

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
BELLSOUTH CORPORATION)	
)	
and)	WC Docket No. 06-74
)	
AT&T, INC.)	
)	
Application Pursuant to Section 214 of the)	
Communications Act of 1934 and Section 63.04 of)	
The Commission's Rules for Consent to the Transfer)	
Of Control of BellSouth Corporation to AT&T Inc.)	

**PETITION TO DENY
OF
ACCESS POINT, INC.
ACN COMMUNICATIONS SERVICES, INC.
DELTACOM, INC.
FLORIDA DIGITAL NETWORK, INC. D/B/A FDN COMMUNICATIONS
GLOBALCOM COMMUNICATIONS, INC.
LIGHTYEAR NETWORK SOLUTIONS, INC.
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
PAC-WEST TELECOMM, INC.
SMART CITY NETWORKS, INC.
US LEC CORP.**

Andrew D. Lipman
Eric J. Branfman
Patrick J. Donovan
Bingham McCutchen LLP
3000 K. Street, NW
Washington, DC 20007

June 5, 2006

TABLE OF CONTENTS

SUMMARY i

I. STANDARD OF REVIEW2

II. THE APPLICATION FAILS TO PROVIDE IMPORTANT INFORMATION CONCERNING ISSUES OF LIKELY COMPETITIVE IMPACT4

III. THE PROPOSED MERGER WOULD CAUSE SIGNIFICANT HARMS.....5

 A. The Proposed Merger Would Result in All of the Harms Identified by the Commission in the SBC/Ameritech Merger.....5

 1. The Merger Will Remove One Of The Last Few Remaining Most Significant Potential Participants Both Within And Outside Of Each Company’s Region, Not Only For Mass Market Customers But For Larger Business Customers As Well.....7

 2. The Merger Will Decrease Regulators’, Competitors’ and Customers’ Ability to Use Comparative Practices and Rate Benchmarking to Evaluate Carriers’ Practices and Proposals, And Will Thereby Increase The Duration Of The Entrenched Firms’ Market Power, Raise The Costs Of Regulating Them And Reduce The Competitiveness Of The Marketplace.....13

 3. The Merger Will Increase the Incentive and Ability of the Merged Entity To Discriminate Against Its Rivals, and Thereby Harm Competition and Consumers In The Advanced Services, Long Distance And Local Exchange Markets20

 4. Applicants Have Failed To Demonstrate That Changed Circumstances Render Irrelevant To This Merger The Commission’s Concerns With Regard To The SBC-Ameritech Merger24

 B. The Merger Would Harm The Marketplace For Internet-Based Services29

 C. The Proposed Merger Threatens the Viability of Independent IXC’s34

 D. The Proposed Merger Would Harm Competition in Tandem Switching and Transit Services36

IV. THE CURRENT LEVEL OF COMPETITION DOES NOT MITIGATE HARMS38

V. THE PROPOSED MERGER WOULD NOT PRODUCE SIGNIFICANT PUBLIC INTEREST BENEFITS48

 A. The Merger Will Not Enhance MVPD and Programming Competition48

 B. Unification of Cingular Ownership Is Not a Competitive Benefit51

 C. Services to Government Customers Will Not Improve53

 D. Vertical Integration Benefits Are Exaggerated.....57

E. The Mergers Will Not Increase Research, Development, and Innovation60

F. Cost Savings to the Companies Are Not a Public Interest Benefit.....63

VI. CONDITIONS ARE NECESSARY TO PRODUCE A BETTER BALANACING OF
COSTS AND BENEFITS64

VII. CONCLUSION76

SUMMARY

The Applicants do little more than go through the motions of presenting a genuine case in support of the proposed merger, assuming that a grant of the Application is assured and providing little more than a repetition of the same arguments used in recent mergers.

However, there is no escaping that the proposed merger is harmful for all the reasons that the Commission found that the SBC/Ameritech merger, absent significant conditions, would be contrary to the public interest. The proposed merger would remove one of the last few remaining significant potential competitors to BellSouth; diminish the ability of regulators and customers to use comparative practices and benchmarking to evaluate the merger partners' performance and proposals; increase the incentive and ability of the merger partners to discriminate against rivals; harm the market for Internet-based services; threaten the viability of independent IXCs, and harm competitive provision of tandem switching and transit services.

The Applicants provide an extraordinarily weak showing of alleged benefits of the proposed merger. The Applicants provide vague, unsupported, and unverifiable allegations of benefits. And, few of the claimed benefits is merger specific. Those that might have a nexus to the merger, such as cost savings, are benefits merely to the merger partners not to the public interest. Nearly all of the alleged benefits, to the extent they have any validity, would occur if the merger does not take place, such as implementation of IP networks, or actually already exist, such as the references to AT&T Corp. inventions before its merger with SBC. The claim of significant benefits from combining ownership of Cingular is unpersuasive since AT&T and BellSouth already own Cingular.

The Applicants fail to describe how they would implement the merger and achieve the integration that they claim would be a major benefit. In particular applicants omit a description

of whether and how they intend to achieve a uniformity of practices and procedures across their respective regions. Competitive carriers have invested substantial amounts to conform to various AT&T and BellSouth requirements. It could potentially be very harmful for CLECs to be required to significantly alter practices and procedures because of the integration of AT&T and BellSouth. Assuming the Commission moves forward with consideration of the proposed merger, the Applicants should be required to submit detailed plans including timelines as to how the integration of the several companies involved would change operating practices and procedures that could affect competitive carriers.

Nor have “conditions changed” since 1999 to make the Commission’s analysis of SBC/Ameritech merger conditions invalid. In spite of growth in competitive lines, BellSouth has experienced a phenomenal 40% increase in its own access lines, retaining its status as the dominant provider in its region.

There is no good reason for the Commission to approve the proposed merger. The Applicant’s boilerplate and paltry showing of benefits do not outweigh the harms previously found by the Commission to arise from a merger of two BOCs. The Commission should deny the application. If it does not do so, substantial conditions would be required in order to support a finding that the proposed merger could serve the public interest.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
BELLSOUTH CORPORATION)
)
and) WC Docket No. 06-74
)
AT&T, INC.)
)
Application Pursuant to Section 214 of the)
Communications Act of 1934 and Section 63.04 of)
The Commission's Rules for Consent to the Transfer)
Of Control of BellSouth Corporation to AT&T Inc.)

**PETITION TO DENY
OF
ACCESS POINT, INC.
ACN COMMUNICATIONS SERVICES, INC.
DELTACOM, INC.
FLORIDA DIGITAL NETWORK, INC. D/B/A FDN COMMUNICATIONS
GLOBALCOM COMMUNICATIONS, INC.
LIGHTYEAR NETWORK SOLUTIONS, INC.
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
PAC-WEST TELECOMM, INC.
SMART CITY NETWORKS, INC.
US LEC CORP.**

Access Point, Inc., ACN Communications Services, Inc., DeltaCom, Inc., Florida Digital Network, Inc. d/b/a FDN Communications, Inc., Globalcom Communications, Inc., Lightyear Network Solutions, Inc., McLeodUSA Telecommunications Services, Inc., Pac-West Telecomm, Inc., Smart City Networks, Inc., and US LEC Corp. submit this Petition to Deny the above-referenced Application requesting approval for the acquisition by AT&T Inc. of BellSouth

Corporation.¹ As recognized by Ed Whitacre, CEO of AT&T, just months before the instant proposed merger was announced, such a merger is contrary to the goals that regulators such as the FCC are bound to strive for because it would produce a company with enormous size and market power: "[SBC's acquisition of BellSouth] doesn't have much chance of happening because of market power, size, etc.... I don't think the regulators would let that happen, in my judgment."² For this reason, and for all the reasons below, the Commission should deny the Application. If it does not deny the Application, the Commission must impose substantial conditions to offset the enormous competitive harm that the proposed merger will produce.

I. STANDARD OF REVIEW

In evaluating merger applications, the Commission asks "whether the combined entity will be able, and is likely, to pursue business strategies resulting in demonstrable and verifiable benefits that could not be pursued but for the combination."³ Claimed benefits must be transaction- or merger-specific.⁴ The claimed benefit "must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects."⁵ "Efficiencies that can be achieved through means less harmful to competition than the

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

² *At SBC, It's All About "Scale and Scope"*, Business Week Online, Nov. 7, 2005.

³ *SBC/AT&T Merger Order* ¶ 182.

⁴ *Id.* ¶ 184.

⁵ *Id.*, citing *EchoStar/DirectTV Order*, 17 FCC Rcd at 20630, ¶ 189.

proposed merger ... cannot be considered to be true pro-competitive benefits of the merger.”⁶

Claimed benefits must also be verifiable.⁷ The Applicants must demonstrate that the proposed merger “is a reasonably necessary means” to achieve the purported benefits.⁸ “A mere recitation by the Applicants that they will provide some benefit if and only if their license transfer is approved cannot suffice to show that such a benefit is merger specific.”⁹ “[S]peculative benefits that cannot be verified will be discounted or dismissed.”¹⁰ The Commission applies a sliding scale approach under which substantial and likely harms requires that claimed benefits show a higher degree of magnitude and likelihood than we would otherwise demand.¹¹

As the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest. This sliding scale approach requires that where, as here, potential harms are indeed both substantial and likely, the Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.¹²

⁶ *Id.* n. 517, citing *In the Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd at 20063-64, 158 (1997)(“*Bell Atlantic/NYNEX Order*”).

⁷ *Id.* ¶ 184.

⁸ *SBC-Ameritech Merger Order* 14 FCC Rcd at 14829 ¶ 267.

⁹ *SBC-Ameritech Merger Order*, 14 FCC Rcd at 14829 ¶ 267.

¹⁰ *Id.*

¹¹ *Id.* ¶ 185.

¹² *SBC-Ameritech Merger Order* 14 FCC Rcd at 14712, ¶ 256 (1999) (citing *Bell Atlantic/NYNEX Order* 12 FCC Rcd 19985).

II. THE APPLICATION FAILS TO PROVIDE IMPORTANT INFORMATION CONCERNING ISSUES OF LIKELY COMPETITIVE IMPACT

In order for the Commission to evaluate benefits and harms of a proposed merger the Applicants must submit sufficient information about the merger. While the Applicants fill numerous pages describing the alleged benefits of integration of the AT&T and BellSouth networks, notably missing is any description of how this would be accomplished. In particular, the Applicants have not provided any details as to how or if differences in operational procedures between the AT&T operating companies and BellSouth will be reconciled. They do not indicate whether AT&T will be adopting some BellSouth policies with regard to any specific issues or vice-versa.

Given that alleged integration is a key claimed benefit, presumably the companies do not each intend to retain their current separate operating procedures. In some areas, such as provision of video programming, it appears that AT&T will establish its programming and other policies for IPTV in the BellSouth region.¹³ The claimed cost savings and elimination of redundant positions also indicates that the Applicants plan to create an extensive degree of uniformity across BellSouth and AT&T regions.¹⁴ And, even if the Applicants do not intend immediately to create uniform operations in some areas, it is likely that they may do so in the future.

Concerning changes in other key areas that could affect the ability of CLECs to compete with the merged company, the Applicants are silent. Changes in operating procedures can be extremely expensive and disruptive to CLECs. The Commission has previously recognized the

¹³ Public Interest Statement at 23.

¹⁴ *Id.* at 53.

importance of nondiscriminatory access to OSS to the ability of CLECs to compete on a commercially reasonable basis.¹⁵ It would be very resource intensive for CLECs to change OSS procedures and interfaces. It is also possible that the Applicants will choose to make their worst, rather than best, practices uniform across their combined region. In fact, the process that the Applicants choose to change operating procedures provides an opportunity for competitively disadvantaging CLECs by imposing changes that are costly to CLECs or that carry a potential for disruption of provisioning of CLEC services to new and existing customers.

For these reasons, as a first step to evaluating the Application, the Commission must require the Applicants to fully disclose plans if any for integrating key competitively sensitive operating procedures and practices. This must include planned changes, timing, and procedures that would be followed to implement any changes. Interested CLECs may then propose appropriate changes or conditions to assure that the Applicants' touted integration will not harm competition.

III. THE PROPOSED MERGER WOULD CAUSE SIGNIFICANT HARMS

A. The Proposed Merger Would Result in All of the Harms Identified by the Commission in the SBC/Ameritech Merger

In its order¹⁶ approving, with conditions, the SBC/Ameritech merger, the Commission identified a number of harms to the public interest and to competition specifically that it found would have been fatal to the merger application but for various conditions that it imposed which

¹⁵ *Application of BellSouth Corporation et al for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-191, FCC 98-271, ¶ 83.

¹⁶ *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, October 8, 1999 (“*SBC/Ameritech Merger Order*”).

offset those harms so that the transaction as a whole could be found to be in the public interest.

Specifically, the Commission found that the SBC/Ameritech Merger threatened to harm consumers of telecommunications services in three distinct, but interrelated, ways.

- 1) The merger would remove one of the most significant potential participants in local telecommunications mass markets both within and outside of each company's region.
- 2) The merger would substantially reduce the Commission's ability to implement the market-opening requirements of the 1996 Act by comparative practice oversight methods which, contrary to the deregulatory, competitive purpose of the 1996 Act, would, in turn, increase the duration of the entrenched firms' market power and raise the costs of regulating them.
- 3) The merger would increase the incentive and ability of the merged entity to discriminate against its rivals, particularly with respect to the provision of advanced telecommunications services which would likely frustrate the Commission's ability to foster advanced services as it is directed to do by the 1996 Act.¹⁷

The proposed merger between AT&T and BellSouth would result in all of these harms. Indeed, because of the increased concentration in the industry since the conditioned approval of the SBC-Ameritech merger, these harms will be much more severe and comprehensive if this merger is approved. Moreover, unlike the case with the SBC/Ameritech merger, no conditions have been proposed by the Applicants here – and even if they had been, conditions along the lines of those imposed on the SBC/Ameritech merger would be grossly insufficient to redress the harms to the public that would result from allowing the AT&T/BellSouth merger to proceed.

¹⁷ *SBC-Ameritech Order at 6* (footnote omitted).

1. The Merger Will Remove One Of The Last Few Remaining Most Significant Potential Participants Both Within And Outside Of Each Company's Region, Not Only For Mass Market Customers But For Larger Business Customers As Well

In the *SBC/Ameritech Order*, the Commission found that the merger between SBC and Ameritech would remove from each of the SBC and Ameritech regions one of the most significant potential participants in local telecommunications mass markets within each region. In addition, though the Commission had no need to reach this point, the merger eliminated one of the most significant potential competitors in the BellSouth region, by reducing the number of major ILECs with both the incentive and the resources to enter the BellSouth region from five (SBC, Ameritech, Bell Atlantic, GTE and Qwest) to four. Nevertheless, the Commission was willing to allow this reduction, but only on the imposition of a number of stringent conditions, intended to redress the competitive harm that would result from this reduction. At the time, the Commission expressed reservations about any further concentration, expressly stating that the burdens on future major LEC merger applicants would be “further escalat[ed].”¹⁸

Since the *SBC-Ameritech Order*, of course, the number of major ILECs who are potential competitors in BellSouth's region has decreased further, from four to three, with the merger of Bell Atlantic and GTE. Moreover, the two largest interexchange carriers, AT&T and MCI, which were not only potential competitors in BellSouth's region for local services, but were actual, if emerging competitors there, have been swallowed up by two of those three major ILECs, reducing what had been a total of six such potential or actual competitors to only three.

¹⁸ *SBC/Ameritech Order* at 147-148.

Further tightening and concentrating the market, a number of CLECs have merged or exited the market.¹⁹

Thus, it is clear on its face that the harm of diminished potential competition posed by the instant proposed merger is worse than that posed by the SBC/Ameritech merger. The Applicants allege that the Commission need not worry about these harms because, inter alia, AT&T and BellSouth allegedly “focus on different customer and service segments,”²⁰ and “AT&T ceased actively competing for mass market customers nearly two years ago.”²¹ In addition, they assert that the Commission should not worry because “retail business customers are sophisticated and take full advantage of their competitive choices.”²² But none of these rationales can overcome the fundamental loss of one of three significant potential competitors in both the AT&T and BellSouth territories.

First, the alleged “focus on different customer and service segments” is unpersuasive. Clearly, within their respective regions, both AT&T and BellSouth provide service to all segments of both the local and long distance marketplaces. Thus, both patently have both the ability and resources to offer services in each other’s markets. As the Commission aptly noted in the SBC/Ameritech context:

As incumbent LECs, each firm is one of only a few potential entrants with the necessary systems, such as billing and operations support, required to provide local exchange services to residential and small

¹⁹ Over the last few years, the BellSouth-centric NuVox/New South merged and ITC^DeltaCom acquired BTI. KMC Telecom, ICG Communications, Intermedia, and Mpower have exited the BellSouth region market or sold their operations to other carriers.

²⁰ Public Interest Statement at 64 *et seq.*

²¹ *Id.*

²² Public Interest Statement at 84 *et seq.*

business customers on a large scale. They also bring particular expertise to the process of negotiating and arbitrating interconnection agreements between incumbent and competitive LECs. In adjacent markets, each Applicant has an array of nearby switches that can be used to provide local exchange services in the other's traditional operating territories. Moreover, in out-of-region markets in which either Applicant has a cellular affiliate, it also has a base of customers to whom it can offer wireline local exchange services, potentially bundled with cellular and other offerings. Finally, in both adjacent and cellular out-of-region markets, SBC and Ameritech have brand recognition with mass market customers that would provide a strong and often unique advantage in providing competitive wireline services.²³

This is even more true of the new AT&T and BellSouth.

Both AT&T and BellSouth have a cellular affiliate (Cingular) in each other's territory. And, AT&T's brand is if anything significantly stronger than SBC's was at the time of the SBC/Ameritech merger – a point trumpeted by SBC when it took AT&T's name following their merger, calling the AT&T globe “one of the most recognized corporate symbols in the world,” and boasted of it as the “Logo That Stands For Telecommunications.”²⁴ BellSouth's brand is probably stronger than Ameritech's was too, since it, but not Ameritech, is still using the historic “Bell” which traces back to the very earliest days – and the inventor – of telephone service.²⁵ Thus, AT&T could be and is a strong competitor in BellSouth's region and BellSouth could be a strong competitor in AT&T's region.

²³ *SBC-Ameritech Merger Order* at 30.

²⁴ See SBC News Release, “The New AT&T Unveils New Corporate Logo on First Day as Nation's Largest Telecommunications Company: Logo That Stands for Telecommunications Revitalized for New Era of Integrated Communications and Entertainment,” San Antonio, Texas, November 21, 2005, <http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21908>

²⁵ BellSouth's brand is strengthened further by its extensive line of BellSouth branded consumer telephone equipment. See http://www.bellsouth.com/consumer/equipment/equip_cordless.html?src=mpsl and http://www.bellsouth.com/consumer/equipment/equip_corded.html or examples.

Applicants maintain, however, that “AT&T concentrates on serving the full range of complex telecommunications needs of the largest retail business customers, both nationally and globally,” while BellSouth merely focuses “on meeting the local and regional voice and data needs of businesses.”²⁶ In further support for their position, Applicants assert that “AT&T has stopped marketing to smaller retail business customers outside of the former SBC’s 13-state region.”²⁷ But Applicants’ assertion as to the supposedly limited scope of AT&T’s reach is belied immediately by its acknowledgment that SBC had attempted to extend its reach outside its region by acquiring or building facilities even before its merger with AT&T,²⁸ -- and of course, in acquiring AT&T, SBC also acquired vast facilities outside its region, much of which was already being used to offer service in BellSouth’s region. It is therefore no surprise that in its marketing AT&T crowds about its ability to provide enterprise users all of its services nationwide, with the sole exception of voice POTS.²⁹ Thus, AT&T is not merely a potential but an *actual* competitor of BellSouth and because of the strength of its brand and its immense resources can only be expected to grow rapidly as a competitor of BellSouth – unless that is, the competition between them is eliminated entirely by the closing of this merger.

Similarly, news of the purportedly limited scope of BellSouth’s offerings has evidently not reached BellSouth’s marketing department, which, in the large business section of its

²⁶ Public Interest Statement at 64.

²⁷ *Id.* at 65.

²⁸ *Id.*

²⁹ *See generally*

http://www.business.att.com/service_portfolio.jsp?repid=ProductCategory&repoitem=eb_access_and_local_services&serv_port=eb_access_and_local_services&segment=ent_biz

website, boasts of BellSouth's "Capabilities with Extended US Coverage" and touts BellSouth's

Managed Network VPN service as follows:

In today's data-driven business climate, companies like yours require flexible, high-bandwidth nationwide wide area network (WAN) solutions than can cost-effectively extend connectivity to all sites and users. And with convergence on the horizon, companies like yours are looking to combine their voice and data networks. In the past, businesses have crossed this hurdle by self-integrating access technologies to build corporate backbones and access networks.

Now, with BellSouth® Managed Network VPN Service nationwide, you can establish a more secure WAN connectivity over a carrier-class IP network infrastructure that allows you to run voice, video and data over a single network. This Layer 3 IP nationwide VPN service simultaneously delivers flexibility and breadth of reach with the security and performance of a private network. It's the next-generation network of choice that can offer quality of service back by pro-active SLAs.

Capabilities include:

Site-to-site connectivity

Remote access

Internet access with integrated security services

Customer Network Management (CNM)

Class of Service (CoS)³⁰

In point of fact, then, by the Applicants' own admission, each offers many services in the other's region today: they are therefore actual, not merely potential, competitors. Moreover, for all the reasons stated by the Commission in the *SBC/Ameritech Merger Order*, they are potential competitors as well for voice POTS.

In light of this fundamental fact, Applicants' assertion that the Commission need not worry because "retail business customers are sophisticated and take full advantage of their competitive

³⁰ See <http://largebusiness.bellsouth.com/> and http://www.bellsouthlargebusiness.com/products_detail.aspx?sct_id=4&ctg_id=38&item_id=75

choices”³¹ is specious. Retail business customers, sophisticated as they may be, can only take advantage of such choices as they have, and such choices are rapidly dwindling. At the time of the SBC/Ameritech merger, the Commission expressed the hope that competition in the market for larger business customers would not be unduly harmed by that merger because of the larger number of competitive choices available to larger business customers than to mass market customers.³² But even if the Commission was right at that time, the landscape is very different today. First, three more of the major competitive alternatives even then available to larger business customers for all or parts of their needs – AT&T, MCI and GTE – have been swallowed up. Second, by the Applicants’ own reckoning, only those competitors with nationwide service offerings are true players in the enterprise space because of the widely dispersed locations and needs of the large enterprise customers, and thus the many niche and regional players that seem to have reassured the Commission several years ago do not pose a significant competitive threat in this space.³³ Third, as explained elsewhere in these comments, the intermodal competition cited by Applicants as competitive alternatives in the retail business market is too limited in scope to deserve substantial weight in this analysis. For example, cable voice and modem service does not pass many business customers, and wireless is far from meeting business customers’ needs for data services. And fourth, many of the smaller competitors which undoubtedly underlaid the Commission’s analysis several years ago have themselves either been swallowed up or exited the market.

³¹ Public Interest Statement at 68.

³² *See SBC/Ameritech Merger Order* at 34.

³³ Public Interest Statement at 63-64.

Of particular note is the Applicants' insistence that BellSouth must be allowed to merge because it cannot compete [in its own region] in this market by reason of its lack of a nationwide long distance network³⁴ while at the same time asserting that such entities as cable providers, wireless carriers, systems integrators and VoIP providers are formidable threats, notwithstanding their obvious lack of such facilities.³⁵ If Applicants' analysis is correct, there is nothing to stop BellSouth from competing by acting as (or acquiring) a systems integrator. And indeed, that seems to be what BellSouth is already doing to some extent, yet to hear Applicants tell it, BellSouth is singularly unable to compete in this manner. Furthermore, if it is the lack of a nationwide network that is BellSouth's fatal handicap, it could easily align itself through merger or some other form of partnership with one of the remaining non-Bell long distance networks, rather than contribute to the continuing reconstitution of the historic AT&T integrated nationwide monopoly.

2. The Merger Will Decrease Regulators', Competitors' and Customers' Ability to Use Comparative Practices and Rate Benchmarking to Evaluate Carriers' Practices and Proposals, And Will Thereby Increase The Duration Of The Entrenched Firms' Market Power, Raise The Costs Of Regulating Them And Reduce The Competitiveness Of The Marketplace

In the *SBC/Ameritech Merger Order*,³⁶ the Commission also found that:

[T]he proposed merger's elimination of Ameritech as an independent major incumbent LEC will significantly impede the ability of this Commission, state regulators and competitors to use comparative practices analyses to discover beneficial, pro-competitive approaches to open telecommunications markets to competition and to promote

³⁴ Public Interest Statement at 63-64

³⁵ *Id.* at 74-75, 78-79, 87-95.

³⁶ *SBC/Ameritech Merger Order* at 51.

rapid deployment of advanced services. More specifically, the loss of Ameritech as an independent source of strategic decisions and experimentation, and the increased incentive for the merged entity to reduce autonomy at the local operating company level as a result of the merger, would severely restrict the diversity that regulators and competitors otherwise could observe and, where pro-competitive, endorse. By further reducing the number of major incumbent LECs, the merger also increases the risk that the remaining firms will collude, either explicitly or tacitly, to conceal information and thereby hinder regulators' and competitors' benchmarking efforts. We therefore conclude that the proposed merger of SBC and Ameritech would impede the ability of regulators and competitors to make effective benchmark comparisons, which would force more intrusive, more costly, and less effective regulatory measures contrary to the 1996 Act's deregulatory aims and the interests of both the regulated firms and taxpayers. The loss of this more efficient method of oversight can only serve to further entrench the large incumbent LEC's substantial market power.

These same harms the Commission found would result from an unconditioned SBC/Ameritech merger will also result from the proposed merger between AT&T and BellSouth, and will in fact be more significant. The loss of BellSouth "as an independent source of strategic decisions and experimentation" is even more grievous than the loss of Ameritech, since it comes at a time when there are significantly fewer points of comparison than there were at the time of the SBC/Ameritech merger. Ameritech and GTE are both gone. Thus, instead of there being six major ILECs among which to compare performance as there were before the SBC-Ameritech merger, if this merger is approved, there will only be three. Put another way, for each such ILEC, there would only be two points of comparison instead of five, as there were before the SBC/Ameritech merger – a reduction of fully sixty percent!³⁷

³⁷ Even if we count from after the SBC-Ameritech merger, the number of comparators would have declined from four to only two. And the dwindling number of small ILECs and CLECs cannot substitute for this loss, as the Commission expressly found in the *SBC-Ameritech Order* (at 31), observing: "Large

The Commission foresaw several consequences from the loss of comparators for comparative practices benchmarking. First, regulators would see the weakening of one of their most important tools for keeping the entrenched carriers honest and to promote the deployment of advanced services, as required by the 1996 Act. As the Commission noted:

[W]e find that the proposed merger's elimination of Ameritech as an independent major incumbent LEC will significantly impede the ability of this Commission, state regulators and competitors to use comparative practices analyses to discover beneficial, pro-competitive approaches to open telecommunications markets to competition and to promote rapid deployment of advanced services. More specifically, the loss of Ameritech as an independent source of strategic decisions and experimentation, and the increased incentive for the merged entity to reduce autonomy at the local operating company level as a result of the merger, would severely restrict the diversity that regulators and competitors otherwise could observe and, where pro-competitive, endorse.³⁸

The proposed AT&T-BellSouth merger would patently erode still further – and probably wash away altogether – the ability of regulators to monitor the practices of the incumbents for purposes of adopting pro-competitive approaches to regulation.

In addition, and at least as important today, the Commission noted that not just regulators, but competitors as well, use comparative benchmarking:

Comparative practices analyses are also crucial for the incumbents' competitors which must rely on incumbent LECs for interconnection, access and unbundled elements. This explicit need to rely on the incumbents' facilities and services distinguishes the section 251 negotiation process from commercial negotiations in other competitive markets. Consistent with the analysis above, competitive LECs commenting in this proceeding assert that in their

incumbent LECs differ greatly from smaller incumbent LECs, competitive LECs and foreign LECs in regulatory treatment, structure and operation.” *See also SBC/Ameritech Merger Order at 75 et seq.*

³⁸ *SBC/Ameritech Merger Order at 51; see also the Commission's lengthy explication of the value of benchmarking for federal and state regulators, id. at 61-66.*

interconnection negotiations with incumbent LECs, and in various state or federal proceedings implementing the Communications Act, they compare the incumbent LEC's price structure, provisioning, or claims about the feasibility of a particular service against their experiences with other incumbents.³⁹

Competitors need such benchmarking even more today, in a context in which commercial agreements are eclipsing arbitrated agreements, to ensure that the benefits of what is left of competition flows through to the marketplace. There are only three comparators left for a competitor to use in an interconnection negotiation for purposes of arguing that an ILECs' practices are not commercially reasonable. If AT&T and BellSouth have their way, there will soon be only two comparators, and for all practical purposes the usefulness of benchmarking to competitors will be destroyed.

There is one additional area – not dwelled upon by the Commission in the *SBC/Ameritech Merger Order* but important nevertheless – in which benchmarking plays an important part in diffusing competition through the market and leveraging its effects. This occurs when retail customers, especially larger business customers, engage in benchmarking. Retail customers frequently benchmark rates and practices at several stages. First, during an RFP (request for proposal) or other formal bidding stage, customers can benchmark carrier proposals not only against each other but against other deals that are present in the marketplace, and which must, when not tariffed, be made public by posting on the carriers' websites. Second, customers frequently benchmark at the time of renegotiation of existing agreements, either in lieu of a rebid at the time of expiration or as a midcourse mechanism for insuring that prices, terms and quality of service remain competitive during a long term agreement. This mechanism when used by

³⁹ *SBC/Ameritech Order* at 66 (footnotes omitted).

customers helps to assure that market signals as to price and service quality diffuse rapidly through the market. Their popularity is attested to by the large number of firms performing such services for business users.⁴⁰ Like regulators and competitors, customers can use benchmarking to good effect even between carriers who do not directly compete (as when they serve different regions), since their practices are nevertheless comparable for benchmarking purposes, and even their rates serve as useful guidelines for what is competitive. Needless to say, however, the continuing loss of potential comparators is substantially diminishing the benefit of benchmarking for customers as well.

The Commission also found that a related, but distinct, harm would result from the SBC/Ameritech merger: it would increase the likelihood that the remaining major ILECs could successfully “collude, either explicitly or tacitly, to conceal information and thereby hinder regulators’ and competitors’ benchmarking efforts.”⁴¹ This would have several dire effects:

The proposed merger, by reducing to *five* the number of major incumbent LECs, also would increase the incentive and ability of the remaining incumbents to coordinate their behavior, either explicitly or implicitly, to impede benchmarking and resist market-opening measures. As an initial matter, by merging Ameritech into SBC, the merger reduces by one the number of independent holding companies whose behavior must be coordinated, which simplifies the process of coordination. Coordination requires that the incentives of all parties

⁴⁰ See, e.g., Contour Telecom Inc. - http://www.contour.ca/ps_ps_benchmarking.html; Thompson Advisory Group - http://www.i-tag.net/sv_Benchmarking.cfm; AP Recovery Inc. - <http://www.aprecovery.com/whatwedo/services.shtml>; Acasta LLC - <http://www.acasta.com/HTML/CS4.htm>; Control Point Solutions - <http://www.controlpointsolutions.com/solutions-strategicsourcing.htm>; ProfitLine - http://www.profitline.com/Solutions/expense_management_02.html; Telwares, Inc. - <http://www.telephonyworld.com/cgi-bin/training/viewnews.cgi?category=all&id=1097014943>

⁴¹ *SBC-Ameritech Merger Order* at 51.

are aligned, and reducing the number of companies reduces the number of incentives that must be aligned.

Reducing the number of firms also increases each firm's incentive to coordinate its behavior to undermine regulatory processes. As we have mentioned, SBC will grow larger as a result of the merger, and therefore stands to sustain a larger loss as the result of any comparative practices analysis that constrains its behavior. This gives the merged firm greater incentive to enter into tacit agreement with the remaining firms to convey minimal information to regulators and/or competitors and to eliminate outlying policies and practices that could become industry benchmarks. Moreover, the merger will create a demonstrably large incumbent LEC that can act as an industry leader for collusive purposes.

As a result of Ameritech's merger with SBC, the other major incumbent LECs also will have more incentive to cooperate in attempts to impede comparative practices analysis. Cooperative ventures, either explicit or implicit, involve the risk that one or more parties will deviate from the cooperative behavior, thereby spoiling the venture. With the cooperation of fewer firms necessary, the merger reduces the risk that a venture will fail, which translates into a lower risk for each firm from participating in the venture. This reduction in risk increases a firm's incentive to cooperate. By reducing the number of major incumbent LEC benchmark firms to five, with each firm facing more incentive to cooperate and little unilateral incentive to break an agreement to impede benchmarking, the proposed merger will facilitate any attempts, especially implicit attempts, to coordinate behavior to conceal forms of competitive deterrence from regulators and competitors. The merger of SBC and Ameritech therefore increases the incentive and abilities of the merged firm and other incumbent LECs to cooperate in becoming less effective benchmarks for regulators and competitors seeking to promote competitive entry and rapid deployment of advanced services.⁴²

If the Commission was (rightly) concerned about the baleful effects of collusion in a market with five participants, it must be far more so in a market that would, after the closing of this newest merger, have only three. As the Commission stressed in the *SBC/Ameritech Merger*

⁴² *SBC/Ameritech Merger Order* at 74-75 (emphasis added; footnotes omitted).

Order,⁴³ the smaller the number of participants, the more likely collusion can be maintained and succeed. The Commission warned that, even with the reduction to five major ILECs, the increased ability of the ILECs to collude would seriously endanger the ability of regulators and competitors to use benchmarking effectively:

Because each successive reduction in the number of benchmarks will reduce the utility of comparative practices analyses, there will be some point at which further reduction in benchmark firms renders such comparisons ineffective. As noted above, in the *Horizontal Merger Guidelines*, DOJ set a threshold of market concentration according to an 1800 HHI, or the equivalent of six equally-sized firms. See *Horizontal Merger Guidelines*, at 16 (“Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.”). In such a market, a merger that reduces the number of competing firms from six to five is therefore likely to be challenged as raising serious concern regarding unilateral and coordinated effects. Analogously, using a market which consists not of competing firms but of benchmark firms, reducing the number of benchmark firms from six to five is likely to raise concern with respect to coordinated efforts to defeat benchmarking, which, as noted above, are more likely to succeed here than in competitive markets where each firm faces potential gain from unilateral deviation.

Commenters respectfully submit that allowing this merger to go through would cause us to reach the very “point at which further reduction in benchmark firms renders such comparisons ineffective” warned of by the Commission. Assuming for back-of-the-envelope purposes that there are now four equal-sized major ILECs, the HHI would today be $4 \times (25 \text{ squared})$ or 2500. A merger of two of those would result in an HHI of $(50 \text{ squared}) + 2 \times (25 \text{ squared})$ or 3750, a rise

⁴³ *Id.* at citing F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* 277-315 (3rd Ed., 1990); A. Jacquemin and M. Slade, “Cartels, Collusion, and Horizontal Merger,” published in R. Schmalensee and R.D. Willig, *Handbook of Industrial Organization*, Vol. 1 (1989).

of 1250 points. Needless to say, the Commission's analogy that the efficacy of benchmarking would suffer as well goes double for the instant merger.

In short, this new loss of potential benchmarking comparators will only exacerbate further the consequences that followed from the SBC/Ameritech merger just as the Commission had predicted. This alone is sufficient reason to deny the Application and disapprove the proposed merger.

3. The Merger Will Increase the Incentive and Ability of the Merged Entity To Discriminate Against Its Rivals, and Thereby Harm Competition and Consumers In The Advanced Services, Long Distance And Local Exchange Markets

In the *SBC/Ameritech Merger Order*, the last, but not least, key concern identified by the Commission, in holding that the merger should be disapproved but for the conditions adopted, was that the SBC/Ameritech merger would increase the ability and incentive of the combined entities, as well as the other remaining ILECs to “discriminate against competitors in the provision of advanced services, interexchange services, and circuit-switched local exchange services”⁴⁴ In particular, “[i]n the retail market for interexchange services, incumbent LECs with section 271 authority to offer interexchange services to in-region customers will have an incentive to discriminate against the termination of calls in its region by independent IXCs in order to induce callers at the originating end to choose the incumbent LEC as the interexchange provider. The combined entity, controlling a larger area, terminates calls from a greater number of in-region customers and therefore has more incentive to engage in such discrimination.”⁴⁵ Such discrimination, the Commission emphasized, violates the “fundamental postulate” of US

⁴⁴ *SBC/Ameritech Merger Order* 84.

⁴⁵ *Id.* at 88.

telecommunications law, as expressed originally in the MFJ governing the divestiture of AT&T and later in the 1996 Act. As the Commission observed: “This increased incentive to discriminate will result in a public interest harm, because it will adversely affect national competitors' provision of services in the new, combined region, and, as a further result, will harm consumers who ultimately will be forced to pay more for retail services, with reduced quality and choice.”⁴⁶ The Commission’s conclusions in this regard once again apply doubly to the instant proposed merger.

The Commission correctly recognized in the *SBC-Ameritech Order* that the larger the combined entity, the more incentive it would have to discriminate because of gains from external effects. Put another way, since discrimination in one region has spill-over effects in other regions, an ILEC with operations in both regions will reap benefits in both regions, and thus will have greater incentive to discriminate. “Economies of scale and scope and network effects,” the Commission reasoned, “imply that when incumbent LECs weaken a competitive service in one region, this weakens it in other regions as well. . . . [T]he merger’s big footprint will create more incentives for the merged entity to discriminate against competitors whose networks become more attractive with more “on-net” customers.”⁴⁷ “As a result,” the Commission concluded, “the level of discrimination engaged in by the combined entity in each region within the combined 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.”⁴⁸

⁴⁶ *Id.* at 84.

⁴⁷ *Id.* at 94.

⁴⁸ *SBC-Ameritech Order* at 87.

By adding BellSouth's nine states to its own thirteen, AT&T will render its footprint enormous and thereby dramatically increase its incentive to discriminate. And the effect will be even more pronounced on BellSouth, since its region will grow to nearly 250% as many states as it has today (22 vs. 9), and nearly 350% as many access lines (69.4 million vs. 20.⁴⁹ The combined region would include nearly half the states in the US, including seven of the ten most populous (California, Texas, Florida, Illinois, Ohio, Michigan and Georgia) and two-thirds of its population.⁵⁰ Combined, the population of these states in 2005 was over 195 million, or nearly two-thirds of the total population of the US! Effectively, since AT&T's long distance operations would now be part of the merged entity as well, the merger would have the effect of reconstituting the old Bell monopoly for two-thirds of the American people, and the bad old pre-divestiture days of rampant discrimination and favoritism, which have already been on the rise,

⁴⁹ Application at 4-6.

⁵⁰ The estimated total population of the 23 states in the combined region as of July 1, 2005, was 188 million out of a total estimated national population of 300 million.

http://factfinder.census.gov/servlet/DTable?_bm=y&-context=dt&-ds_name=PEP_2005_EST&-CONTEXT=dt&-mt_name=PEP_2005_EST_G2005_T001&-tree_id=805&-redoLog=false&-geo_id=04000US01&-geo_id=04000US02&-geo_id=04000US04&-geo_id=04000US05&-geo_id=04000US06&-geo_id=04000US08&-geo_id=04000US09&-geo_id=04000US10&-geo_id=04000US11&-geo_id=04000US12&-geo_id=04000US13&-geo_id=04000US15&-geo_id=04000US16&-geo_id=04000US17&-geo_id=04000US18&-geo_id=04000US19&-geo_id=04000US20&-geo_id=04000US21&-geo_id=04000US22&-geo_id=04000US23&-geo_id=04000US24&-geo_id=04000US25&-geo_id=04000US26&-geo_id=04000US27&-geo_id=04000US28&-geo_id=04000US29&-geo_id=04000US30&-geo_id=04000US31&-geo_id=04000US32&-geo_id=04000US33&-geo_id=04000US34&-geo_id=04000US35&-geo_id=04000US36&-geo_id=04000US37&-geo_id=04000US38&-geo_id=04000US39&-geo_id=04000US40&-geo_id=04000US41&-geo_id=04000US42&-geo_id=04000US44&-geo_id=04000US45&-geo_id=04000US46&-geo_id=04000US47&-geo_id=04000US48&-geo_id=04000US49&-geo_id=04000US50&-geo_id=04000US51&-geo_id=04000US53&-geo_id=04000US54&-geo_id=04000US55&-geo_id=04000US56&-geo_id=04000US72&-search_results=01000US&-format=&-_lang=en

will for all intents and purposes complete their triumphant return. As the Commission cogently and – it turns out – presciently noted in 1999:

This merger would partially reverse the breakup of the Bell System prompted by complaints against AT&T's discrimination towards nascent competitive long distance carriers. As noted above, the old Bell system, with its large footprint, made it difficult for rivals to obtain access to necessary inputs, thus prompting its ultimate breakup. This merger would result in a large footprint that would take a big step toward recreating the Bell System whose discrimination against interexchange carriers led to divestiture in the first place. We find this inconsistent with our mandate under the Act to reduce regulatory involvement in telecommunications markets.⁵¹

In addition to increasing the combined entity's *incentive* to discriminate, the merger would, if allowed to proceed, also dramatically increase the combined entity's *ability* to discriminate. As the Commission found in the *SBC-Ameritech Order*, "[t]he increased ability of the combined entity to discriminate, at least in the absence of stringent conditions, will result from: (1) the reduction in the number of benchmarks, making it more difficult for regulators to monitor and detect misconduct; (2) the ability of the combined entity to coordinate and rationalize the discriminatory conduct of the two companies (sharing 'worst practices'), making detection and proof of discrimination more difficult; and (3) the efficiencies (economies of scope) that result from being able to share strategies and resources while fighting similar regulatory battles in multiple state forums."⁵² And with the loss of much of the Commission's remaining benchmarking capability, the competitors' ability to prove the existence and extent of discrimination will be severely diminished as well.

⁵¹ *SBC/Ameritech Merger Order* at 103.

⁵² *SBC-Ameritech Order* at 95 (footnotes omitted).

With regard to the SBC-Ameritech merger, the Commission found that this heightened incentive and ability of the merged entity to discriminate would separately harm competition in advanced services,⁵³ long distance,⁵⁴ and local exchange services.⁵⁵ Competition in all three of these areas would be harmed even more by this merger, which would cover two thirds of the country by populations.

4. Applicants Have Failed To Demonstrate That Changed Circumstances Render Irrelevant To This Merger The Commission's Concerns With Regard To The SBC-Ameritech Merger

In the Declaration of Dennis W. Carlton and Hal S. Sider, March 29, 2006 (“Carlton-Sider Declaration”), submitted in support of the Application, Messrs. Carlton and Sider purport to show that the competitive concerns which the Commission found in the SBC-Ameritech merger are not relevant to this new one.⁵⁶ At the threshold, indeed, in defiance of the principles of *res judicata*, they continue to maintain that the Commission’s findings were simply wrong, citing their own “econometric analysis” submitted at the time of the SBC-Ameritech merger, and asserting that other research has shown that they were right and the Commission was wrong.⁵⁷

⁵³ *SBC/Ameritech Mreger Order* at 89-96.

⁵⁴ *Id.* at 96-104.

⁵⁵ *Id.* at 106-111.

⁵⁶ Carlton-Sider Declaration at 50-59.

⁵⁷ Carlton-Sider Declaration at 51-52. Even if the Commission could, and were inclined to, entertain this attempt to overturn its conclusive findings with regard to the SBC-Ameritech merger, Messrs. Carlton and Sider have hardly even made the attempt. Their “analysis” consists of a single paragraph of text accompanied by (i) citations to their own previous arguments and (ii) citations to – but no discussion whatsoever of – three journal articles that purportedly support their thesis. The Commission should ignore this rather laughable exercise in nostalgia.

Recognizing that their assertions as to erroneous nature of the Commission's earlier findings are both grossly too late and absurdly too little, Messrs Carlton and Sider themselves dismiss this portion of their argument as "not essential." They then go on to assert that "competition has grown substantially since the FCC's analysis of ILEC mergers in 1999 and 2000."⁵⁸ They assert that the fact that there has been some additional deployment of CLEC facilities since 1999 and the alleged "rapid growth in recent years" of cable telephony, wireless voice services and wireless broadband services demonstrate that the Commission need no longer fear that huge ILEC mergers of the type exemplified by the SBC-Ameritech merger – and even more so by the instant proposed merger – could result in discrimination deterring CLEC activity or the entry of other competitors, because the existence of such activity means that the threat has not "materialized."⁵⁹

But such an argument is silly on its face. The Commission did not find that such activity and entry would be absolutely precluded by the discrimination that would result from the SBC-Ameritech merger, but only that it would deter such activity and entry to an unacceptable extent. Messrs Carlton and Sider make no attempt to show that such deterrence has not in fact occurred. In addition, Messrs Carlton and Sider make no attempt to determined whether even the activity that did occur would have occurred absent the conditions imposed by the Commission on the SBC-Ameritech merger. While the conditions imposed by the Commission in the SBC-Ameritech merger would be far from adequate to protect consumers and the public interest

⁵⁸ Carlton-Sider Declaration at 52.

⁵⁹ Carlton-Sider Declaration at 52-53.

generally from the deleterious effects of this newer, bigger, more harmful merger, the Applicants in the instant proceeding have not even proposed such limited conditions. Thus, the activity in the marketplace after the SBC-Ameritech merger and its conditions is simply irrelevant to the issue of whether the relief Applicants have asked for – unconditional approval of proposed merger – would be in the public interest.

Messrs. Carlton and Sider argue that “[t]he concerns expressed by the FCC do not apply in today’s competitive environment,” because recent changes in competition “reduce the incentive and ability of ILECs to engage in the type of discrimination that was the focus of the FCC’s 1999 concerns.”⁶⁰ They do not, however provide any data or detailed information to back up these claims. Instead, they offer two conclusory paragraphs, without even a single footnote or other citation to actual empirical evidence, to the effect that there is now “greater facilities-based competition” from CLECs, cable firms and wireless carriers, to which aggrieved competing entities or customers could purportedly turn if they encounter discrimination from the merged mega-entity. They do not even state – much less attempt to prove – that these other entrants would be viable alternatives for a party discriminated against by the mega-entity. They also pass over in silence the fact that most if not all of these alleged “alternatives” would themselves face the same discrimination and would themselves necessarily rely on cooperation from the mega-entity which the mega-entity would have every incentive to withhold.

Messrs. Carlton and Sider attempt to dispense with concerns that the new merger would hamstring regulators’ ability to engage in benchmarking. Their argument is in two parts. First, they assert, benchmarking is less necessary because “carriers that fail to provide adequate

⁶⁰ Carlton-Sider Declaration at 53.

wholesale service will lose in the marketplace” because CLECs encountering such degradation will, simply turn to an intermodal rival.⁶¹ But this supposes that the intermodal rivals are adequate alternatives, a supposition which, as is thoroughly demonstrated elsewhere in this Petition is far from true.

In addition, they say, since Section 271 authority has now been granted to the RBOCs, this means that “[m]any of these goals [of the 1996 Act] have been achieved” and that therefore benchmarking is now unnecessary to assist in the achievement of these goals.⁶² Messrs Carlton and Sider seem to forget that the goals of the 1996 Act are evergreen and are not resolved for all time by the grant of Section 271 authority. The grant of such authority meant only that the RBOCs were found to have met the bare minimum thresholds for being allowed into the long distance market, not that they were forever after excused from any inquiry into whether they were attempting to forestall further competition – or to roll back existing competition – by engaging in unlawful discrimination or other anticompetitive behavior. And benchmarking remains a critical regulatory tool for preventing such backsliding.

Messrs Carlton and Sider’s second line of argument is that, because some regulators have developed a number of specific measures for assessing ILEC performance, no further comparison to other market participants is necessary.⁶³ But this argument assumes without proving that the specific measures adopted by some regulators are in fact, and by themselves, adequate to protect against anticompetitive behavior – a proposition with which Petitioners

⁶¹ Carlton-Sider Declaration at 55.

⁶² Carlton-Sider Declaration at 56.

⁶³ Carlton-Sider Declaration at 56-58.

emphatically disagree. Messrs Carlton and Sider also ignore the fact the telecommunications market is a technologically dynamic one, and that even if specific measures had been adequate a few years ago (which they were not) for determining whether RBOCs were engaging in anticompetitive behavior, they certainly are not today, when performance standards should have improved considerably. For this reason too, these measures are not acceptable substitutes for the benchmarking engaged in by competitors and enterprise customers as described hereinabove, and the vital competitive function of such benchmarking would be lost if it were simply replaced by obsolete numerical measures.

Finally, Messrs Carlton and Sider deny – in three short paragraphs – that AT&T and BellSouth are potential entrants into each other’s territory. They base this assertion on the fact that they have not yet entered each other’s territory en masse, that BellSouth is not a significant threat (though why that is they do not say), and that “legacy AT&T” (but not legacy SBC) does not in any event compete in the mass market any longer. Even on its face, their argument entirely fails to show why SBC should not be considered a significant potential entrant in BellSouth’s territory, as was the case in the SBC-Ameritech and Bell Atlantic-NYNEX mergers. More fundamentally, their analysis entirely disregards the discussion of potential competition that underlay the Commission’s concern in the *SBC-Ameritech Order*, which entertained and rejected near-identical arguments made at the time by SBC and Ameritech, and accordingly is entitled to no weight whatsoever.

Accordingly, contrary to Applicants’ contention, the proposed merger would cause all of the same harms found by the Commission in connection with the SBC/Ameritech Merger, and in most instances, the harms would be greater than they were in the SBC/Ameritech merger.

B. The Merger Would Harm The Marketplace For Internet-Based Services

When approving the AT&T-SBC merger in 2005, the Commission stated that it was unlikely that the merged company would choose to engage in packet discrimination or degradation of IP traffic, finding that there would be no incentive to do so.⁶⁴ The Commission approved the merger, imposing certain conditions that required the resulting AT&T/SBC to, among other things, maintain for three years the same number of settlement-free peering arrangements as on the date of the merger and to post its peering policies for an additional two years.⁶⁵ Although, the Commission found that the AT&T-SBC merger would not have anticompetitive effects on the Internet backbone market,⁶⁶ it stated that it approved the merger based on AT&T-SBC's commitment to maintaining settlement-free peering arrangements, and complying with the principles of the Commission's September 23, 2005 Policy Statement, designed to ensure that broadband networks are widely deployed, open, affordable and accessible to all consumers.⁶⁷ Additionally, the Commission explicitly rejected assertions that the vertical integration of AT&T and SBC could allow the merged entity to raise the costs of its VoIP and retail broadband rivalry by: (a) discriminating against IP packets transmitted by its broadband

⁶⁴ *SBC Communications, Inc. and AT&T Corp. Application for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, FCC 05-183 (rel. Nov. 17, 2005).

⁶⁵ *See Id.* ¶ 108.

⁶⁶ *See Id.*

⁶⁷ *See Id.*; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, FCC No. 05-151 (rel. Sept. 23, 2005).

and VoIP competitors; and/or (b) leveraging bottleneck control over special access to gain a competitive advantage in the backbone and broadband markets.⁶⁸

Directly contrary to the Commission's assumption that AT&T would not engage in IP discrimination, **both** AT&T and BellSouth have in recent months expressed an intent to engage in such discrimination, the parameters of which are far from clear. BellSouth has stated that it wants to "prioritize" services potentially depending upon which content providers are affiliated with BellSouth. BellSouth has already discussed the issue of payment with Internet content providers to ensure their content gets priority delivery over their network.⁶⁹ According to William Smith, chief technological officer for BellSouth, the company plans to use its technology to identify which "packets" of content should be allowed to move more quickly through its network to consumers.⁷⁰ Additionally, AT&T's CEO, Edward Whitacre, has stated that the only way Internet upstarts such as Google, MSN and Vonage will be able to get customers in the future will be:

through a broadband pipe. Cable companies have them. [SBC] ha[s] them. Now what they would like to do is use [SBC's] pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using.⁷¹

⁶⁸ *SBC Communications, Inc., and AT&T Corp. Application for Approval of Transfer of Control*, Memorandum Opinion and Order, *supra* ¶ 140.

⁶⁹ *Report: Bells to Push for Web Fees*, CNNMoney.com, Jan. 6, 2006.

⁷⁰ Marilyn Geewax, *Web "Neutrality" Proviso Sought*, BaltimoreSun.com, Dec. 13, 2005.

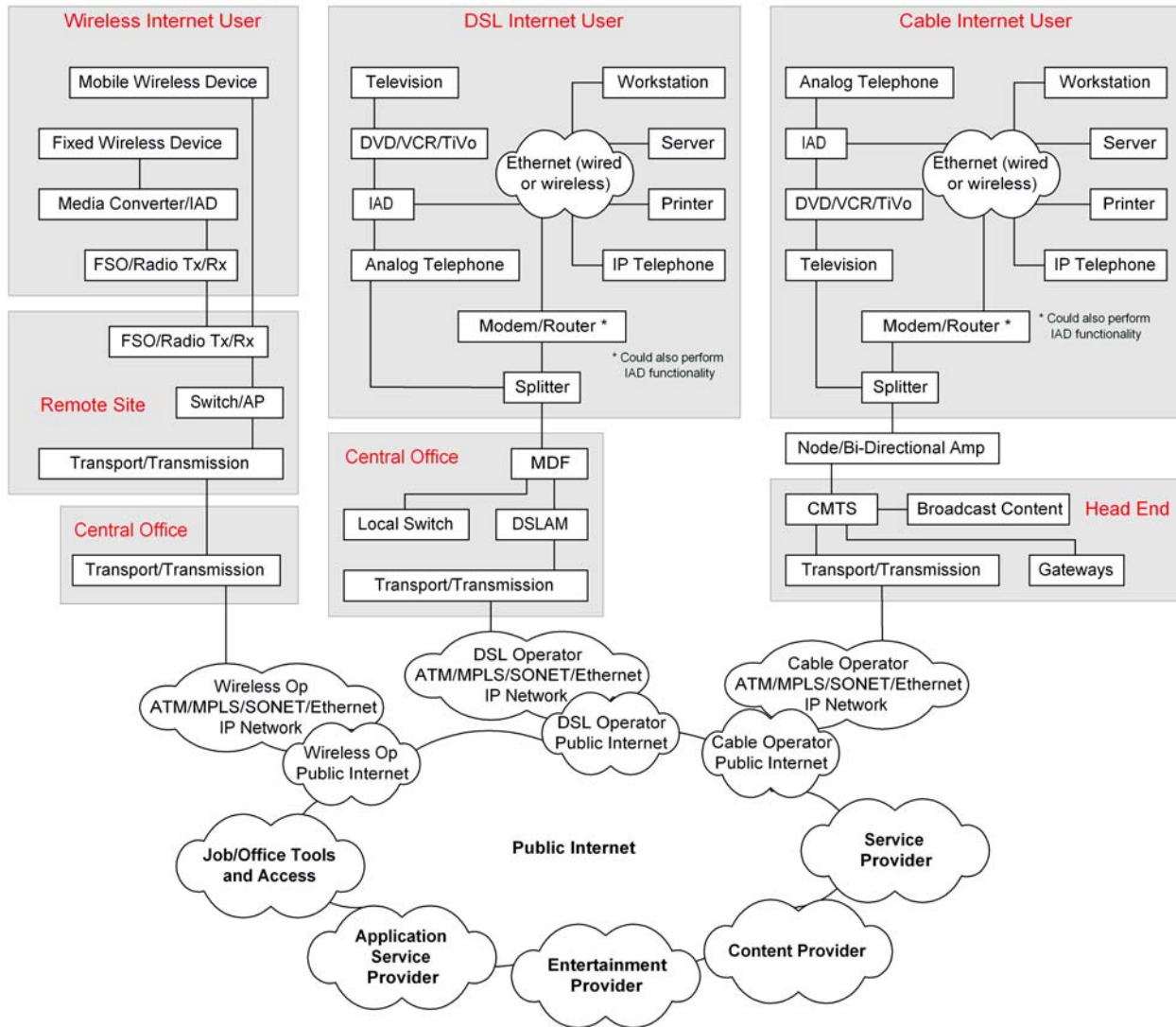
⁷¹ *At SBC, It's All About "Scale and Scope"*, *supra*.

This ability of the combined company to become a gatekeeper for access across the IP backbone to information content on the Internet is directly contradictory to the Commission's stated goal of competition and its previous advocacy of the ideals of network neutrality.

And, there are numerous ways in which the Applicants could discriminate. Each point in which electronic data exchanges traverse through the system presents an opportunity within the IP network for the combined AT&T-BellSouth to discriminate, and both companies have indicated a desire to do so. For example, at each switch or router, control over the end user's data could be exercised via firewalls, IP port forwarding, rate limiting, packet inspection and restriction, or forced caching. ATM cells flowing across any ATM network could be subject to a wide variety of controls for anticompetitive purposes. The following diagram provides a high level view of how customers served by wireless, DSL, or cable modem service connect to the IP backbone and the various control points that could be used by the combined company to engage in non-price discrimination.

**SIMPLIFIED HIGH SPEED INTERMODAL
 ACCESS TECHNOLOGIES**

Darren Sandford, Pac-West
 Current Revision 1.0, Apr 6 2005



"Interconnection" of IP broadband networks is currently implemented outside the normal telephone company regulatory framework pursuant to "peer-to-peer" relationships. Whatever the validity of this policy in a market in which there were several providers of backbone services and

barriers to entry were relatively low, the concentration of this market in a few local access providers, who can erect new barriers to entry by denying access to their local facilities, calls for a re-examination of the Commission's imposition in the *SBC-AT&T Merger Order* of limited conditions addressing AT&T's ability to use its IP network to discriminate.

Carriers like AT&T and MCI are able to peer on a cost-free basis because they have similar networks. On the other hand, smaller carriers must pay for peering with the largest networks. As a result, CLECs and ILECs had been on equal footing in terms of getting access to the Internet backbone because neither had large IP networks. By combining with AT&T, BellSouth would be able to peer with other owners of large IP networks at no charge, and thereby gain a competitive advantage over the CLECs in its region, which must pay peering fees.

SBC itself has stated:

The size of a backbone is critical because a backbone's value to its users lies in its ability to provide a connectivity to the entire Internet... [W]here one backbone achieves a substantial size advantage over its rivals, it necessarily "reduces the value of, and therefore the demand for, the rivals' products." At some point, "the market may 'tip,' with customers abandoning the rivals altogether because their networks are too small to be viable."⁷²

AT&T Corp. has likewise stated that:

IBPs [Internet Backbone Providers] with unbalanced traffic, then, are expected to become customers rather than be peers. They can do so by entering into a "transit arrangement" pursuant to which, for a fee, an Internet Backbone Provider [] agrees to transport the traffic to terminating points on its network or on the networks of other IBPs with whom it has a private peering relationship. Alternatively, a large IBP might agree to a "paid-for" private peering relationship allowing traffic to be terminated on its peering

⁷² *Opposition of SBC Communications Inc. to Application of Sprint Corporation and MCI WorldCom Inc.*, CC Docket No. 99-333 at 41 (Feb. 18, 2000).

relationship allowing traffic to be terminated on its network, but the IBP paying for such an interconnection cannot represent to its customer that it has a private peering relationship. This significantly hampers its ability to compete with those that do have settlements-free private peering relationships.⁷³

Accordingly, if it approves the merger, the Commission should implement substantial new safeguards designed to protect against unreasonable discrimination in the provision of IP interconnection.

C. The Proposed Merger Threatens the Viability of Independent IXCs

The Applicants apparently envision that BellSouth's long distance traffic will be moved to AT&T's long distance network.⁷⁴ Therefore, the proposed merger, on top of previous mergers, creates a risk of undermining the viability of independent facilities-based interexchange carriers. The combined long-distance market share of AT&T and Verizon will be extremely high, and therefore, no significant, viable market will exist to support independent facilities-based long distance providers. This, in turn, will impede competition for local service. Most consumers desire bundled service. If independent facilities-based IXCs are unable to compete with AT&T and Verizon, CLECs will have no choice but to purchase long-distance service from AT&T or Verizon, each of which will be able to use its control over long distance to impede CLEC competition for customers wanting bundled service.⁷⁵

⁷³ *Petition of AT&T Corp. to Deny Application of Sprint Corporation and MCI WorldCom Inc.*, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T at ¶ 9 (Feb 18, 2000).

⁷⁴ Public Interest Statement at 54.

⁷⁵ Given its coverage of nearly two-thirds of the country that would result from the merger, the combined AT&T would find itself competing for local service with nearly all CLECs of any size, and would therefore have an increased incentive to extract the duopoly profit in the provision of long-distance service at wholesale to these CLECs, so as to disadvantage them in competing with AT&T in bundled service.

AT&T has already shown that BOCs can discriminate against independent long distance providers by providing lower quality access, using their market power over the local exchange bottleneck “to undermine long distance competition through discrimination and other anticompetitive conduct,” and by forcing these providers to buy special access at grossly excessive prices.⁷⁶ If BellSouth had that much power before the merger, its *ability* to discriminate will increase because provision of better service to its long distance operators will be masked by the “integration” that AT&T states it will implement. AT&T will have an increased *incentive* to discriminate, because it can favor its own in-house long distance network. That is the precise reason it was necessary to break up AT&T in the first place.⁷⁷

In the *SBC/AT&T Merger Order*, the Commission found that that merger would not affect the viability of the wholesale interexchange marketplace because eliminating SBC as a purchaser of wholesale long distance services would primarily impact one provider, WilTel, because SBC bought most of its long distance service from WilTel, while other long-distance providers “will have an opportunity to seek other customers.”⁷⁸ In this instance, however, there is no evidence that BellSouth purchases most of its long-distance service from any one long-distance provider. More importantly, the Commission’s assumption in the *SBC/AT&T* merger that there will be other LEC customers to which independent long-distance carriers can sell their service is of little relevance here. If this merger is approved, every one of the 7 original RBOCs, plus GTE and Sprint, will be affiliated with a long-distance provider, and surely will have no

⁷⁶ Comments of AT&T Corp, In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket No. 02-112, pages 6, 12, 20.

⁷⁷ *U.S. v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982).

⁷⁸ *SBC/AT&T Merger Order* ¶ 151.

interest in purchasing long-distance service from an unaffiliated long-distance provider. This leaves only CLECs and relatively small ILECs as potential wholesale customers for independent long-distance providers. The result will be a weakening in competition both in the long-distance and the local markets.

D. The Proposed Merger Would Harm Competition in Tandem Switching and Transit Services

The proposed merger affords AT&T an opportunity to extend to BellSouth and its affiliates, including Cingular, practices designed to thwart competitive provision of tandem switching and transit services.⁷⁹ Competitive tandem switching and transit services provide CLECs, wireless carriers, and cable companies alternative means to interconnect and exchange traffic without using incumbent LEC transit and tandem-switched access services.

Competitive tandem switching and transit services provide numerous public interest benefits. The availability of these services pressures incumbents to offer competitive rates and to increase service reliability throughout the entire telecommunications industry. These improvements in efficiency and cost reductions directly benefit existing and new entrants in the telecommunications industry. Competitive tandem switching also inherently builds redundancy into the telecommunications sector and infrastructure, which, in turn, allows for faster disaster recovery and provides more robust homeland security, diversity, redundancy, efficiency, and increased reliability of the public switched telephone network (“PSTN”). These competitive services provide significant benefits to carrier customers, including lower per minute transit

⁷⁹ “Transit” refers to the intermediary switching of local and other non-access traffic that originates and terminates on the networks of different telecommunications providers within a local calling area or MTA. “Tandem-switched access” refers to the routing of switched access, usually interLATA, traffic between the network of an interexchange provider or other service provider, on the one hand, and the end office of the originating or terminating local service provider, on the other.

charges, reduced port charges and nonrecurring fees, simpler network configurations, increased network reliability, and improved quality of service and traffic transparency, which helps prevent issues concerning “phantom traffic.”

Competitive tandem switching and transit services also help level the playing field by increasing competitive carriers’ leverage with ILECs. Obtaining connectivity through competitive providers allows emerging providers to deploy service by removing completion of their interconnection agreement with the ILEC as a bar to their market entry. Thus, resale of ILEC connectivity not only improves competitors’ growth capacity, but also increases such carriers’ leverage with the ILECs in negotiating an acceptable interconnection agreement. Providing an alternative route for carriers to terminate traffic indirectly to the ILEC prevents the ILECs from acting as a gatekeeper by using the interconnection negotiation process to delay or restrict competitive entry.

In spite of these benefits, however, some dominant carriers⁸⁰ have refused to establish a direct connection with competitive tandem switching and transit services even though traffic volumes – even in some cases 7 DS3s of terminating traffic volume – justify a direct interconnection.⁸¹ In light of the benefits of competitive tandem switching and transit services, it

⁸⁰ Letter to Marlene H. Dortch from Counsel for Neutral Tandem Inc., WC Docket No. 05-65, October 14, 2005.

⁸¹ In the context of an arbitration, the Commission has ordered carriers to establish direct connections when traffic volumes reach the level of 1 T-1. *Petition of Worldcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for the Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd 27039, 27079 -27084 (2002) (“*Verizon – Worldcom Virginia Arbitration Order*”). In its recent reply in the Commission’s Intercarrier Compensation proceeding, Verizon reiterated the position that direct connection is necessary for carriers that handle large volumes of traffic. Specifically, Verizon repeated the position it took before the Commission in the Virginia Arbitration proceeding: “Verizon, for example, finds that it is inefficient to use its tandem switches for transiting

would seriously harm the public interest if AT&T were to extend to BellSouth its policies designed to thwart competitive tandem switching and transit services. Over a short period, AT&T could even terminate its current direct connections with competitive providers established by AT&T Corp.

In order to prevent this harm, the Commission needs to go further than it did in connection with the SBC/AT&T merger. There, the Commission chose to sidestep this issue as one of particular disputes between carriers that it did not need to address.⁸² For the reasons discussed above, this proposed merger poses serious risks, that are not limited to specific carriers, of impairing competitive provision of tandem switching and transit services and the public interest benefits they provide. Accordingly, the Commission should impose the conditions suggested in Section VI of these comments if it otherwise approves the merger.

IV. THE CURRENT LEVEL OF COMPETITION DOES NOT MITIGATE HARMS

Applicants claim that the proposed merger does not raise concerns of harm to competition, or of the harms that the Commission found would be created by the SBC/Ameritech merger, because a myriad of competitors vying for market power, including foreign based companies, competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers provide vigorous competition to AT&T and BellSouth.⁸³

when the volume of traffic exchanged between two indirectly interconnected carriers is consistently at a level sufficient to fill at DS1.” Reply Comments of Verizon In Response to Further Notice of Proposed Rulemaking, filed in CC Docket No. 01-92 on July 20, 2005, at 8-9, citing *Verizon – Worldcom Virginia Arbitration Order*. Also, most ILEC interconnection agreements with CLECs provide that the CLEC will establish a direct interconnection with other carriers when traffic volumes reach the level of 1 T-1.

⁸² *SBC/AT&T Merger Order*, ¶175, n. 493.

⁸³ Public Interest Statement at 62-97.

Applicants' claims of competition are exaggerated. First, to the extent there are genuine competitors in the business market, they rely on AT&T and BellSouth for provision of the essential last mile facilities necessary to provide service.⁸⁴ The Commission explicitly found in the *TRO Remand Order* that ILECs retain market power in all relevant business markets, concluding that "the barriers to entry impeding competitive deployment of loops are substantial."⁸⁵ The Commission found that CLECs "face substantial operational barriers to constructing their own facilities;"⁸⁶ that competitors still face "steep economic barriers" to the deployment of last mile facilities;⁸⁷ and that these barriers "typically make duplication of such facilities uneconomic."⁸⁸ It is not surprising then that competitors have only built their own last mile facilities to a very small percentage of business customers.⁸⁹ Facilities based CLECs still rely on ILEC-provided loop facilities at 75% of their customer locations.⁹⁰ Even AT&T Corp., before it merged with SBC, in previous proceedings before this Commission, informed the Commission that it relied on ILEC loops to serve approximately 95% of its business customers.⁹¹

⁸⁴ WC Docket 04-405, AT&T Comments at 36-37.

⁸⁵ *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Order on Remand, FCC 04-290, ¶ 153 ("TRO Remand Order")

⁸⁶ *Id.* ¶ 151.

⁸⁷ See *TRO* ¶ 199.

⁸⁸ *TRO Remand Order* Separate Statement of Commissioner Kathleen Abernathy.

⁸⁹ See WC Docket 04-405, Time Warner Telecom *et al* Comments at 9 *citing* RBOC 2004 UNE Report, WC Docket 04-313, filed Oct. 4, 2004 at I-2.

⁹⁰ See WC Docket 04-405, Time Warner Telecom *et al* Comments at 10.

⁹¹ Reply Decl. of Lee Selwyn, *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, ¶ 18 (FCC RM No. 10593 (filed on behalf of AT&T Corp. Jan. 23, 2003)). The fact that AT&T purchases so much special access from ILECs suggests that AT&T's

As Chairman Powell explained, in rejecting ILEC claims that competitors did not need access to unbundled last mile broadband facilities, “the record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances.”⁹²

Applicants further state that CLECs, especially in BellSouth's region, are successfully competing for customers, citing to examples in which CLECs have planned expansion throughout the region.⁹³ However, in the states in which BellSouth currently operates, CLECs have only a minor share of end user switched access lines compared to competing ILECs.⁹⁴ BellSouth's has experienced a nearly 40 percent increase in its access lines from 1999 to 2005, gaining a total of 12,438,891 lines. CLECs in BellSouth's region on the other hand have gained only 3,698,977 lines.⁹⁵ Thus, BellSouth has gained more than triple the access lines that CLECs have gained.⁹⁶ Furthermore, on a nationwide basis, CLECs still only provide approximately 32

customer base includes a significant number of small and medium-sized business customers, in addition to the large enterprise customers on which the Application focuses, ignoring the small and medium business market.

⁹² Separate Statement of Chairman Powell, *Triennial Review Remand Order Press Release*.

⁹³ Public Interest Statement at 69-73.

⁹⁴ *Trends in Telephone Service Report*, Industry Analysis and Technology Division, Wireline Competition Bureau, at 8-10 Table 8.6 (rel. June 2005). CLECs have the following percentages of end user switched access lines in BellSouth regions: Alabama 15 percent; Florida 16 percent, Georgia 19 percent; Kentucky 11 percent; Louisiana 12 percent; Mississippi 10 percent; North Carolina 11 percent; South Carolina 10 percent and Tennessee 14 percent.

⁹⁵ [Local Telephone Competition: Status as of June 30, 2005](#), Wireline Competition Bureau, Industry Analysis and Technology Division, Table 9 (rel. April 2006).

⁹⁶ See *Id.*; *Statistics of Communications Common Carriers, 2004/2005 Edition*, Wireline Competition Bureau, Industry Analysis and Technology Division, Table 2.1 (rel. Nov. 2005); *Statistics of Communications Common Carriers*, Common Carrier Bureau, Industry Analysis Division, Table 2.1 (rel.

million of the approximately 180 million switched access lines in services to end user customers.⁹⁷ Thus, there is no reason for the Commission to conclude that competition since 1999 has changed the major overarching fact that BellSouth remains that dominant carrier in its region.

Although cable operators have their own facilities, Applicants' claims regarding the impact of cable broadband competition in the business market are also unconvincing⁹⁸ because "cable modem service is primarily residential service."⁹⁹ In many markets, cable networks only pass – let alone serve – just a quarter of business customers.¹⁰⁰ Most CLECs' experience is that cable operators do not serve the business market at all. The Commission has reported that only about 10 percent of total high-speed lines serve business customers and fewer than 18 percent of these high-speed lines are cable modem services.¹⁰¹ The *TRO Remand Order* confirmed that cable modem service is unsuited, and therefore not a substitute, for ILEC services for a number of reasons, including that it is asymmetrical, relatively low bandwidth, and lacks sufficient

Aug. 2000). BellSouth's total access lines in 1999 were 31,443,505 and increased to 43,882,396 by December 2004 whereas CLECs had 1,522,711 access lines as of June 2000, which increased to only 5,221,688 lines by December 2004.

⁹⁷ *Id.* at 8-1.

⁹⁸ Public Interest Statement at 81.

⁹⁹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report to Congress, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at 14 (rel. Sep. 9, 2004) (“*Fourth Advanced Services Report*”).

¹⁰⁰ Ex parte letter of Jonathan Banks, BellSouth, to Marlene H. Dortch, FCC, *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 at 5 (filed Nov. 8, 2004).

¹⁰¹ *High-Speed Services for Internet Access: Status as of June 30, 2005*, Industry Analysis and Technology Division, Wireline Competition Bureau (April 2006), Table 7 and Table 13.

reliability and security.¹⁰² Indeed, the Commission expressly found that the RBOCs provided “little evidence that cable companies ... are a significant presence in the enterprise loop market.”¹⁰³ Rather, to the extent that cable companies provide service to business customers, it is in the mass market to “small and medium business ... that are near the residential network.”¹⁰⁴ Simply put, there is no evidence that cable operators provide a serious alternative to serve the large business customer niche.

Nor do cable operators provide an alternative for other competitors to reach business customers. Besides not reaching most business customers, cable operators do not offer service on a wholesale basis. Thus, even in Omaha, Nebraska, where the Commission recently eliminated UNE obligations in some Qwest wire centers, the Commission recognized that Qwest was the only wholesale last mile alternative for CLECs.¹⁰⁵

To the extent that cable does provide a competitive alternative, it does not do so to the extent necessary to eliminate harms. The Commission has previously found that competition does not diminish the need for regulation where the market is primarily allocated between two dominant firms.¹⁰⁶ Courts have recognized that a duopoly in the market is the equivalent of a

¹⁰² *TRO Remand Order* ¶¶ 193-194.

¹⁰³ *Id.* ¶ 193.

¹⁰⁴ *Id.*

¹⁰⁵ *In the Matter of In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket 04-223, Memorandum Opinion and Order, FCC 05-170 ¶¶ 60, 78, 110 (Dec. 2, 2005).

¹⁰⁶ *See Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, 17 FCC Rcd 20559, 20684 ¶¶ 103-105 (2002) (“*EchoStar Merger Order*”).

monopoly because, “firms in a concentrated market ... in effect share monopoly power by recognizing their shared economic interests and their interdependence with respect to price and output decisions.”¹⁰⁷ A “durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices.”¹⁰⁸ In addition, there are numerous areas in AT&T's and BellSouth's service territory where cable does not compete with those carriers at all. As AT&T itself has stated, many residential customers do not even have access to cable modem Internet services.¹⁰⁹

Apart from cable, other intermodal alternatives cited by the Applicants are likewise not sufficient to discount potential harms, as there is no reliable evidence that any “of these technologies and service categories has yet posed anything like a significant competitive antidote to the incumbents' market power.”¹¹⁰ Notably, the Commission found in the *TRO Remand Order*, “the record does not indicate that other intermodal options, such as fixed wireless and satellite, offer significant competition in the enterprise loop market.”¹¹¹

Thus, predictions of expansive broadband competition from the electric power industry and wireless broadband technology have been plentiful over the last decade or more but have not yet come true. Although the Commission has predicted competition from electric utility

¹⁰⁷ *Brooke Group v. Brown & Williamson*, 509 US 209, 227 (1993).

¹⁰⁸ *FTC v. Heinz*, 246 F.3d 708, 725 (D.C. Cir. 2001).

¹⁰⁹ See WC Docket 04-405 AT&T Comments at 41.

¹¹⁰ See *Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*) Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12618 ¶ 164 (1997) (“*LMDS Order*”)

¹¹¹ *TRO Remand Order* ¶ 193 n. 508.

communications services for years, no viable competition has taken root.¹¹² The Commission may not rely upon predictions that in the future BPL, WiMax and other nascent technologies will provide competitive alternatives because the Commission is required to examine *current* market conditions and the incumbents' *current* market power.¹¹³ Thus, Applicants' claims regarding "potential" competition from these alternative sources have already been dispositively rejected by this Commission and foreclose AT&T's arguments here.

Nor is there any evidence that wireless service provides the kind of competitive broadband or other alternative that Applicants claim.¹¹⁴ The failure of previous efforts to provide commercially viable wireless broadband access are well documented, and current efforts at delivering wireless broadband, although to some degree successful, still remain in the developmental stages. In the *TRO*, the Commission discounted mass-market broadband competition from the wireless sector, observing that "fixed wireless and satellite services remain nascent technologies, with limited availability."¹¹⁵ And while millions of American consumers have started using cell phones in recent years, there is little evidence that cell-phone technology is an economic substitute for wireline technologies. In other words, despite Applicants assertions to the contrary, very few consumers have "cut the cord" and become "wireless only"

¹¹² *1995 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, ¶ 120 (1995) (Commission observed that electric utilities that have incurred substantial costs to deploy networks that reach nearly every household in the country could compete with cable companies).

¹¹³ *See LMDS Order* at 12618 ¶ 165.

¹¹⁴ Public Interest Statement at 82, 91-95.

¹¹⁵ *TRO* ¶ 231.

users.¹¹⁶ Less than 6 percent of adults live in households with only a wireless phone¹¹⁷ and according to the FCC's most recent *Trends in Telephone Service* report, wireline providers are still collecting more revenues than wireless providers, when averaged for all households.¹¹⁸ Additionally, many wireline customers, such as business and government entities, will likely always have a need for wireline services which cannot be substituted for by wireless services. Even if wireless could provide an alternative to Applicants services', it could not be counted as a competitor to them since a significant portion of that competition would come from Cingular, the country's largest wireless company, which they own.¹¹⁹

Nor is VoIP a significant competitor to the traditional wireline residential or business market as Applicant asserts.¹²⁰ First, VoIP requires that a customer access be provided by the owners of the local network— and in the vast majority of its exchanges in their regions that will be AT&T or BellSouth, or a CLEC using last mile facilities from AT&T. Thus, VoIP does not eliminate the dependence of competitors on ILEC or cable last mile facilities.

¹¹⁶ Julian V. Luke and Marcie L. Cynamon, *The Prevalence of Wireless Substitution* (presented at 59th Annual Conference of the American Assn. for Public Opinion Research May 15, 2004).

¹¹⁷ *Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services Tenth Report*, FCC 05-173, WT Docket No. 05-71 (Sept. 30, 2005), citing, Stephen Blumberg, Household Telephone Service and Usage Patterns in the US in 2004, data presented at "U.S. Household Telephone Usage Patterns in 2004: A Focus on Cell Phone Usage," seminar hosted by the Bureau of Labor Statistics, Washington DC (June 16, 2005).

¹¹⁸ *Trends in Telephone Service Report*, Industry Analysis and Technology Division, Wireline Competition Bureau, at 3-4 Table 3.2 (rel. June 2005).

¹¹⁹ *Merger of SBC Communications Inc. and AT&T Corp., Description of the Transaction, Public Interest Showing, and Related Demonstrations*, Filed with the FCC on 2/21/05.

¹²⁰ Public Interest Statement at 81-82.

In any event, VoIP has yet to attain significant penetration in comparison to traditional wireline services have.¹²¹ VoIP has only been deployed in the mass-market for a couple of years at this point, and even leaving aside the problems that VoIP providers have had with 911 and call reliability, long-run future gradual substitution of VoIP for wireline local voice services - assuming that it occurs - does *not* put VoIP on the map in terms of providing significant competition to the Applicants.

Nor is the possibility that VoIP applications may some day replace traditional circuit-switched wireline voice services relevant to assessing current harms of the instant proposed merger. Rather, the test is whether VoIP providers, other than the Applicants, offer an economic substitute for AT&T traditional wireline telecom services.¹²² Applicants have not shown any evidence of price-related substitution of VoIP for any service, so it is impossible to reach the conclusion that VoIP is in the same market with wireline. In any event, the Applicants continue to use aggressive tactics to stymie existing VoIP competition, such as asserting such traffic is subject to access charges, in addition to not cooperating in providing 911 access to VoIP carriers.¹²³

¹²¹ According to a recent study done by market-research firm Savatar, only 15 percent of small to medium businesses have deployed VoIP services. Of the 85 percent of businesses that have not utilized VoIP services, many state that they do not have a strong imperative to do so, feeling that it lacks value for them and they do not have a strong need for it (see Sylvia Carr, *Small businesses nonplussed by VoIP*, at <http://management.silicon.com/smedirector/0,39024679,39157243,00.htm> (March 15, 2006); see also *VoIP Industry Getting 'Busy Signals' from Small / Medium Businesses (SMBs): Fall VON 2005 Conference & Expo*, at <http://www.von.com/fall05/press/savatar.htm>).

¹²² See, e.g., *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, 17 FCC Rcd 23246, ¶ 41 (2002).

¹²³ See, *IP-Enabled Services Rulemaking; E911 Requirements for IP-Enabled Service Providers* Vonage response to BellSouth Corporation Ex Parte Communication, WC Docket Nos. 05-196; 04-36 (filed Dec. 8, 2005); *Enhanced 911 Calls Still Far from Wide Coverage*, USA Today, Oct. 24, 2002, at

Applicants' reliance on the presence and expansion of systems integrators, who purchase service components from various providers, is misplaced.¹²⁴ The acquisition of BellSouth threatens to undermine the very basis for the success that systems integrators have enjoyed in recent years. Systems integrators rely on the presence of many providers competing with one another at all levels in the market. The present merger, therefore, will thwart competition from systems integrators by harming competition on which systems integrators depend.

Finally, Applicants assert that equipment vendors are "poised" to gain market share. AT&T states that equipment manufacturers are pursuing the demand for business telecommunications systems and services thus increasing competition.¹²⁵ AT&T provides no information that these manufacturers currently pose any sort of real or perceived competitive threat to the wireline market.

Applicants have grossly exaggerated the extent of current competition within the market. This alleged competition does not provide a basis for discounting harms identified elsewhere in these comments.

http://www.usatoday.com/money/industries/telecom/2002-10-24-e911_x.htm; *See also, In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. §160(c) from Enforcement of 47 U.S.C. §251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266, Comments of BellSouth (filed March 1, 2004); *In the Matter of Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. §160(c) from Enforcement of 47 U.S.C. §251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266, Opposition of SBC (filed March 1, 2004).

¹²⁴ Public Interest Statement at 78-79.

¹²⁵ Public Interest Statement at 79-80.

V. THE PROPOSED MERGER WOULD NOT PRODUCE SIGNIFICANT PUBLIC INTEREST BENEFITS

A. The Merger Will Not Enhance MVPD and Programming Competition

The Applicants' showing concerning alleged benefits in the provision of video programming consists to a large extent of a discussion of the generalized benefits of competition in video programming.¹²⁶ While plausible at a theoretical level, all of these benefits could be achieved by BellSouth's provision of video programming even if it remains independent of AT&T. Therefore, the generalized discussion of the benefits of video competition are not merger-specific. More importantly, however, there is no reason to believe that video competition from AT&T will produce lower prices to consumers because AT&T plans to price Project Lightspeed *higher* than the average cable TV subscription.¹²⁷ Therefore, whatever the theoretical benefits of video competition, they are not likely to be realized from competition from AT&T.

Contrary to the Applicants' contention, the merger is not necessary to deploy IPTV in BellSouth territory. Applicants admit that BellSouth is investing \$2.2 billion over five years to upgrade its network to IPTV capability.¹²⁸ Therefore, BellSouth has made a decision to deploy IPTV. Although the combined company could likely bring IPTV to BellSouth's customers, it also the case that BellSouth can, and would do so, even in the absence of the proposed merger, in light of its substantial investment intended for that purpose. Although the Applicants claim that BellSouth has not made any decision on whether to deploy IPTV, BellSouth has reportedly told

¹²⁶ Public Interest Statement at 20.

¹²⁷ XChange Magazine, "AT&T Earnings Higher Than Expected," April 25, 2006.

¹²⁸ Public Interest Statement at 23.

the Louisiana PSC that it will do so.¹²⁹ Therefore, the Applicants have not shown that provision of IPTV in the BellSouth region is “likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.”¹³⁰

Nor is there any reason to believe that the merger would speed deployment of IPTV in BellSouth territory. AT&T does not acknowledge that the “architecture” of its IPTV service will require substantial new investment in the BellSouth region which would likely slow deployment in comparison to a timetable in which BellSouth proceeds to deploy IPTV independent of AT&T. Second, AT&T’s alleged head start in providing IPTV¹³¹ means nothing because the Applicants virtually admit that AT&T is bound by its current programming agreements and would need to negotiate programming agreements for BellSouth territory “which can take months, if not years.”¹³² Thus, Applicants’ claim that BellSouth could avoid lengthy programming negotiations is disingenuous since AT&T would need to do so in any event in since its agreements are not apparently portable to BellSouth territory.

Applicants’ claim that the merger would increase diversity of programming is not credible. Diversity in programming is promoted by a flourishing marketplace of providers and buyers of programming, not by the elimination of a major purchaser of video programming. The merger would inhibit diversity, and promote uniformity, in the availability of programming across BellSouth and AT&T regions because a single entity - AT&T - rather than two

¹²⁹ Broadband Everywhere, “The Web We Weave: BellSouth Has No Plans to Provide Video Services in Louisiana,” May 2006.

¹³⁰ *Id.*, citing *EchoStar/DirectTV Order*, 17 FCC Rcd at 20630, ¶ 189.

¹³¹ Public Interest Statement at 24.

¹³² Public Interest Statement n. 83.

companies, would be making programming choices for those subscribers. This concern is verified by the Applicants' claim that one benefit of the merger will be that the merged company can obtain better pricing for programming through volume discounts in that the merged company will be purchasing programming for a greater number of subscribers than if AT&T and BellSouth were making separate programming purchasing.¹³³ The Applicants would be able to obtain volume discounts when purchasing programming based on a larger number of subscribers only when they are buying the same packages of programming to be provided to those subscribers. For the same reasons, and because they are vague, unsupported, and speculative at best, the Applicants' claim that the merger will result in "creative new deals"¹³⁴ may not be accorded any weight in the Commission's public interest analysis.

The claim that the merger would produce more Spanish language programming should be rejected. Apart from being vague and speculative, Bell companies are not in any event building fiber to a significant extent to areas with a significant Hispanic population. BOCs are building fiber to communities with minority populations below the national average.¹³⁵ Of the 570 towns that BOCs have announced for fiber deployment, only 10 have majority Hispanic populations.¹³⁶ In Texas, BOCs' fiber-targeted communities are 13.5% Latino although the statewide average is 32% Latino.¹³⁷ On average, Bell-announced towns for deploying fiber are 8.3% Hispanic.¹³⁸

¹³³ Public Interest Statement at 24.

¹³⁴ Public Interest Statement at 26

¹³⁵ Broadband Everywhere, "A Picture is Worth a Thousand Words," April 2006.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

Therefore, even if the merger would somehow promote greater Spanish language programming, it would not be a significant benefit in light of AT&T's fiber targeting. The Commission may not give any weight to the claimed benefit of a greater diversity of programming.

Accordingly, there is no basis for the Commission to find that the merger would provide any benefits with respect to provision of video programming.

B. Unification of Cingular Ownership Is Not a Competitive Benefit

The Applicants claimed benefits concerning unified ownership of Cingular are unconvincing and not, in any event, merger specific. The Applicants admit that the merger will not change the structure of the wireless marketplace.¹³⁹ This is the key reality for purposes of evaluating whether unification of Cingular ownership would be a benefit of the merger. Because there will be no change in the wireless competitive landscape, the claimed benefits from unified ownership, even if they are valid, are necessarily trivial. Moreover, the change in ownership in this case is merely *pro forma* since it involves a merger of the two companies that already own Cingular and cooperate closely in running it. The claimed merger benefits concerning Cingular reflect no more than an effort to paint a minor change as a major benefit.

Moreover, the claims of benefits of single ownership of Cingular are impeached by the previous claim of SBC and AT&T Corp. that that their merger, including considering the Cingular network, would provide a “centrally managed network and provide customers with end-to-end communications and comprehensive network management as well.”¹⁴⁰ If that previous

¹³⁹ Public Interest Statement at 6.

¹⁴⁰ *SBC/AT&T Merger Order* at ¶ 191; *SBC/AT&T Application* at 15-16; *SBC/AT&T Reply* at 6-7.

allegation is correct, it could not be the case that combining ownership of Cingular will provide any material additional benefits.

The Applicants' claim that Cingular should be owned by one company because of competitive pressures to provide "converged" solutions is unpersuasive because if such competitive pressures exist they will drive Cingular to more toward converged solutions even if its current owners remain separate companies. As the Applicants state, Cingular has been very successful. Moreover, Verizon Wireless' joint ownership by Verizon and Vodaphone has not prevented Verizon Wireless from competing successfully. Therefore, there is no reason to believe that Cingular under its current ownership could not provide converged solutions. Further, therefore, the Applicants' converged solutions argument is not merger specific. Applicants also fail to provide a description of the converged solutions, which Applicants vaguely describe as new applications for consumers, new managed services for business customers, and new services for government. The Commission may not find that these converged solutions would be a benefit on the basis of these vague, unsupported descriptions.

The companies have already announced that they will be deploying IP Multimedia Subsystems ("IMS") to deliver new IP-based services.¹⁴¹ Cingular, AT&T and BellSouth can deploy IMS via an intercarrier agreement providing for the combination of services and networks and the ability of the customer to be easily switched between services and networks. The three companies can provide either one IMS network operated as a joint venture or three separate, but interoperable, IMS networks. Either way the agreement can call for the ability to have access to customer information necessary for the provision of service. In short, there is no foundation for

¹⁴¹ Public Interest Statement at 12.

the argument that three carriers operating through a properly structured intercarrier agreement cannot provide the same level of service as one merged entity. Thus, the proposed merger is not essential to IMS and IMS is not a merger specific benefit.

The Applicants argue that a merged company will enable them to offer a service that switches between licensed commercial wireless frequencies and VoIP use at WiFi hotspots. The Applicants fail, however, to address why the same service concept cannot be provided through intercarrier agreements between Cingular and AT&T and between Cingular and BellSouth. An intercarrier agreement can resolve all of the issues regarding customer databases and when each carrier provides service to the customer. Again, therefore, this claimed benefit is not merger specific.

For these reasons, the Commission should conclude that the alleged benefits of combining ownership of Cingular are conclusory, unsupported, and not merger specific. To the extent there are any cognizable benefits relating to Cingular, they are necessarily trivial in light of the bigger reality that the merger will create no more than a *pro forma* change of ownership of Cingular.

C. Services to Government Customers Will Not Improve

As elsewhere in the application, the Applicants continue the practice of citing to declarations of their own employees, which, when examined, don't provide any credible supporting information. For national security benefits, Applicants cite to the Declaration of James Kahan as the basis for a finding of benefits to government customers. But that declaration provides no more than two sentences which are as vague and unsupported as the public interest

statement the declaration allegedly supports.¹⁴² Mr. Kahan alleges but does not otherwise provide any explanation of how the companies' merged networks will provide improved security. It is particularly implausible that improved security would result from the merger since the current networks of the companies are already interconnected and operate to provide seamless service to all customers. Mr. Kahan does not explain why any improvements to security, to the extent valid, could not be achieved absent the merger. Moreover, Mr. Kahan does not appear to have any experience in national security networks or issues. Rather, he is in charge of implementing mergers, including creation of public interest justifications for them. There is no reason for the Commission to give his declaration concerning national security benefits any weight whatsoever.

In connection with the SBC/AT&T merger the Commission made the minimal finding that that merger had "the potential" to generate benefits from "more efficient routing."¹⁴³ In doing so, the Commission violated its own standard for evaluating alleged merger benefits by failing to identify "demonstrable and verifiable" benefits,¹⁴⁴ relying instead on vague and unsupported conclusory statements from the applicants. The Commission provided no quantification or support that that proposed merger would make any material difference to national security or the quality of services provided to the government. Services that AT&T and BellSouth currently provide to the government already meet stringent standards imposed by the government to meet reliability and national security needs. Characteristically, Applicants

¹⁴² Kahan Declaration at 12.

¹⁴³ *SBC/AT&T Order* ¶ 186.

¹⁴⁴ *SBC/AT&T Order* ¶ 182.

provide no quantification as to how, in light of these stringent standards, the alleged “fewer hops, reduced latency and lower rate of packet loss” would make any material difference in what the government already receives.¹⁴⁵ Therefore, the Commission may not make any finding of benefits deriving from latency etc. in connection with the instant application.

Nor is there any basis to the claim that the establishment of unified control over the local operations of BellSouth and AT&T will accelerate the restoration of service. BellSouth and AT&T are required to restore service in accordance with the TSP requirements.¹⁴⁶ The combination of the two companies will do nothing concerning restoration priority. Moreover, unified control is likely to slow down recovery because local officials will be required to check with officials that are even more remote from the scene of a disaster than is now the case.

In fact, the Applicants ignore the harmful impacts of the merger on provision of services to the government. The integration of networks, assuming they would be materially different from the current interconnected, seamless networks of AT&T and BellSouth, could make communications less secure and less reliable because problems in the integrated network will now affect a larger number of potential customers. Now, a security breach or outage would presumably affect only AT&T or BellSouth customers, but not both. The government is better served by more diversity of network providers so that if one network goes down, others remain available. For example, if the single point of contact touted by the Applicants is unavailable,¹⁴⁷ the government will not be well served and would be better off with an ability to deal with two

¹⁴⁵ Public Interest Statement at 30.

¹⁴⁶ 47 C.F. R. Part 64, Appendix A.

¹⁴⁷ Public Interest Statement at 31.

different providers. The Applicants have failed to provide any explanation of why its envisioned integrated network does not harm national security interests.

Moreover, the Applicants' claim of benefits to the government contradict more than a decade of federal government telecommunications procurement policy, as well as the government's determination to break up the old AT&T in 1983. Since the late 1980's, the government, acting as a purchaser of telecommunications services, has sought lower prices and greater network redundancy in telecommunications procurement (as do many non-governmental customers). Abandoning that policy to obtain more services from fewer providers is not in the interest of American taxpayers, who, under the policy that Applicants propose be abandoned, have enjoyed remarkable cost savings in government telecommunications services while government use of telecommunications services has exploded.¹⁴⁸

Since 1988 and the first FTS2000 contract, the federal government has wisely sought to obtain the benefits of telecommunications competition for government customers and American taxpayers. Thus, the government's telecommunications procurements are part of "the overall strategy to foster so-called, 'ruthless competition' for government telecommunications services."¹⁴⁹ For this reason, the government's procurement policy calls for multiple suppliers providing multiple and overlapping services so Federal agencies always receive the benefits of

¹⁴⁸ See FTS Network Program, Presentation of Karl Krumbholz, at slide 3, Sep. 30, 2004 available at <http://www.gsa.gov/Portal/gsa/ep/programView.do?pageTypeId=8199&oid=16100&programPage=%2Fep%2Fprogram%2FgsaDocument.jsp&programId=11455&channelId=-16201>. reviewed April 19, 2005.

¹⁴⁹ See GSA's Metropolitan Area Acquisition Home page at <http://www.gsa.gov/Portal/gsa/ep/programView.do?programId=10081&programPage=%2Fep%2Fprogram%2FgsaOverview.jsp&P=TRA4&pageTypeId=8199&oid=9694&channelId=-13485> reviewed April 19, 2005.

competition even after procurement is complete.¹⁵⁰ The proposed merger will by contrast decrease the number of available suppliers in BellSouth territory.

For these reasons, the Commission may not conclude that the proposed merger would produce benefits to government or national security.

D. Vertical Integration Benefits Are Exaggerated

The Applicants claim that there will be extensive efficiency benefits from combining the AT&T and BellSouth networks.¹⁵¹ This claim is unconvincing for a number of reasons. First, Applicants fail to provide sufficient information to evaluate the claim. Although they claim that efficiencies will be significant, and that the SBC/AT&T merger has already produced similar efficiencies, they fail to provide any quantification of these “synergies” other than references to AT&T conferences with financial analysts, and even that apparently is not a granular estimate that would provide any basis for credence.¹⁵² If efficiencies are significant, Applicants should be able to provide a concrete estimate or report of them. Many of these alleged efficiencies appear to derive from fewer “hops,” “peering points,” and decreased “latency.” Although these are precisely the types of efficiencies that should be capable of quantification, as already noted, Applicants provide none. For example, how many fewer hops would be involved? If for no other reason, the Commission should reject claimed efficiencies because the Applicants have failed to provide adequate supporting information.

¹⁵⁰ See GSA Networkx Overview Presentation available at <http://www.gsa.gov/Portal/gsa/ep/programView.do?pageTypeId=8199&oid=16100&programPage=%2Fep%2Fprogram%2FgsaDocument.jsp&programId=11455&channelId=-16201> reviewed April 19, 2005. (Network contract designed to “Leverage the volume of government requirements” and “Provide the lowest prices in the telecommunications marketplace”).

¹⁵¹ Public Interest Statement at 40; Declaration of Christopher Rice at 1.

¹⁵² Public Interest Statement n. 124.

Second, most of the benefits that Applicants claim are already being achieved as a result of AT&T Corp.'s merger with SBC, such as upgrading the legacy AT&T core network, are irrelevant to the BellSouth merger since SBC previously claimed that these benefits would be made possible by that previous merger.¹⁵³ Accordingly, they cannot be counted as benefits of the current merger.

Third, Applicants have failed to show that development of IP networks would not have occurred "but for the merger."¹⁵⁴ Carriers across the globe recognize that the future belongs to IP-based communication. SBC said as much in a Petition for Forbearance filed with the Commission in 2004.¹⁵⁵ In addition, SBC, BellSouth, and the other RBOCs filed a Fact Report two years ago in the Commission's IP-enabled proceeding claiming that the migration from legacy networks to IP networks was *already* underway at that time.¹⁵⁶ At the time of that filing, none of the RBOCs had announced plans to merge with a major IXC or undertake a new merger with a BOC.

Similarly, in the *IP-Enabled Services* NPRM, the Commission observed that "Cable Operators, wireline carriers, and wireless providers have announced that they have begun to

¹⁵³ Public Interest Statement at 41-42.

¹⁵⁴ See *SBC-Ameritech Merger Order* at 14825 ¶ 255.

¹⁵⁵ Petition of SBC Communications Inc. for a Declaratory Ruling Regarding IP Platform Services, WC Docket 04-36 (filed Feb. 5, 2004); Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, WC Docket No. 04-29 (filed Feb. 5, 2004).

¹⁵⁶ SBC Announced this IP network upgrade in June 2004 and dubbed the initiative "Project Lightspeed." See SBC Communications to Rapidly Accelerate Fiber Network Deployment in Wake of Positive FCC Broadband Rulings, Press Rel, June 22, 2004 available at <http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21207>.

deploy, or intend to deploy, IP networks.”¹⁵⁷ The RBOC VoIP Report likewise claims that the RBOCs, including SBC, “will provide IP-based services.”¹⁵⁸ The same report observes that “IP-based services are also being offered competitively to enterprise customers, as both complements to, and substitutes for, older packet switched services, such as Frame Relay and ATM.”¹⁵⁹ At the time that the RBOCs made these assertions, none of them had announced plans to merge with a major IXC or undertake a new merger with a BOC. Thus, the proposed merger is not necessary for the development of IP networks.

Fourth, the merger is not necessary to permit the Applicants to provide higher service quality or guarantees of higher service quality. To the extent the alleged technical service improvements would make a material difference, which is not known absent a detailed showing with quantification, the companies through appropriate service agreements could, without a merger, provide whatever level of quality a customer seeks.

The Applicants’ claim that the merger will provide the security functionality of AT&T’s core network, such as spyware and worm identification, is nonsensical. The Applicants state that “all traffic that crosses the legacy AT&T backbone has the benefit of those security features built into the network.”¹⁶⁰ If this is the case, customers in BellSouth’s region would get the benefit of this security functionality whether BellSouth merges with AT&T or not.

For these reasons, the Applicants have failed to demonstrate that the alleged benefits of vertical integration, even if otherwise valid, are real or merger specific. If anything, the merger,

¹⁵⁷ 19 FCC Rcd 4863, 4874 ¶ 12 (2004).

¹⁵⁸ RBOC VoIP Report, WC Docket No. 04-36, filed May 28, 2004.

¹⁵⁹ RBOC VoIP Report at 1.

¹⁶⁰ Rice Declaration at ¶ 8.

by eliminating competitors and reducing customer choice of providers will permit the Applicants to be less responsive to customer demands and provide lower quality of service without facing competitive consequences.

E. The Mergers Will Not Increase Research, Development, and Innovation

The Applicants' showing concerning innovations consists entirely of high level speculation and references to technical research and services that were developed mostly by AT&T Corp. prior to its merger with SBC. The Applicants submit not a single example of any innovation or research that will be made possible by the merger. Applicants provide a list of alleged innovations by AT&T and BellSouth (which have already been developed), and the statement that the companies will be able to provide these innovations to BellSouth's customers "far more effectively."¹⁶¹ However, the Applicants provide absolutely no explanation as to why AT&T could not provide these innovations absent the merger and how the merger would permit this to be done "far more effectively."¹⁶² "[S]peculative benefits that cannot be verified will be discounted or dismissed."¹⁶³ Accordingly, the Commission may not count these alleged innovations as a benefit of the merger.

In fact, because AT&T will be combined with a LEC, it will have less incentive to develop new services that could help it obtain a local service presence. As previously recognized by AT&T Corp., the merger will foreclose non-price competition, in the form of research and

¹⁶¹ Public Interest Statement at 49.

¹⁶² *Id.* ¶ 184.

¹⁶³ *Id.*

development, between the prospective merger partners. In opposing the SBC/Ameritech merger, AT&T Corp. argued that:¹⁶⁴

Applicants' repeated assertions that the public will benefit from the merger because the combination will reduce duplicative research and development and lead to better products ... is ironic. ... The Commission [has] observed that '[r]esearch and development ... is a means through which firms engage in non-price competition, by seeking means to differentiate products either in function or quality' Likewise, the federal antitrust authorities have stated that they will view firms with specialized research and development capabilities as competing in separate 'innovation markets' and will block transactions that reduce competition in those markets.¹⁶⁵

Moreover, large incumbent carriers are not able to be genuine innovators. Large incumbent carriers move slowly in order to avoid costly mistakes. Given the size of their networks and large numbers of customers, it is simply too risky to deploy truly innovative improvements in services and networks. Rather, a more prudent approach for large incumbent carriers from a business perspective is to let others innovate and then adopt the innovations only after they have been tested in the marketplace, even if this results in some initial loss of customers. In fact, the BOCs' policy is to delay making changes until they are absolutely required by competition and only well after others have taken the lead in provision of new services because it is so expensive to alter BOC networks substantially.

In addition, new services cannibalize existing ones. As AT&T Corp. has explained to the Commission, BOCs not only lack the incentive to invest but also have the perverse incentive to

¹⁶⁴ See *SBC-Ameritech Merger Order* at 14850, ¶ 333.

¹⁶⁵ Petition of AT&T Corp. to Deny Applications, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp., Transferor to SBC Communications, Inc., Transferee*, CC Dkt. No. 98-141 (filed Oct. 15, 1998) at 49.

delay or withhold new technology from the marketplace in order to continue collecting from ratepayers.

As the Commission has also found in the past, they are firms who have powerful incentives to withhold investments in new technologies that will limit the value of their existing monopoly assets, who delayed rolling out DSL- and ISDN-based service for a decade because it would impair their second telephone line services, and who introduced the DSL-based service only in response to cable modem services and the DSL-based offerings of data CLECs.

ILECs are entrenched monopolists with substantial high-margin second telephone line and other services that are cannibalized by broadband, and ILECs thus did not roll out DSL (or ISDN) technology until cable modem and CLEC services began to cut into their second line revenues. The Commission found that it was "the development of competition, and the threat of losing revenue and customers to carriers offering advanced services," that caused incumbent LECs to invest in facilities for advanced services. *UNE Remand Order* ¶ 138. If that threat is diminished, ILECs will invest less, not more.

The ILECs have never been a significant source of innovation, and they ultimately invest in improving their networks for only two reasons: (1) to increase revenue by improving network efficiencies or stimulating demand, or (2) to protect revenue by responding to actual or feared competitive threats.¹⁶⁶

As examples, BOCs are beginning to provide video programming only because they now perceive a need to compete against cable companies. BOCs are only providing VoIP service in order to stem the loss of customers to pioneering VoIP providers like Vonage and Skype. As is well known, in order to avoid cannibalizing T1 service, the BOCs sat on DSL for years until pioneering DSL competition by CLECs forced them to offer it. The proposed merger will

¹⁶⁶ Comments of AT&T Corp., CC Docket Nos. 01-338, 96-98, & 98-147 at 9, 20-21, 43 (April 5, 2002) (internal citations omitted).

exacerbate BOCs' inherent resistance to innovation because of the new company's greatly increased size.

In any event, to the extent the Applicants have incentives to innovate, such as those caused by competition, these will exist absent the merger. Assuming Applicants' contentions concerning innovations were otherwise valid, they are offset by the deleterious impact on innovation of the increased size of the merged company.

For these reasons, Applicants have failed to show that the proposed merger would result in a net positive benefit in terms of innovation.

F. Cost Savings to the Companies Are Not a Public Interest Benefit

The Applicants claim significant cost savings (90% of estimated "synergies" of the merger) from eliminating staff, consolidating advertising, procurement, and reductions in fixed and variable costs.¹⁶⁷ By themselves, these are not public interest benefits, however. The Applicants include one sentence as to how the alleged savings will benefit consumers: "These cost savings will benefit customers by supporting the combined company's increased research, development and innovation, thereby making the company a more effective competitor."¹⁶⁸ This is insufficient to warrant a finding that alleged cost savings will benefit the public interest. Notably missing is any commitment to spend any of the savings on research and development. It would be consistent with this statement for the company to pass through virtually all of any cost savings to its shareholders or to use them to fund another acquisition. In addition, the Applicants do not propose any rate reductions for customers. Given their monopoly market shares in most

¹⁶⁷ Public Interest Statement at 51-54.

¹⁶⁸ *Id.* at 51.

markets, and the fact that the much smaller competitors that they face do not enjoy any of the alleged savings from this merger, they have no reason to reduce rates.

For these reasons, the Commission should find that the alleged cost savings do not constitute a public interest benefit.

VI. CONDITIONS ARE NECESSARY TO PRODUCE A BETTER BALANCING OF COSTS AND BENEFITS

As discussed, the Applicants have failed to provide adequate information describing how they plan to implement the integration of AT&T and BellSouth with respect to competitively sensitive operating matters. This omission precludes the Commission from performing a public interest analysis and justifies dismissing the Application.

Even assuming there were no issue concerning harms that might be caused by implementation of the merger, however, in view of the weak or nonexistent showing of public interest benefits and substantial possibility of harms that would be caused by the merger, the Commission should deny the application as filed as contrary to the public interest.

Alternatively, in order to find that the Application would serve the public interest, the Commission must impose appropriate conditions so a balancing of harms and benefits will produce a substantial positive net benefit. The conditions should apply across the SBC and BellSouth regions. To the extent merger conditions are imposed on BellSouth that conform to those imposed on SBC/AT&T, the latter conditions should be extended to lapse at the same time as those imposed on BellSouth.

The Commission has broad authority to approve a merger subject to conditions under, *inter alia*, Section 214 of the Act which authorizes the Commission to attach to the certificate “such terms and conditions as in its judgment the public convenience and necessity may

require.”¹⁶⁹ Pursuant to this authority, if it determines to approve the merger at all, the Commission should impose the following conditions.

Divestiture of In-Region Assets & Customers: The Commission should go considerably further in terms of divestiture of BellSouth in-region assets than agreed to by SBC/AT&T in its consent decree with the Department of Justice.¹⁷⁰ Those divestitures as a practical matter appear to involve unused fiber. Therefore, their divestiture will have little impact on competition. Instead, the Commission should require a substantially greater divestiture possibly including all of the local exchange and exchange access facilities and residential and business customers of AT&T in the BellSouth region.¹⁷¹ This is the only divestiture that would prevent further concentration in the local market that is already dominated by BellSouth in its service territory.

Divestiture of in-region assets, while helpful, is not sufficient by itself to ameliorate the anticompetitive effects of the proposed merger. In fact, AT&T’s own statements demonstrate that both it and others are heavily dependent upon SBC for special access services and other

¹⁶⁹ 47 U.S.C. § 214(c); See, e.g., In re Application of GTE Corp. Transferor and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations, CC Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, at ¶¶ 1-4, 248-259, 319 (June 16, 2000) (“BellAtlantic/GTE Merger Order”) (“we find in this order that, absent conditions, the merger of Bell Atlantic and GTE will harm consumers of telecommunications services;” “spinoff of GTE’s Internet backbone and related assets into a separate public company” required.); In re Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, CC Docket No. 98-24, FCC 98-169, 13 FCCR 15,243-15,244, Memorandum Opinion and Order, at ¶ 12 (Rel. July 23, 1998) (“Teleport/AT&T Merger Order”); United States v. FCC, 652 F.2d 72, 81-81, 88 (D.C. Cir. 1980); In the Applications of NYNEX Corporation, Transferee, and Bell Atlantic Corporation, Transferor, FCC 97-286, 12 FCCR 20,0002, Memorandum Opinion and Order, at ¶ 32 (Aug. 14, 1997) (“BA/NYNEX Merger Order”).

¹⁷⁰ United States v. SBC Communications, Inc. and AT&T Corp, Complaint and Final Judgment, Civil Action No. 1:05CV02102, U.S. D.C. D.C., October 27, 2005.

¹⁷¹ The Commission has ample jurisdiction to require divestiture. See, e.g., *BellAtlantic/GTE Merger Order*, at ¶¶ 1-2, 28-29 (Commission required the transfer of the Internet backbone and related assets of GTE Internetworking, Inc. (Genuity) to “an independently owned public corporation” be completed prior to merger closing).

services. Any purchaser of AT&T's assets in the BellSouth region would face an even greater reliance on its principal competitor. For these reasons and the reasons provided above, the Commission should impose the additional merger conditions discussed below.

Cost-Based Access: In light of BellSouth's and AT&T's dominance in the market for special access in their respective regions,¹⁷² they should be required to implement safeguards designed to reduce the opportunities for discrimination in the provision of access to local bottleneck facilities, collusion between BOCs, and other anticompetitive effects. For many services BellSouth has maintained or increased prices notwithstanding increased network efficiencies and productivity gains and competitive pricing.¹⁷³ BellSouth and AT&T should be required to first implement, on a temporary basis, incremental cost-based pricing of switched and special access services, until the Commission completes its existing rulemakings regarding ILEC overpricing and other anticompetitive conduct in the special access market¹⁷⁴ and its rulemaking to establish a unified intercarrier compensation regime.¹⁷⁵

¹⁷² See, e.g., In the Matter of AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates For Interstate Special Access Services, RM-10593, AT&T Petition For Rulemaking, at ¶¶ 16-18 (filed October 15, 2002) (“the only alternatives available to CLECs are the Bells’ special access services ... over 98% of AT&T’s facilities-based local service for business customers using incumbent facilities of DS-1 level or higher is provided over incumbent special access services, not UNEs.” “The Bell’s ability to engage in discriminatory contract tariffs is equally pernicious, because it allows the Bells surgically to foreclose competition.”).

¹⁷³ For example, BellSouth’s price for 800 database query service has remain unchanged since 1999 even though competitive SS7 providers offer service for 25% of BellSouth’s price. Access customers are unable to avoid BellSouth’s charges for calls that originate with BellSouth’s subscribers.

¹⁷⁴ *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, FCC 05-18, Order and Notice of Proposed Rulemaking, at ¶ 3 (rel. Jan. 31, 2005).

¹⁷⁵ See, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, at ¶ 15 (rel. March 3, 2005) (“Our current classifications require carriers to treat

Non-Discrimination in Volume Discounts: Further, the Commission should preclude AT&T and BellSouth from providing an unfair advantage to their long distance affiliates by ensuring that they cannot engage in a price squeeze by offering volume and term discounts and other incentives for which only its affiliates (or those of other RBOCs) can qualify in the market for special access and high capacity wholesale services. To preclude this anticompetitive conduct, the Commission should impose a merger condition that requires the combined company to tariff any special access services or wholesale services that it offers to its affiliates or other RBOCs and make such services available to competitors at the same price without the volume and term commitment that it requires of its affiliates or RBOCs. All agreements between Verizon and the merged company for access to each others' local networks must be made available and subject to opt-in on an pick-and-choose basis.

Performance Measures: In light of the fact that the merger will increase BellSouth's dominance in the special access and high capacity services markets, the Commission should impose rigorous performance measures and self-effectuating remedies governing BellSouth's performance in processing orders, provisioning, repairing, and maintaining special access services and UNEs for its competitors. These should go considerably further than the 5 bare-bones performance measures imposed on SBC/AT&T. The performance measures should be comprehensive to assure nondiscrimination in provision of special access services.¹⁷⁶ In light of

identical uses of the network differently, even though such disparate treatment usually has no economic or technical basis.”).

¹⁷⁶ At a minimum, the required performance measures should include metrics, standards, and damages for the following parameters: mechanized provisioning accuracy, mean installation interval, order completion due date met, percent of due missed because of lack of facilities, percent of trouble reports within 30 days, percent of missed repair commitments, receipt to clear duration, percent or repeat trouble, percent or repeat trouble reports, percent of billing accuracy.

some BOC's past record of discrimination in the provisioning of UNEs in "no facilities" situations,¹⁷⁷ comprehensive performance measures should be imposed to prevent such discrimination in the more concentrated market that will result from the mergers. These performance measures and other merger conditions must be enforced through self-effectuating remedies that impose liquidated damages that compensate the carriers that were injured by SBC's violations, not the United States Treasury. The liquidated damages and penalties imposed for anticompetitive practices should also escalate with multiple violations so that such damages have a deterrent effect on SBC, rather than being an acceptable cost of doing business.

Service quality measures ("SQMs) and self-effectuating enforcement mechanisms ("SEEMS") should not be weakened for any existing performance measures now applicable to the companies.

Affiliation for Purposes of UNE Rules: The proposed merger would make AT&T Corp. collocations affiliated with BellSouth. For purposes of implementation of the rules governing unbundled access to network elements established in the *Triennial Review Remand Order*,¹⁷⁸ the Commission should require as a condition of any approval of the merger that AT&T treat AT&T Corp. collocations as affiliated under those rules. This should include a retroactive application insofar as BellSouth has treated these collocations as unaffiliated prior to the merger.

On the other hand, CLECs have come to rely on at least the current availability of UNEs under the BOCs' initial implementation of the *Triennial Review Remand Order*. CLECs could

¹⁷⁷ Triennial Review Order, at ¶¶ 630, 637 (The Commission rejected the RBOCs' no facilities policy and held that "with the exception of constructing an altogether new local loop, we find that requiring an [ILEC] to modify an existing transmission facility in the same manner that it does so for its own customers provides competitors access to only a functionality equivalent network.").

¹⁷⁸ 47 C.F.R. §§ 51.319(a)(4)-(5) and (e); *Triennial Review Remand Order*, at ¶¶ 66, 126, 129, 146, 174-180.

be harmed if UNEs were to become less available because of changes in wire center business line counts insofar as lines that AT&T obtained from BellSouth as special access are excluded from current line counts, but would be recounted as BellSouth lines. Accordingly, the Commission should prohibit wire center density recalculations based on the merger of AT&T and BellSouth that have the effect of decreasing the availability of UNEs.

Facilitating Competitive Tandem Switching and Transit Service: To prevent harms that would be caused by AT&T policies designed to thwart competitive tandem switching and transit providers, the Commission should require first that Cingular and all other affiliates of the merged companies permit direct connection to their switches performing end office switching functions, if technically feasible, to any requesting carrier that has enough traffic to justify a T-1 connection. Permitting direct connections to end offices will permit traffic to be routed efficiently without going through ILEC tandems. A “requesting carrier” includes a competitive provider of tandem switching and transit services.¹⁷⁹

The Commission should also assure nondiscrimination in provision of interconnection to competitive tandem providers. The Commission should require that all affiliates of the merged company offer interconnection to tandem switches of competitive carriers, including third-party competitive tandems, on terms that are non-discriminatory with respect to their interconnection with ILEC tandem switches (whether operated by an ILEC affiliate of the merged companies or by an unaffiliated incumbent LEC). This requirement would help assure that a LEC can choose to have its end office subtend a competitive tandem provider's tandem switch and have AT&T

¹⁷⁹ Comments of AT&T, Inc., WC Docket No. 05-55, April 10, 2006, at 1 (“Consistent with the Act, the Commission should declare that all intermediate carriers, including transit service providers, are entitled to interconnect with terminating telecommunications carriers.”)

route traffic to that competitive tandem on the same terms that AT&T would route traffic to an ILEC-operated tandem.

OSS Enhancements: The Commission should require AT&T and BellSouth to implement an enhanced OSS by the merger closing date to provide real-time access to BellSouth's databases for remote terminal location and vacant facility information for purposes of obtaining UNE loops. In addition, the merged company may not implement any significant OSS changes without CLEC consultation and concurrence.

Safeguards for IP-Enabled Marketplace: As discussed in these comments, the mergers would enable AT&T to undermine competitive providers in the market for IP-enabled services in BellSouth territory by imposing higher costs on critical inputs, and by refusing to provide, or discriminating in the provision of, access to the IP backbone. The conditions imposed on SBC/AT&T to post its peering policies and to maintain current level of peering on a temporary basis do not go far enough. Instead, in light of these anticompetitive effects, the Commission should require the merged company to (1) allow any IP network to peer with the merged SBC and BellSouth if that network interconnects at a specified number of peering points, and (2) to provision interconnection to the IP backbone and transit service to non-peering ISPs and CLECs at LRIC rates. The Commission should impose net neutrality requirements to preclude ILECs from blocking or providing inferior quality access to non-ILEC IP-enabled services. Further, the Commission should prohibit the merged company from imposing any restrictions or limitations on use of Session Initiation Protocol ("SIP") by its customers or services obtained from third parties by the customer. SIP is a signaling protocol used for establishing sessions in an IP

network. Absent appropriate conditions, SIP could be a useful tool for discrimination by the merged company.

Negotiation of 271 Terms: The Commission should require AT&T and BellSouth to negotiate, and arbitrate if necessary, the rates, terms and conditions for “271 network elements.” pursuant to the § 252 process. AT&T and BellSouth currently refuse to do so, on the ground among others that *Coserv Ltd Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003) relieves them of this obligation.¹⁸⁰ This position is wrong because the law specifies that (1) RBOCs are obligated to offer 271 network elements;¹⁸¹ (2) § 271 requires that interconnection agreements approved by a state commission, pursuant to § 252, containing both § 251(c)(3) and § 271 network elements;¹⁸² (3) the *TRO* and *TRRO*, among other things, established new standards pertaining to ILECs’ obligation to offer 251(c)(3) and 271 network elements that must be negotiated and implemented pursuant to the § 252 process;¹⁸³ and (4) a state commission is legally obligated to resolve related open issues and establish the appropriate

¹⁸⁰ AT&T’s position is that § 252 only requires it to negotiate and, if necessary, arbitrate § 251(b) and (c) issues and that the independent duties imposed on it by § 271 or elsewhere cannot be subject to the § 252 arbitration process so long as it refuses to negotiate such provisions.

¹⁸¹ 47 U.S.C. §§ 271(c)(2)(B)(iv),(v), (vi), & (x).; *TRO*, ¶¶ 652-53 (emphasizing that “BOCS have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251”).

¹⁸² 47 U.S.C. § 271(c)(1) (requiring that agreements be “approved under Section 252”).

¹⁸³ *TRO*, ¶¶ 656-664 (prescribing the standard that needs to be applied when establishing rates, terms and conditions for 271 network elements and recognizing that although the FCC may have relieved BOCs from offering certain UNEs in the *TRO* (and later in the *TRRO*) pursuant to § 251(c)(3), BOCs still have an independent obligation pursuant to § 271 to provide access to them at just, reasonable, and not unreasonably discriminatory rates, terms and conditions consistent with § 201 and § 202 of the Act); ¶¶ 703-704, 706 (holding that the § 252 process be followed in implementing the *TRO* and stating that “Parties may not refuse to negotiate any subset of the rules we adopt herein [which includes the FCC’s 271 determinations]”); *see generally* 5 U.S.C. Sec. 551 (a “‘rule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency....”).

terms for offering such facilities in a § 252 arbitration.¹⁸⁴ Although Commenters believe the law is unequivocal, BOCs, including the Applicants, are forcing them and other CLECs to devote scarce resources litigating this issue.

Discounts. The Commission should require AT&T to provide DS1 loops and EELs in every wire center regardless of the impact of the FCC's existing UNE rules for a period of at least five years. Further, the Commission should require promotional discounts of 25%-30% on all loops and subloops for a period of at least three years.

Reasonable Terms and Conditions of Transfer of Traffic from the Incumbent to a CLEC. BellSouth imposes anticompetitive terms and conditions when a CLEC transfers traffic from the incumbent network to its own or alternative facilities, such as a fiber ring. These terms and conditions can include installation charges for existing loops that connect to the fiber ring, even though this is no more than a billing change. The Commission should require BellSouth to implement reasonable terms and conditions to facilitate facilities-based competition.

UNE and Collocation Price Caps. The merged companies will not seek or implement any increases for prices for any Section 251 UNEs or for collocation for a period of five years.

Local Wholesale. The merged company will not raise former AT&T Corp. wholesale service prices for 5 years.

EEL Audits. AT&T and BellSouth have pursued EEL audits of some CLECs for a number of years. This process is extremely disruptive and burdensome to CLECs. In addition, the purpose of the pre-*TRO* EEL rules was to prevent special access conversions, especially by

¹⁸⁴ 47 U.S.C. § 252(b)(4)(C) (requiring a state commission to resolve all open issues in a § 252 arbitration); *TRO*, ¶¶ 701-705 (holding that the § 252 process should be used to conform interconnection agreements to reflect the *TRO*).

MCI and AT&T Corp. , which are now owned by BOCs, eliminating any justification for audits of CLECs under the pre-*TRO* rules. Accordingly, as a condition of the merger, the Commission should require the merged company to terminate any audits initiated under the pre-*TRO* rules.

Divestiture of WiMax Spectrum. If the merged company is able to retain WiMax spectrum, it would potentially be able to strengthen its market power over last mile access. Accordingly, the merged company should be required to divest WiMax spectrum.

Access to Fiber Loops. The Commission should also require AT&T to offer unbundled access to FTTC, FTTP, and hybrid loops for all customers at commercially negotiated rates for five years. The merged company will offer TDM services over packet networks and fiber loops via “pseudo wire” or other technology at TELRIC prices.

“Naked DSL.” The merged company will offer DSL to consumers without a requirement that the customer also purchase either circuit switched or IP voice service.

Moratorium on DSL-Capable Copper Loop Retirements. BellSouth should not be permitted to retire DSL-capable loops for a period of five years. This is a necessary transition condition to help assure that competitive DSL providers can continue to grow notwithstanding the anticompetitive impacts of the merger.

Commitment to Pay Competitors’ Access Charges. Because competitors will be impaired without access to the merged company’s loops and transport, SBC/BellSouth will have excessive leverage in obtaining concessions from competitors when purchasing interstate or intrastate access from competitors, including with respect to existing contracts and arrangements. In order to ameliorate this market power, the merged company should be required for five years to pay competitors’ current contract or tariff prices for interstate and intrastate access services.

Assurance of Reasonable Winback Practices. BellSouth engages in anticompetitive winback practices. In order to assure that the merged companies do not engage in unreasonable winback policies, the merged companies should be prohibited from (1) offering retail pricing that is below TELRIC wholesale deaveraged zone pricing for the equivalent service, and (2) charging CLECs disconnect fees for UNEs when the customer switches back to the ILEC. The Commission should also consider conditions that will restrict the ability of the merged company to engage in winback pricing that is geographically focused on where CLECs are competing.

Most- Favored Nation Arrangements. AT&T should be required to offer CLECs within the merged entity's region any new arrangement or unbundled network element (UNE) secured by AT&T outside of its region. AT&T or its affiliates who have negotiated any interconnection arrangement or UNE in one AT&T state will be made available in all other states throughout its region. Furthermore, in any of its states, the merged firm will, where technically feasible, provide to any requesting telecommunications carrier any interconnection agreement or UNE in any other of the same states that was negotiated by an affiliate of AT&T, subject to state-specific pricing. This condition facilitates market entry and promotes the use of best practices (as understood by competitors).

Multi – State Interconnection and/or Resale Agreements. Subject to technical feasibility and state-specific pricing, the merged entity will offer requesting carriers an interconnection and/or resale agreement covering multiple AT&T states no later than two months after the merger. This condition attempts to neutralize the merged company's ability and incentive to impose unwarranted negotiation costs and delays upon competing carriers.

Enforcement. Both the permanent and transitional merger conditions should be self-enforcing to the extent feasible. In particular, the performance measures should be self-enforcing. Moreover, in light of the Commission's limited enforcement capability, the Commission should authorize the state commissions to enforce these merger conditions in their particular state.

VII. CONCLUSION

For the reasons discussed herein, the Commission may not conclude that grant of the application as filed would serve the public interest. The Commission should impose significant conditions on any approval of the proposed merger.

Respectfully submitted,

/s/ Patrick J. Donovan

Andrew D. Lipman
Eric J. Branfman
Patrick J. Donovan
Bingham McCutchen LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
(202) 424-7500

Counsel for

Access Point, Inc.
ACN Communications Services, Inc.
DeltaCom, Inc.
Florida Digital Network, Inc.
d/b/a FDN Communications
Globalcom Communications, Inc.
Lightyear Network Solutions, Inc.
McLeodUSA Telecommunications Services, Inc.
Pac-West Telecomm, Inc.
Smart City Networks, Inc.
US LEC Corp.

June 5, 2006