT&T and BellSouth with regard to broadband transmission post-*Wireline Broadband* further demonstrate bad faith and a pattern of misleading the FCC. In order to obtain deregulation of broadband transmission services, both AT&T and BellSouth made a series of promises regarding how they would treat competitors and ISPs after deregulation were it granted. In fact, AT&T trumpeted to the Commission its agreement with USIIA that declared:

> Market-driven commercial contracts will facilitate the most efficient, productive, creative and technology-neutral provisioning of broadband services. SBC and the USIIA support market-based approaches to prices, terms, and conditions governing the business relationship between SBC and ISPs. Accordingly, existing Federal and State tariffs and other common carrier obligations should be replaced by market-based commercial arrangements. These business arrangements would remove constraints on both parties that deprive them of the opportunity to provide creative and innovative services to consumers.[56]

BellSouth also reassured the Commission that "[i]n any event, there is no basis for concern that BOCs will not continue to offer broadband facilities to many independent ISPs,"[57] and that "Currently, [incumbent] LECs are limited in the wholesale services that they can provide to ISPs. [incumbent] LECs, for example, cannot negotiate individual services, terms and conditions for specific products or deals but must provide generic services to all takers pursuant to public tariff. Without doubt, BellSouth will continue to offer wholesale services."[58] The Commission substantially relied on these statements in the *Wireline Broadband Order*,

> [W]e expect that wireline broadband transmission will remain available to ISPs and others without any *Computer Inquiry* requirements. Incumbent LECs have represented that they not only intend to make broadband Internet access

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[56] *See Memorandum of Understanding SBC and USIIA*, CC Dkt. 02-33, 95-20 and 98-10 (May 2, 2002) available at www.usiia.org/news/SBCMOU.pdf.

[57] Reply Comments of SBC Communications, Inc., CC Dkt. 02-33, at pp. 6-7 (Jul. 1, 2002).

[58] Reply Comments of BellSouth Corp., CC Dkt. 02-33, at p. 20 (Jul. 1, 2002).

> transmission offerings available to unaffiliated ISPs in a manner that meets ISPs' needs, but that they have business incentives to do so. [59]

Unfortunately, both EarthLink and its competitive LEC subsidiary, New Edge Network, Inc. ("New Edge"), have been subjected to blatantly unreasonable and anticompetitive conduct of both AT&T and BellSouth following the deregulation granted in the FCC's *Wireline Broadband Order*.[60] For example, just three months after the *Wireline Broadband Order* was released, BellSouth required EarthLink, as a condition for renewal of its RBAN service, to accept several anticompetitive restrictions on the use of the service. There are absolutely no legitimate business reasons for these new restrictions imposed upon EarthLink; in reality, they are designed by BellSouth solely to foreclose EarthLink from offering competitive services to customers within the BellSouth regions.

Incredibly, BellSouth's conduct has been even more egregious with regard to New Edge. Prior to the *Wireline Broadband Order* deregulation, New Edge was conducting business as a competitive LEC with collocated equipment in the BellSouth region and as a reseller of BellSouth's DSL services. New Edge utilized BellSouth's DSL services to provide virtual private networks for multi-site business customers. BellSouth's DSL services were delivered via an ATM/PVC platform (Layer 2) pursuant to its federal tariff. After FCC deregulation,

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[59] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd. 14853, ¶ 74 (2005). The FCC specifically directed AT&T and BellSouth to meet these promises with reasonable offers for competitors:

> Based on the record before us, we expect that business incentives will compel wireline broadband carriers to offer broadband transmission on a commercially reasonable basis to independent ISPs and will motivate wireline carriers to negotiate mutually acceptable rates, terms, and conditions with unaffiliated ISPs. We strongly encourage the parties to work together to develop individual contracts that are mutually beneficial to each party.

Id., ¶ 75.

[60] *See* "Declaration of Christopher Putala" at Attachment 1.

however, BellSouth decided to cease offering Layer 2 DSL services to New Edge after May 17, 2006, effectively ending the ability of New Edge to offer businesses in BellSouth an alternative VPN service using ATM-over-DSL.[61] New Edge requested that BellSouth negotiate a commercial agreement that would ensure the continuance of the ATM/PVC platform, but BellSouth has refused. Further, although it would limit New Edge in the services it can offer, New Edge requested to negotiate a commercial agreement for BellSouth's RBAN service. This time, BellSouth did not refuse New Edge's request; prior to discussing an RBAN agreement, however, New Edge would have to agree to certain conditions including: (1) the removal of all collocated facilities in the BellSouth region; and (2) New Edge's agreement not to offer VOIP services in the BellSouth region.

Similarly, AT&T has stalled negotiations and/or refused to negotiate any broadband transmission arrangements. With regard to EarthLink, while AT&T has discussed several ideas for a long-term broadband transmission arrangement, AT&T has refused to provide any written draft proposal, or even a draft agreement, so that the parties may secure a long-term agreement. Obviously, this bargaining tactic hurts EarthLink far more than it does AT&T, given that EarthLink has thousands of subscribers on AT&T's broadband services and yet, AT&T refuses to delineate whether it will even offer a transmission component to continue offering competitive broadband Internet access in AT&T regions. With regard to New Edge, AT&T has been even more blunt: it simply refuses even to discuss a continuing broadband transmission arrangement.

These anticompetitive actions by BellSouth and AT&T sorely demonstrate their blatant disregard for their broadband commitments made to the Commission just a short time ago. Their course of conduct with EarthLink and New Edge is no doubt not unique, and likely others are

[61] Compounding the harm, BellSouth's plan to eliminate Layer 2 DSL service did not include any plan of action for transitioning New Edge VPN customers over to an alternative service.

experiencing the same bullying force of unregulated anticompetitive conduct. Rather than provide AT&T with more market power and instead of falling prey to more promises in the hopes of Commission action, the Commission should examine the veracity of the statements, and the course of conduct by AT&T and BellSouth after DSL deregulation.

Indeed, the remarkable industry consolidation that would occur as a result of this proposed merger would redound to the detriment of consumers in a myriad of other ways as well. Mergers of this scope and scale, far from creating tangible benefits for consumers, often result in years of integration delays, customer confusion and diminished customer service. Especially in light of the fact that the integration of AT&T and the former SBC is far from complete, the FCC should be especially concerned about the impact of this merger on consumers, including wholesale customers.

Moreover, while the Applicants may assert that the merger will bring about operational and cost-saving "efficiencies,"[62] real-world mergers have demonstrated that such claims are often little more than self-serving and hypothetical. As Michael A. Salinger, Director of the Bureau of Economics at the Federal Trade Commission, stated in September 2005, "The efficiency evidence that parties present to the agencies is less credible than one might expect."[63] Accordingly, the FCC should reject such claims as speculative and, in any event, to be balanced

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[62] *AT&T/BellSouth Public Interest Statement*, pp. iv, 40-46.

[63] "Four Questions About Horizontal Merger Enforcement," by Michael A. Salinger, Director, Bureau of Economics, Federal Trade Commission (Sept. 14, 2005) available at http://www.ftc.gov/speeches/salinger/050914ababrownbag.pdf (citing U.S. v. Oracle Corp., 331 F. Supp. 2d 1098, 1175 (N.D. Cal 2004) (wherein Oracle's claim of merger efficiencies of roughly $1 billion annually was summarily rejected as far-fetched. As Salinger stated, "[t]he claimed efficiencies were little more than best guesses; and, frankly, the guesses themselves were implausible.")).

against the harms consumers will suffer as they attempt to navigate the mega-telco that the proposed merger would create.

IV. THE PROPOSED MERGER WILL RESULT IN THE LOSS OF VITAL MARKET AND REGULATORY BENCHMARKS

The Commission has long recognized that the decrease in competition as a result of a proposed merger can make it substantially more difficult for it to use the performance of the remaining comparably-situated companies to "benchmark" industry standards to ensure the public is served by just and reasonable rates and terms and can impede the innovation incentives of the remaining providers.[64] Especially in light of the striking consolidation of the industry since the 1996 Act, the proposed merger will reduce even further the vital market benchmarks that assist the Commission in ensuring that the public interest is served going forward and the communications-consuming public receiving the price, quality and innovation benefits of a competitive market.[65] As noted by the Commission, "[w]hen only a few similarly-situated benchmark firms remain, the harms to benchmarking increase more than proportionately with

[64] As the Commission has noted, "reducing the number of separately owned and operated carriers that can acts as 'benchmarks' for evaluating the conduct of other carriers or the industry as a whole" is likely to reduce the "Commission's ability to identify, and therefore to contain, market power." *Bell Atlantic/NYNEX Merger Order*, ¶ 147.

[65] *See* Id., ¶ 148 ("The existence of several Bell Companies as an important regulatory tool has been praised by the DOJ, the Courts, and the Bell Companies themselves."); *SBC/Ameritech Merger Order*, ¶ 57 (comparing practices of "independent firms can assist federal and state regulators in defining incumbent LEC obligations and in discovering new approaches and solutions to open markets to competition under sections 251 and 271 and state law. Such comparative practice analyses (or 'benchmarking') depend upon having a sufficient number of independent sources of observation available for comparison."). The FCC also recognized that major differences between the large incumbent LECs and other carriers, such as small or rural LECs and competitive LECs, exclude use of these other carriers for comparison, and noted that the benchmarking process only works when the "firms under observation are similarly situation." Id., ¶¶ 58, 159, 160. *See also, Bell Atlantic/GTE Merger Order*, ¶ 155.

each successive loss of a firm as an independent source of observation."[66] Simply put, the substantial reduction in the number of comparably-sized incumbent LEC competitors that would result from the proposed merger will diminish the critical market and regulatory yardsticks to ensure incumbent LECs serve the public's interest rather than their private interests.[67]

In particular, as the FCC has historically recognized, the presence of an additional competitor serves to provide incentives for companies – including incumbent LECs – to improve their services to consumers and meet "best practices."[68] Thus, for example, when the marketplace supports multiple similarly situated carriers, regulators can compare practices and more easily recognize a "best" practice used by one carrier and, in turn, require all carriers to implement the practice.[69] Likewise, as the FCC has experienced, the existence of similarly-situated carriers can provide the impetus for carriers to improve rather than hide behind cries that

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[66] *SBC/Ameritech Merger Order*, ¶ 116.

[67] The FCC has noted that "the loss of independent incumbent LECs will have a greater impact on reducing benchmarking's effectiveness the larger the region of the combined entity and the smaller the number of similarly-situated firms remaining following the merger." *Bell Atlantic/GTE Merger Order*, ¶ 134.

[68] *See e.g. Bell Atlantic/NYNEX Merger Order*, ¶ 147-56; *SBC/Ameritech Merger Order*, ¶ 111 (indicating that under "best-practices" benchmarking, regulators can compare "behavior across a group of similarly situated, independent firms in order to identify the best practice employed by a firm, or subset of firms.") On the other hand, with competitors acting as benchmarks, the Commission can also more easily recognize sub-standard performance practices and require the incumbent LEC to reach the performance standards of competitors not engaged in such practices.

[69] Under "best practices" benchmarking,

> a regulator compares behavior across a group of similarly situated, independent firms in order to identify the best practice employed by a firm or subset of firms. When individual incumbent LECs adopt a variety of techniques or technologies to provide a particular service, regulators and competitors can compare the costs and benefits of each technique to arrive at a 'best practice,' which presumptively could be required of all incumbents.

SBC/Ameritech Merger Order, ¶ 111 (footnotes omitted).

"it can't be done," such as when the Commission has looked to "best practices" to question BOC arguments that certain practices were not possible.[70]

Thus, in promoting local number portability to serve American consumers, the FCC was faced with all but one BOC claiming that Location Routing Number ("LRN") was not cost-effective and instead proposing a lower quality, different method, which, if implemented, would result in diminished service on calls to ported numbers. Only Ameritech planned to deploy LRN, which provides equal-quality service to all calls regardless of the carrier. Given Ameritech's ability to deploy LRN, however, the Commission concluded that all incumbent LECs could implement LRN and were required to do so.[71] Clearly, absent this market-driven incentive offered by similarly-situated companies, the public would have been denied the LRN method likely considered the "best practice" for consumers. Similarly, where Ameritech stated it was unable to measure and bill for shared transport, the fact that Bell Atlantic, NYNEX, and

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[70] *See, e.g., In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 4761, ¶ 42 n. 100-02 (1999) (In calling into question the claims of certain incumbent LECs that cageless collocation threatened the reliability of the network, the Commission pointed to U.S. West's offering of requesting carriers cageless collocation.). Courts have also recognized the utility of competitors to regulators in detecting discriminatory pricing and other practices:

> [T]he existence of seven [regional] BOCs increases the number of benchmarks that can be used by regulators to detect discriminatory pricing. . . . Indeed, federal and state regulators have in fact used such benchmarks in evaluating compliance with equal access requirements . . . and in comparing installation and maintenance practices for customer premises equipment.

U.S. v. Western Elec. Co., 993 F.2d 1572, 1580 (D.C. Cir. 1993), *cert. denied*, Consumer Fed'n. Am. v. U.S., 510 U.S. 984 (1993).

[71] *In the Matter of Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 7236, ¶¶ 13, 38 (1997)

PacTel all offered shared transport in conjunction with unbundled local switching convinced the FCC to implement the shared transport requirement.[72]

Likewise, the proposed merger's elimination of BellSouth as an independently-owned BOC is likely to reduce significantly the level of innovation that consumers will enjoy and that regulators and competitors could observe and analyze, which in turn will result in a decline of innovation by other carriers.[73] As the Commission indicated in the *SBC/Ameritech Merger Order*, which reduced the number of BOCs from six to five (far less diminution than here),

> Having a significant number of independent points of observation is especially crucial for regulators and competitors in decisions regarding new services and innovative technologies. Such decisions are likely to entail forecasting the expected benefits, costs, timing, and problems associated with the provision and maintenance of such services and innovations. Although it is impossible to make such predictions with certainty, the existence of numerous major incumbent LECs increases the information available to regulators in evaluating whether or when to require the new service or innovation, and in setting rates. Conversely, having few major incumbent LECs to serve as independent points of observation can undermine the credibility of such determinations.[74]

Indeed, it is precisely the innovation of similarly-situated carriers that can often help spur companies to innovate, as none wants to be considered a laggard in this technologically-driven telecommunications environment. Consumers are increasingly knowledgeable about the options and offerings available throughout the nation, spurring the introduction of an innovation in California to consumers in Georgia. If, however, the same company serves both Georgia and

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[72] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd. 12460, ¶ 26 (1997). *See also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, ¶ 204 (1996) (holding that one incumbent LECs ability to interconnect at a particular point in its network is evidence of its ability to provide the same or similar interconnection in another network.).

[73] *SBC/Ameritech Merger Order*, ¶ 59 (noting the elimination of Ameritech will greatly reduce regulators' and competitors' ability to observe innovation).

[74] *SBC/Ameritech Merger Order*, ¶ 117.

California, it is most likely that such innovation will slow as the competitive pressure will not exist. As was made painfully obvious in the pre-divestiture days, without competitive pressure, the days of the standard black telephone went on far too long. Moreover, innovation throughout networks is also likely to decrease as there will be fewer network alternatives available and fewer distinct approaches to operation, design and development. Given these harms, the FCC cannot find that the merger is in the public interest as proposed.

CONCLUSION

For the foregoing reasons, EarthLink urges the Commission to deny the application for approval of the merger of AT&T and BellSouth as contrary to the public interest and to the broadband and voice competition goals of the Act.

Respectfully submitted,

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Dated: June 5, 2006

CERTIFICATE OF SERVICE

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EXHIBIT A

SBC, AT&T Reach Services Agreements with Covad

Covad Will Extend Broadband Access to Merged Companies, to Enable Expansion of VoIP Services Out-Of-Region, Promote Vigorous Competition in Telecommunications Industry

San Antonio, Texas, May 5, 2005

SBC Communications Inc. (NYSE: SBC) and AT&T Corp. (NYSE: T) together have reached a services agreement under which Covad Communications Group Inc. (OTCBB: COVD) would extend broadband access to the merged companies, which would help the combined entity expand Internet protocol (IP) services, including voice-over-Internet-protocol (VoIP), out-of-region to consumers and businesses. The deal, effective upon completion of the SBC and AT&T merger, demonstrates the parties' commitment to promoting vigorous competition in the telecommunications industry among product and service providers.

"Consumers will continue to benefit from competition in the provision of telecommunications services, making them the real winners here," said Mark Keiffer, senior vice president-business marketing for SBC. "And agreements such as these will be especially important in enabling SBC, post-merger, to become a more effective out-of-region competitor. We look forward to working with Covad not only in offering services to consumers and businesses outside of our territory, but in building on the excellent relationship that exists between AT&T and Covad today to work to bring additional services to the market, post-merger."

AT&T entered into a long-term commercial agreement with Covad on Jan. 1, 2002, buying high-speed Internet access services for resale. SBC entered into an agreement for similar services with Covad on Nov. 12, 2001. This new commercial agreement, along with the current contracts, would continue past the completion of the SBC-AT&T merger.

SBC and Covad also signed a separate commercial agreement that covers the provision of line-sharing over copper and remote-terminal facilities in SBC's territory for a four-year period. Line-sharing allows communications providers like Covad to deploy high-speed DSL broadband on the same line customers use for their voice phone services.

"These agreements are very important to Covad as they ensure that we will continue to be a strong competitor and supplier to AT&T and SBC now and after their merger," said Charles Hoffman, president and chief executive officer of Covad. "It allows the provision of a robust suite of voice and data services over Covad's extensive network of collocated facilities. In particular, we look forward to supporting the combined company's out-of-region competitive efforts. We are pleased about the opportunity to continue working with SBC and AT&T, and to be a key supplier for the combined entity."

Covad, based in San Jose, Calif., is a leading nationwide provider of broadband voice and data communications for small and medium businesses, and a key supplier of high-speed Internet access for competitive voice and Internet services providers. Founded in 1996, Covad owns and operates the only nationwide DSL broadband network in the United States.

"Covad has been a valuable supplier," said Regina Egea, AT&T vice president of global access strategy and bandwidth product management. "We're very pleased that we will continue to utilize the competitively priced and high-quality services and capabilities of Covad once our merger with SBC is completed and the combined company competes to deliver IP, including VoIP, services around the nation."

Other specific terms of the agreements are not disclosed. Completion of the SBC-AT&T merger is expected by the end of this year or early 2006, following all regulatory and governmental approvals.

SBC Communications Inc. is a Fortune 50 company whose subsidiaries, operating under the SBC brand, provide a full range of voice, data, networking, e-business, directory publishing and advertising, and related services to businesses, consumers and other telecommunications providers. SBC holds a 60 percent ownership interest in Cingular Wireless, which serves 50.4 million wireless customers. SBC companies provide high-speed DSL Internet access lines to more American consumers than any other provider and are among the nation's leading providers of Internet services. SBC companies also offer satellite TV service. Additional information about SBC and SBC products and services is available at www.sbc.com.

For more than 125 years, AT&T (NYSE "T") has been known for unparalleled quality and reliability in communications. Backed by the research and development capabilities of AT&T Labs, the company is a global leader in local, long distance, Internet and transaction-based voice and data services.

Covad Communications is a leading nationwide provider of broadband voice and data communications. The company offers DSL, Voice Over IP, T1, Web hosting, managed security, IP and dial-up, and bundled voice and data services directly through Covad's network and through Internet Service Providers, value-added resellers, telecommunications carriers and affinity groups to small and medium-sized businesses and home users. Covad broadband services are currently available across the nation in 44 states and 235 Metropolitan Statistical Areas (MSAs) and can be purchased by more than 57 million homes and businesses, which represent over 50 percent of all US homes and businesses. Corporate headquarters is located at 110 Rio Robles San Jose , CA 95134. Telephone: 1-888-GO-COVAD. Web Site: www.covad.com.

About the Proposed SBC/AT&T Merger:
In connection with the proposed transaction, SBC Communications Inc. ("SBC") filed a registration statement, including a proxy statement of AT&T Corp., with the Securities and Exchange Commission (the "SEC") on March 11, 2005 (File No. 333-123283). Investors are urged to read the registration and proxy statement (including all amendments and supplements to it) because it contains important information. Investors may obtain free copies of the registration and proxy statement, as well as other filings containing information about SBC and AT&T Corp., without charge, at the SEC's Internet site (www.sec.gov). These documents may also be obtained for free from SBC's Investor Relations web site (www.sbc.com/investor_relations) or by directing a request to SBC Communications Inc., Stockholder Services, 175 E. Houston, San Antonio, Texas 78205.Copies of AT&T Corp.'s filings may be accessed and downloaded for free at the AT&T Investor Relations Web Site (www.att.com/ir/sec) or by directing a request to AT&T Corp., Investor Relations, One AT&T Way , Bedminster , New Jersey 07921 .

SBC, AT&T Corp. and their respective directors and executive officers and other members of management and employees may be deemed to be participants in the solicitation of proxies from AT&T shareholders in respect of the proposed transaction. Information regarding SBC's directors and executive officers is available in SBC's proxy statement for its 2005 annual meeting of stockholders, dated March 11, 2005, and information regarding AT&T Corp.'s directors and executive officers is available in the registration and

proxy statement.Additional information regarding the interests of such potential participants is included in the registration and proxy statement and other relevant documents filed with the SEC.

For SBC-AT&T
Cautionary Language Concerning Forward-Looking Statements:
This document contains forward-looking statements within the meaning of the U.S. Private Securities Litigation Reform Act. Forward-looking statements are statements that are not historical facts and are generally identified by the words "expects", "anticipates", "believes", "intends", "estimates" and similar expressions.These statements include, but are not limited to, financial projections and estimates and their underlying assumptions, statements regarding the benefits of the business combination transaction involving AT&T and SBC, including future financial and operating results and the plans, objectives, expectations and intentions of the combined.Such statements are based upon the current beliefs and expectations of the managements of AT&T and SBC and are subject to significant risks and uncertainties (many of which are difficult to predict and are generally beyond the control of AT&T and SBC) that may cause actual results to differ materially from those set forth in, or implied by, the forward-looking statements. The following factors, among others, could cause actual results to differ materially from those set forth in the forward-looking statements: the ability to obtain governmental approvals of the transaction on the proposed terms and schedule; the failure of AT&T shareholders to approve the transaction; the risk that the businesses will not be integrated successfully; the risk that the cost savings and any other synergies from the transaction may not be fully realized or may take longer to realize than expected; disruption from the transaction making it more difficult to maintain relationships with customers, employees or suppliers; competition and its effect on pricing, spending, third-party relationships and revenues.Additional factors that may affect future results are contained in SBC's and AT&T's filings with SEC, which are available at the SEC's Web site http://www.sec.gov. Other than as required by applicable law, AT&T and SBC disclaim any obligation to update and revise statements contained in this news release based on new information or otherwise.

For Covad
Safe Harbor Statement under the Private Securities Litigation Reform Act of 1995: The foregoing contains "forward-looking statements" which are based on current information and beliefs as well as on a number of assumptions concerning future events made by management. Examples of forward-looking statements include the expected benefits of the agreements described in this news release. Readers are cautioned not to put undue reliance on such forward-looking statements, which are not a guarantee of performance and are subject to a number of uncertainties and other factors, many of which are outside of the control of Covad, that could cause actual results to differ materially from such statements. These risk factors include the difficulty of rapidly expanding and deploying new services, the impact of competition, pricing pressures, consolidation in the telecommunications industry, and uncertainty in telecommunications regulations and changes in technologies, among other risks. For a more detailed description of the risk factors that could cause such a difference, please see Covad's 10-K, 10-K/A, 10-Q, 8-K and other filings with the Securities and Exchange Commission. Covad disclaims any intention or obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise. This information is presented solely to provide additional information to further understand the results of Covad.

EXHIBIT B

EXHIBIT B

AT&T/BellSouth Merger: Additional Information and Document Request

AT&T

1. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss existing, planned, or potential service offerings in BellSouth territory separately for: (1) local and long-distance services; (2) mass market broadband services, including separately Internet access and VOIP (whether provided over DSL, fiber, wireless, or otherwise); (3) special access services; and (4) enterprise services.

2. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss AT&T's wholesale DSL services agreement with Covad. Include the number of customers or subscribers outside of SBC legacy territory, separately by state, reached through this agreement.

3. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss existing, planned, or potential service offerings in Verizon territory separately for: (1) local and long-distance services; (2) mass market broadband services, including separately Internet access and VOIP (whether provided over DSL, fiber, wireless, or otherwise); (3) special access services; and (4) enterprise services.

4. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss the planning, implementation, or deployment of fiber in AT&T (SBC legacy) territory. Include information related to: (1) addition of fiber to existing networks, (2) estimated deployment costs and capital expenditures, (3) network and support costs, (4) marketing efforts, (5) correspondence or communications with local franchising authorities, (6) estimated geographic areas served, and (7) estimated number of customers or subscribers served.

5. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss the planning, implementation, or deployment of fiber in BellSouth territory. Include information related to: (1) addition of fiber to existing networks, (2) estimated deployment costs and capital expenditures, (3) network and support costs, (4) marketing efforts, (5) correspondence or communications with local franchising authorities, (6) estimated geographic areas served, and (7) estimated number of customers or subscribers served.

6. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss AT&T's past, present, and future plans to replace copper transmission lines and loops with fiber optic cable.

7. List the total number of customers or subscribers that AT&T currently has in BellSouth territory, separately for (1) local and long distance services, (2) Internet access services (separately for dial-up and broadband), (3) VOIP services, and (4) enterprise or business services. Include the amount of increase or decrease in customers or subscribers, separately for each service, per month over the last three years.

8. List the competitive LEC ("CLEC"), Internet service provider ("ISP"), and cable competitors, separately for each state, separately for (1) local and long distance services, (2) Internet access services, (3) VOIP services, and (4) enterprise or business services, operating in legacy SBC territory. List the number of customers or subscribers served by each CLEC, ISP, and cable company listed for each service.

9. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss the projected or estimated total number of AT&T VOIP customers or subscribers annually over the next five years.

10. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss: (1) the total amount of traffic that traverses the current AT&T Internet backbone pre-merger; (2) the projected or estimated amount of traffic that will be added to the AT&T Internet backbone without the merger in the next five years; and (3) the projected or estimated total amount of traffic that will be added to the AT&T Internet backbone post-merger in the next five years.

11. Provide copies of all contracts for broadband transmission services entered into by AT&T with all affiliated and unaffiliated providers (including competitive LECs and ISPs) after the release of the FCC's *Wireline Broadband Order*, 20 FCC Rcd. 14853 (2005). Provide a list of all providers that have requested broadband transmission services from AT&T since the release of the FCC's *Wireline Broadband Order*, and the status of the negotiations or arrangements with each such provider.

<u>BellSouth</u>

12. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees

of, the company that discuss existing, planned, or potential service offerings in the legacy SBC territory separately for: (1) local and long-distance services; (2) mass market broadband services, including separately Internet access and VOIP (whether provided over DSL, fiber, wireless, or otherwise); (3) special access services; and (4) enterprise services.

13. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss existing, planned, or potential service offerings in Verizon territory separately for: (1) local and long-distance services; (2) mass market broadband services, including separately Internet access and VOIP (whether provided over DSL, fiber, wireless, or otherwise); (3) special access services; and (4) enterprise services.

14. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss the planning, implementation, or deployment of fiber in BellSouth territory. Include information related to: (1) addition of fiber to existing networks, (2) estimated deployment costs and capital expenditures, (3) network and support costs, (4) marketing efforts, (5) correspondence or communications with local franchising authorities, (6) estimated geographic areas served, and (7) estimated number of customers or subscribers served.

15. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss the planning, implementation, or deployment of fiber in AT&T territory. Include information related to: (1) addition of fiber to existing networks, (2) estimated deployment costs and capital expenditures, (3) network and support costs, (4) marketing efforts, (5) correspondence or communications with local franchising authorities, (6) estimated geographic areas served, and (7) estimated number of customers or subscribers served.

16. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss BellSouth's past, present, and future plans to replace copper transmission lines and loops with fiber optic cable.

17. List the total number of customers or subscribers that BellSouth currently has in legacy SBC territory, separately for (1) local and long distance services, (2) Internet access services (separately for dial-up and broadband), (3) VOIP services, and (4) enterprise or business services. Include the amount of increase or decrease in customers or subscribers, separately for each service, per month over the last three years.

18. List the competitive LEC ("CLEC"), Internet service provider ("ISP"), and cable competitors, separately for each state, separately for (1) local and long distance

services, (2) Internet access services, (3) VOIP services, and (4) enterprise or business services operating in BellSouth territory. List the number of customers or subscribers served by each CLEC, ISP, and cable company listed for each service.

19. Provide all documents, reports, memos, presentations, analyses, and studies prepared for or by, distributed within, or exchanged between or among employees of, the company that discuss the projected or estimated total number of BellSouth VOIP customers or subscribers annually over the next five years.

20. Provide copies of all contracts for broadband transmission services entered into by BellSouth with all affiliated and unaffiliated providers (including competitive LECs and ISPs) after the release of the FCC's *Wireline Broadband Order*, 20 FCC Rcd. 14853 (2005). Provide a list of all providers that have requested broadband transmission services from BellSouth since the release of the FCC's *Wireline Broadband Order*, and the status of the negotiations or arrangements with each such provider.

EXHIBIT C

EXHIBIT C

AT&T (F/K/A SBC) AND BELLSOUTH HISTORY OF NONCOMPLIANCE

Company/Action	Date	Penalty	Cite	Synopsis
MERGER VIOLATIONS				
SBC: *Forfeiture Order*	10/09/02 (FCC release) 5/13/05 (Court Decision)	$6 million (vacated by D.C. Circ)	17 FCC Rcd 19923; 407 F.3d 1223 (D.C. Cir.)	FCC determined that SBC violated the condition of its merger with Ameritech that requires them to offer CLEC's access to shared transport for intraLATA toll traffic. The court determined that, among other errors, the FCC had not adequately described when the requirement was waivable, and therefore vacated and remanded the forfeiture order.
SBC: *Consent Decree*	06/28/99	$1.3 million	14 FCC Rcd 12741	SBC acquired Southern New England Telecom Corp. and in its merger discussions with the FCC represented that it would be in full compliance with §272 after the merger. SBC was not in compliance with §272 afterwards and made misrepresentative statements to the FCC as to its planned compliance.
SBC: *Consent Decree*	05/28/02	$3.6 million	17 FCC Rcd 10780	FCC determined SBC did not adequately meet the terms of its previous *Consent Decree* (above) stemming from a merger and also had §271 violations.
SBC: *Forfeiture Order*	03/15/01	$88,000	16 FCC Rcd 5535	SBC "willfully and repeatedly" violated conditions of its merger with Ameritech by failing to report certain data in accordance with the Business Rules established in the merger.
SBC: *Memorandum Opinion & Order*	04/17/03	N/A	18 FCC Rcd 7568	SBC violated conditions of their merger and therefore §201(b) of the Act by failing to let CLEC use unbundled network element to transport IntraLATA phone traffic
SBC: *Consent Decree*	03/20/03	$250,000	18 FCC Rcd 4997	Settlement of reporting errors in violation of SBC's merger with Ameritech. This is the same thing that they were fined $88,000 for in 2001, but really made no changes to improve resulting in this consent decree.

EXHIBIT C

Company/Action	Date	Penalty	Cite	Synopsis
GENERAL NONCOMPLIANCE				
Ameritech: *Order to Show Cause*	03/03/95	N/A	10 FCC Rcd 5606	FCC issued this order after NECA discovered Ameritech was not complying with mandated accounting rules and reporting requirements.
Ameritech: *Consent Decree*	11/04/96	$150,000	11 FCC Rcd 15476	Ameritech entered into a consent decree after NAL charging that it violated the Act by constructing new communications facilities
Ameritech: *Consent Decree*	11/01/96	$1.2 million price cap index reduction	11 FCC Rcd 14831	Response to 03/03/95 *Order to Show Cause* (above)
SBC: *Forfeiture Order*	05/24/01 02/25/02 (reducing amount)	$94,500 (Reduced to $84,500)	16 FCC Rcd 10963 17 FCC Rcd 4043 (reducing amount)	Violated rules requiring ILEC's to post notice of premises that have run out of collocation space. (Amount was reduced by 02/25/02 Order)
SBC: *Forfeiture Order*	04/15/02	$100,000	17 FCC Rcd 7589	Deliberate refusal to provide a sworn statement in response to FCC request
Ameritech, Qwest, U.S. West: *Memorandum Opinion & Order*	10/07/98	N/A	13 FCC Rcd 21438	Establishing that Ameritech and U.S. West violated §271 and may have violated equal access and nondiscrimination obligations of §251.
BellSouth: *Notice of Apparent Liability*	03/25/04	$75,000	19 FCC Rcd 5310	BellSouth allowed one of its affiliates to provide operations, installation and maintenance for its §272 affiliate in violation of FCC rules
BellSouth: *Consent Decree*	07/17/03	$1.4 million	18 FCC Rcd 15135	Violations in connection with (1) the marketing and provisioning of in-region interLATA services in states where BellSouth had not received authorization to provide such services pursuant to section 271 of the Act and (2) allegations that BellSouth improperly rejected the local service requests of CLECs

EXHIBIT C

Company/Action	Date	Penalty	Cite	Synopsis
BellSouth: *Consent Decree*	11/02/00	$750,000	15 FCC Rcd 21756	*Consent Decree* stems from a failure to negotiate in good faith the terms and agreements of an amendment to an interconnection agreement with Covad. Commissioner Furchtgott-Roth issued a scathing dissent against the FCC for pursuing this
BellSouth: *Consent Decree*	11/01/96	No money, just tighter regulations	11 FCC Rcd 14803	BellSouth entered into the consent decree after an audit found improper reporting techniques
AT&T: *Notice of Apparent Liability*	01/30/06	$100,000	21 FCC Rcd 751	AT&T failed to have a corporate officer with knowledge execute a statement that the company has established adequate compliance with rules governing consumer proprietary network information
SBC: *Consent Decree*	12/16/04	$500,000	2004 FCC Lexis 7455	SBC Connecticut had a series of violations of the E-Rate USF program
SBC: *Consent Decree*	10/01/03	$1.35 million	18 FCC Rcd 19880	Settlement from violations where SBC provided IntraLATA service without FCC authorization
SBC: *Notice of Apparent Liability*	10/16/01	$2.52 million	16 FCC Rcd 19091	Violations related to willful misrepresentations made to the FCC about its intraLATA operations and failing to comply with earlier consent decree
Ameritech: *Ohio NAL*	06/20/02	$8.5 million	2002 Ohio PUC Lexis 564	Failing to meet Ohio's minimum telephone service standards (noting that they could have fined Ameritech over $122 million)
Southwestern Bell: *Notice of Apparent Liability*	10/31/96	$1,000	11 FCC Rcd 13973	Failure to file a form on time

ATTACHMENT 1

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

In the Matter of	)	
	)	
Application for Consent	)	WC Docket No. 06-74
To Transfer of Control Filed by	)	
AT&T Inc. and BellSouth Corporation	)	
	)	

DECLARATION OF CHRISTOPHER PUTALA

I, Christopher Putala, declare under penalty of perjury on this 5th day of June 2006 that the following statements are true and accurate to the best of my knowledge and belief:

1. I am the Executive Vice President, Public Policy, for EarthLink, Inc.

2. I have reviewed the attached Petition to Deny and the statements made therein are true and accurate.

3. In January 2006, BellSouth required EarthLink, as a condition for renewal of its RBAN service, to accept several anticompetitive limits on the service.

4. There are no legitimate business reasons for these new restrictions against EarthLink, and these conditions are clearly anticompetitive and designed to prevent EarthLink from offering competitive services within BellSouth's regions.

5. While AT&T has discussed several ideas for a long-term broadband transmission arrangement with EarthLink, AT&T has refused to provide EarthLink any written draft proposal, nor even a draft agreement, so that the parties may secure a long-term agreement.

6. Prior to the *Wireline Broadband Order* deregulation, New Edge was conducting business as a CLEC with collocated equipment in the BellSouth region and as a reseller of BellSouth's DSL services. New Edge utilized BellSouth's DSL services to provide virtual private networks for multi-site business customers. BellSouth's DSL services were delivered via an ATM/PVC platform (Layer 2) pursuant to its federal tariff.

7. After FCC deregulation, however, BellSouth decided to cease offering Layer 2 DSL services to New Edge after May 17, 2006, effectively ending the ability of New Edge to offer businesses in BellSouth an alternative VPN service using ATM-over-DSL. Compounding the harm, BellSouth's plan to eliminate Layer 2 DSL service did not include any plan of action for transitioning New Edge VPN customers over to an alternative service.

8. New Edge requested that BellSouth negotiate a commercial agreement that would ensure the continuance of the ATM/PVC platform, but BellSouth has refused.

9. Further, although it would limit New Edge in the services it can offer, New Edge requested to negotiate a commercial agreement for BellSouth's RBAN service. This time, BellSouth did not refuse New Edge's request. Prior to discussing an RBAN agreement, however, New Edge would have to agree to certain conditions including: (1) the removal of all collocated facilities in the BellSouth region; and (2) New Edge's agreement not to offer VOIP services in the BellSouth region.

10. AT&T has refused even to discuss a continuing broadband transmission arrangement with New Edge.

11. Since the *Wireline Broadband Order*, New Edge has attempted to discuss with AT&T personnel a contract for broadband transmission service. AT&T, however, refuses to discuss a continuing broadband transmission arrangement with New Edge.

12. As a broadband Internet service provider and voice service provider (including VoIP), EarthLink requires "last mile" broadband connections to its customers in order to provide service to those customers.

13. A significant source of broadband transmission services for EarthLink in AT&T territory is AT&T; similarly, a significant source of broadband transmission services for EarthLink in BellSouth territory is BellSouth.

14. Other than BellSouth and AT&T, Covad is the only commercially meaningful source of wholesale DSL transmission service in BellSouth Territory and AT&T territory. Covad's services are in a significant number of cases restricted geographically, however, and in those geographic areas, EarthLink has no alternative to the respective BOCs for DSL transmission service.

15. AT&T and BellSouth have different approaches to the provisioning of wholesale DSL and fiber-based transmission services. Those differences include (1) the extent to which the companies require purchasers to use "layer 3" services, which include a pre-selected backbone provider; (2) the extent to which copper loops are replaced with fiber, and the alternatives to DSL that are made available when such replacements occur; (3) the extent to which resale is restricted; and (4) the extent to which remote terminal are used, which limit access to customers served by such terminals.

16. Although both AT&T and BellSouth substantially restrict the nature and uses of the wholesale broadband transmission services that they sell, having the companies operate separately provides EarthLink with some ability to negotiate against one company's restrictive practices on the grounds that the other company does not impose similar restrictions. The combination of the companies would eliminate those differences and would eliminate any possibility that the two companies would ever compete across their traditional territorial boundaries – competition that would give EarthLink more opportunity to obtain commercially favorable terms and conditions for transport that it could in turn use to provide better services to its customers at better prices.

/s/ *Christopher Putala*

Christopher Putala

Date: June 5, 2006