

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

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

PETITION TO DENY OF COMPTEL

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Pursuant to Section 309(d) of the Communications Act, 47 U.S.C. § 309(d), COMPTEL hereby petitions the Commission to deny the above-captioned applications of AT&T and BellSouth to approve AT&T’s acquisition of BellSouth. AT&T and BellSouth have failed to meet their burden of demonstrating that the acquisition is in the public interest and for this reason, the Commission must deny the applications.

COMPTEL is the leading industry association representing competitive facilities-based telecommunications service providers, emerging VoIP providers, integrated communications companies, and their supplier partners. COMPTEL members compete directly with AT&T and BellSouth in providing voice, data and video services in the U.S. and around the world. COMPTEL members also purchase essential inputs—unbundled network elements (“UNEs”), special access facilities and backbone capacity—from

AT&T and BellSouth in order to serve their end users. Because its members are customers and competitors of both AT&T and BellSouth, COMPTEL acting on behalf of its members is a party in interest with standing to oppose this merger pursuant to Section 309(d).

I. INTRODUCTION AND SUMMARY

The proposed merger of AT&T and BellSouth will cause substantial harm to the telecommunications marketplace. In particular, the merger raises serious competitive issues in the marketplace for special access and broadband transmission services.

The merger of AT&T and BellSouth will allow the combined company to exert substantial market power over special access services. Further concentration in the special access market will mean even higher rates and poorer service quality for special access. Additionally, the merged company will be able to use its increased market power to discriminate against its wholesale special access customers. In the market for broadband services, the horizontal integration of AT&T and BellSouth will eliminate the single most likely potential competitor in BellSouth territory. This would have a severe adverse impact on the availability and pricing of many broadband services, including Internet access and Voice over Internet Protocol (“VoIP”).

For all these reasons, the merger is not in the public interest and the Communications Act requires the Commission to deny the petition.

II. LEGAL STANDARD

In reviewing the merger, the Commission must conduct the public interest analysis required by sections 214(a) and 310(d) of the Communications Act to determine whether AT&T and BellSouth have shown that approval of the merger would serve the public interest.¹

Section 214 and 310 of the Act require the Commission to weigh the potential public interest harms resulting from a proposed merger against the potential public interest benefits “to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessity.”² The burden of proof is on the Applicants.³ Unlike review by antitrust agencies, the purpose of the Commission’s public interest analysis is not to determine whether the merger will *harm* competition, but instead the Commission must be “convinced that it will *enhance* competition.”⁴ The Commission examines

¹ 47 U.S.C. §§ 214(a) and 310(d).

² *Intelsat, Ltd., Transferor, and Zeus Holdings Limited, Transferee*, IB Docket No. 04-366, DA 04-4034, at ¶ 15 (2004) (“*Intelsat Order*”).

³ *See Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, at ¶ 48 (1999) (“*SBC/Ameritech Order*”).

⁴ *Applications of NYNEX Corp. and Bell Atlantic Corp. For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC

four primary factors: “(1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission’s implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes; and (4) whether the merger promises to yield affirmative public interest benefits.”⁵ The Commission’s analysis of the public interest benefits and harms also includes an analysis of the potential competitive effects of the merger under antitrust principles.⁶ If the Commission is unable to find that the proposed transaction serves the public interest for any reason, or if the record presents any substantial and material questions of fact, section 309(e) of the Act requires that the Commission designate the application for hearing.⁷

For the reasons set forth below, the Applicants have failed to demonstrate that the merger is in the public interest. The proposed merger as described in the applications would have significant anti-competitive effects, and therefore must be denied.

Rcd. 19985 at ¶ 2 (1997) (“*Bell Atlantic/NYNEX Order*”) (emphasis added).

⁵ See *SBC/Ameritech Order* at ¶ 48.

⁶ *Id.* at ¶ 49.

⁷ 47 U.S.C. § 309(e); See also *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, ¶ 202 (1998) (“*WorldCom/MCI Order*”).

III. THE PROPOSED MERGER WILL ADVERSELY IMPACT THE MARKET FOR SPECIAL ACCESS SERVICES.

a. The Proposed Merger Will Eliminate a Direct Competitor in the Special Access Market in BellSouth Territory.

The concern that many commenters had in the SBC/AT&T and Verizon/MCI merger proceedings was that those mergers would remove the primary BOC competitors (AT&T and MCI) from the market for special access services. Now that the “new” AT&T has acquired the old AT&T’s special access facilities, the proposed merger of AT&T and BellSouth creates the same competitive concerns in BellSouth territory. Just as the old AT&T was the primary (and in many cases the only) competitor to BellSouth, now the new AT&T is the primary competitor to BellSouth. Removal of AT&T as the primary competitor to BellSouth will significantly reduce competition in the special access market in BellSouth territory.

Despite the applicants’ vague statements regarding AT&T’s total special access assets, one thing is certain: the new AT&T now possesses all of the old AT&T’s special access facilities. In the old AT&T’s wholesale sales literature, the company stated that it had roughly 61,000 total route miles of fiber, over 16,000 miles of which were used to provide special access service.⁸ Although far from ideal, the presence of AT&T as a special access competitor likely would exert some disciplining effect on the special access rates charged

⁸ See AT&T Wholesale Sales Information, *available at* http://www.att.com/wholesale/docs/gws_sheet.pdf.

by BellSouth. If the proposed merger is consummated, however, AT&T will no longer be able to exert any price discipline over BellSouth's rates.

Further, as the Commission itself has recognized, the large sunk costs and economies of scale associated with the deployment of loop and transport facilities make it unlikely that any competitive carriers will enter the market to replace AT&T's competitive presence.⁹

With AT&T's acquisition of BellSouth, the merged entity will be able to exercise market power over special access services in the operating territories of the majority of the former Baby Bells – i.e., SBC, Ameritech, PacTel and BellSouth – as well as SNET. Upon consummation of the merger, the number of major special access providers in the combined AT&T-BellSouth territory will drop from three to two (Verizon and the combined AT&T/BellSouth). As is discussed in greater detail below, the total number of providers may even drop from three to one. *See supra* Part III.d. Even greater concentration in the special access market than what already exists today after the last round of mergers will result in even higher rates and poorer service quality for special access. Moreover, the combined firm will have a greater ability and incentive to discriminate against non-affiliated companies after the merger. For all these reasons, the merger is not in the public interest and the Commission must deny the applications for transfer of control.

⁹*See Triennial Review Order* at ¶ 72 (2003).

b. The Proposed Merger Will Allow the Merged Company to Discriminate Against Wireless Carriers in the Special Access Market.

One service that relies on special access lines for which competition will be appreciably and obviously lessened in every geographic market within AT&T and BellSouth territory as a result of the merger is retail wireless service. Wireless calls travel wirelessly only for a very short distance (from the radio handset to the antenna at the cell site) relative to the distance over which the calls are typically carried and switched through wireline facilities. Thus, competitive wireless carriers are dependent on incumbent LEC special access services and facilities in order to deliver their services to consumers.

AT&T Wireless (which has since been acquired by Cingular) succinctly explained this dependence of wireless carriers on wireline incumbents:

[Wireless] carriers are major consumers of ILEC special access services. They have no choice. Although wireless services are increasingly viewed as a form of inter-modal competition to wired telephony services, including broadband services, the ironic fact is that wireless networks out of necessity consist largely of wireline facilities. . . . These [facilities] overwhelmingly are made with landline transport facilities purchased from ILEC special access tariffs.¹⁰

To illustrate just how dependent wireless carriers are on special access lines from the incumbents, AT&T Wireless noted that more than 90% of its transport costs go to paying incumbents for special access services.¹¹ Sprint

¹⁰ Comments of AT&T Wireless Services, Inc., *In the Matter of AT&T Corp. Petition to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*, RM-10593, at 2-3 (filed Dec. 2, 2002).

¹¹ *Id.* at 3.

has stated that, for its wireless services, “[t]he single largest network operating cost is special access.”¹² Even for its highest capacity circuits (for which more competitive alternatives might be expected), Sprint has told the Commission that it is dependent on the incumbents for well over 80% of its circuits.¹³ Additionally, T-Mobile confirmed that for many types of circuits it must purchase well over 90% of its demand from the incumbents.¹⁴

In acquiring BellSouth, AT&T will obtain 100% ownership of Cingular Wireless. Post-merger, therefore, AT&T will be both the dominant wireless provider in the nation and the dominant wireless input provider throughout a 22 state area.

Pre-merger, both AT&T and BellSouth have an incentive to charge wireless competitors a reasonable rate for special access services. If BellSouth, as a 40% owner of Cingular, had raised rates for all wireless carriers in a non-discriminatory way, BellSouth may have increased its profits from special access sales. However, its majority partner AT&T would not like that BellSouth was taking Cingular’s profits in the form of special access revenues that went only to BellSouth. Hence, both firms had an

¹² Comments of Sprint Corporation, *In the Matter of Unbundling Obligations of Local Exchange Carriers*, CC Docket Nos. 01-338, 98-147, and 96-98, at 49 (filed Apr. 5, 2002).

¹³ Comments of Sprint Corporation, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 6-8 (filed June 13, 2005).

¹⁴ *Id.* at 5.

incentive to charge Cingular a “normal” and “fair” input price for special access—even if the rates were higher than a competitive market would have produced.

In contrast, the post-merger single owner of both the ILEC input supplier and the downstream mobile wireless carrier will have an incentive to raise input prices to Cingular as well as all of its rivals. By raising its rivals’ costs, the merged firm could either collect higher profits through a combination of higher access revenue and higher retail wireless revenue (if the rivals raised their retail rates and Cingular followed), or the merged firm could raise its rivals’ costs, not follow their price increase, and simply take profits through increased access revenues and higher market share in the retail market. In both AT&T and BellSouth territories, the acquisition of BellSouth by AT&T will create the incentive and ability to manipulate wholesale input and retail prices for wireless services that did not exist previously.

c. The Proposed Merger Will Increase the Likelihood for Exclusionary Contracts in the Special Access Market.

The most notable features about the special access market are that: 1) post-merger, AT&T still maintains a monopoly over the market; even the competitive carriers with the largest networks must buy over 90% of their total special access circuits from the incumbents; 2) in the most populous markets, neither AT&T’s nor BellSouth’s special access services are price regulated by the FCC; and 3) almost all of the special access circuits sold by

AT&T and BellSouth are sold under “optional pricing plans,” which are an ongoing barrier to facilities-based competitive entry into the special access market because they severely foreclose access to customers and distort entry decisions. The key feature of these optional pricing plans is that in order to get “discounts” on circuits for which competitors have no competitive alternative (the vast majority of their circuits), customers must commit to purchasing the majority of their total circuit volumes from the incumbent—including circuits for which a cheaper competitive alternative may be available. In other words, because only the incumbent can supply *all* of any customer’s special access demand, the incumbent can therefore condition the availability of discounts on certain circuits (the majority, for which no competitive alternative is available) on the customer’s commitment to transfer the “competitively sensitive” portion of its demand to the incumbent.

Another feature of these contracts is that customers that cannot meet their volume commitments must pay high “termination” penalties. This means that even if other competitors could offer a better base special access rate for part of the customers’ special access needs, customers would still be unable to use these services because the high termination costs imposed by the incumbent when the customers could not meet their volume commitment are far greater than any savings recouped from using other special access

providers. While customers do not like these contracts that impose termination costs, they have little choice but to sign them.¹⁵

The end result is that the incumbents have been able to use their monopoly power in the special access market to exclude competitors from effectively competing, thereby forcing customers to use only incumbent-provisioned special access services for all their needs. The BellSouth acquisition further enhances AT&T's ability to engage in this form of exclusionary conduct. The acquisition will allow AT&T to offer selective "discounts" on special access services over an even greater monopoly territory. Moreover, the combined company post-merger will be able to demand that customers commit to purchase even greater volumes of special access services where potential competition may exist. The applicants have not shown that the merger will not result in more anticompetitive exclusionary contracts. For this reason, the application must be denied.

d. The Proposed Merger Will Facilitate Collusion Between the Merged Company and Verizon.

The proposed merger is not in the public interest because it will facilitate anticompetitive coordinated behavior between the combined

¹⁵ See, e.g., Declaration of Mark Chaney in support of the Comments of WilTel, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, ¶ 6 (filed June 13, 2005). "Discount pricing plans offered by ILECs further reduce the ability of CLECs to compete and result in higher prices. Even where a CLEC may offer a competing special access service (at a substantial discount to the ILEC offering), WilTel may not use that CLEC in many cases because it can incur a lower incremental expense by committing additional services to an existing ILEC plan even though the overall unit cost from the ILEC may be higher."

company and Verizon by strengthening the incentives and the ability for the two companies to: (1) tacitly agree not to compete, or (2) coordinate on prices and terms of competition. As stated above, upon consummation of the proposed merger, the number of region-wide special access providers in the combined AT&T-BellSouth territory will drop from three to two, with Verizon serving as the only other likely competitor to the combined company.

However, the number of suppliers may actually decrease to only one (the merged firm) if AT&T/BellSouth and Verizon fail to compete vigorously with one another out-of-region. In both the SBC/Ameritech and Bell Atlantic/GTE mergers, the Bell Companies argued that the transactions were in the public interest because they would serve as a catalyst for out-of-region competition. However, as the applicants themselves recognized in their Public Interest Statement, significant out-of-region competition has not yet occurred.¹⁶ Moreover, the Commission imposed conditions on both of those mergers because, by “reducing the number of major incumbent LECs, the merger[s] also increase[] the risk that the remaining firms will collude, either explicitly or tacitly.”¹⁷ As the Commission recognized, “collusion is more likely to occur where only a few participants comprise a market and entry is relatively difficult.”¹⁸ Under this precedent, the Commission has no choice

¹⁶ See, e.g., Public Interest Statement at 86, 106.

¹⁷ *SBC/Ameritech Order* at ¶ 104.

¹⁸ *Id.* at ¶ 121.

but to recognize that collusion between the combined company and Verizon is more than possible here.

For one thing, the Commission's recent deregulation of Verizon's ILEC, with respect to any service over 200 kbps in any direction, and its portent for AT&T indicates that this increase in market power will coincide with the Commission granting the two largest carriers unprecedented tools with which to discriminate against rivals, and coordinate with each other. Without any general obligation to provide local private line services on a common carrier basis (indifferently to all customers—regardless of whether the customer is a competitor), Verizon (and probably AT&T as well)¹⁹ will be able to deny competitors access to private line services in a way that they could not have done previously. One Wall Street analyst succinctly explained the effect of the FCC's deregulation, “[the local private line market is] the most lucrative market today, and this [the FCC's deregulation] ensures Verizon remains dominant in its territory.”²⁰ This merger will thus not only eliminate a

¹⁹ AT&T has indicated that it will soon file a petition similar to Verizon's petition, and FCC Chairman Kevin Martin has indicated that he would be supportive of such petitions. “I'd be supportive of others who want to have the same kinds of opportunities to invest in their networks,” Martin said. “AT&T next to seek business broadband deregulation” Reuters, published March 21, 2006, available at http://news.com.com/AT38T+next+to+seek+business+broadband+deregulation/2100-1034_3-6052174.html

²⁰ “FCC Deregulates Verizon's Big-Business Market” *The Wall Street Journal*, March 21, 2006 at A3 quoting Jessica Zufolo, a telecom analyst for Medley Global Advisors.

significant in-region access competitor to BellSouth and Verizon, but the impending deregulation of the post-merger firm will ensure that for a dominant majority of the access lines in the United States, neither Verizon nor post-merger AT&T will face any threat to their dominance of this critical input market.

Even if AT&T and Verizon do not agree to stop aggressively competing altogether, they could nonetheless coordinate on prices and terms of services, which would have the same effect as not competing at all. The Commission previously found that the “existing antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality.”²¹ Where “a proposed merger would result in a significant increase in concentration in an already concentrated market, parties advocating the merger will be required to demonstrate that claimed efficiencies are particularly large, cognizable, and nonspeculative.”²² The applicants have failed to meet this burden.

IV. THE PROPOSED MERGER WILL REDUCE COMPETITION IN THE MARKET FOR BROADBAND SERVICES.

²¹ *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation), Transferee*, Hearing Designation Order, 17 FCC Rcd at 20605 at ¶ 103 (“*DirectTV-EchoStar Order*”).

²² *Id.*

The Commission must analyze the merger's effect on both *actual* and *potential* competition.²³ With respect to the merger's effect on actual competition in broadband transmission markets, the applicants have claimed that "AT&T has only a limited number of DSL customers, and is not a significant competitor outside of its 13 state region."²⁴ Yet the applicants say nothing about the merger's effect on *potential* competition in the market for retail and wholesale broadband services. That omission renders the application facially deficient and requires its denial. The applicants' failure even to mention the possibility that they would compete in the broadband transmission market absent the merger is particularly glaring in light of the fact that AT&T earlier told the Commission that the SBC/AT&T merger would "produce a flagship U.S. carrier that will offer the most efficient, highest quality capabilities to government, business, and residential customers nationwide."²⁵ Especially given its promise to compete out of region, AT&T's failure to provide any analysis of the effect of this merger on potential competition is fatal.

²³ See *In the Matter of Applications of Nextel Communications Inc. and Sprint Corporation For Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd. 13967, ¶ 22 (2005) (*Sprint/Nextel Order*). See also *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 23 (2002) ("*Bell Atlantic/GTE Order*").

²⁴ Public Interest Statement at 106.

²⁵ AT&T/SBC Public Interest Statement, Executive Summary at p.iv (Feb. 21, 2005).

Today, according to the national data compiled by the Commission, over 95% of broadband connections are provided either by an incumbent local exchange company or by the cable company.²⁶ Not every community, however, even has these two broadband choices. Therefore, the broadband market today is, at best, a duopoly. Broadband transmission—especially last-mile broadband transmission capacity—is a necessary input for all competitive mass market communications carriers. Because that transmission capacity is generally available today under duopoly conditions, the merger of two potential broadband network provider competitors raises serious concerns about the level of broadband competition that would remain post-merger.

a. The Proposed Merger Will Eliminate a Potential Broadband Transmission Competitor in BellSouth and AT&T Territory.

Even if one accepted for the sake of argument the applicants' claim that they are not actual competitors, the proposed merger would still substantially harm competition. This is so because the merger will remove the single most likely potential entrant into the broadband transmission market in BellSouth territory—AT&T. As is discussed further below, AT&T is the most likely entrant into the wholesale and retail broadband transmission markets in BellSouth territory (Verizon is the only other). If

²⁶ See *High Speed Services for Internet Access: Status as of June 30, 2005*, at pp. 2-3, Wireline Competition Bureau (April 2006) (Of total high-speed lines, 55.8% were cable and 39.8% were DSL, with ILECs controlling 96.2% of DSL lines).

the Commission were to find that AT&T is not likely to compete out of region, that would amount to a Commission finding that the current broadband duopoly is a persistent structural characteristic of the nation's telecommunications infrastructure. That, in turn, would require a fundamental re-evaluation of the Commission's recent rulings on broadband UNEs, special access pricing, and common carrier regulation of DSL. If, on the other hand, the Commission finds that AT&T is one of very few potential entrants into the highly concentrated broadband transmission market, then it must either deny the merger or adopt conditions that replace the foreclosed competition by requiring the merged company to sell transmission on demand at reasonable and nondiscriminatory rates, and on reasonable and nondiscriminatory terms and conditions.

The Commission has discussed the role of potential competition in previous Baby Bell/Baby Bell mergers. In the *Bell Atlantic/NYNEX Order*, for example, the Commission introduced its concept of "most significant market participants," which builds upon the antitrust theory of "actual potential competition." There, the Commission stated:

In determining the most significant market participants from the universe of actual and precluded competitors, we identify the market participants that have, or are likely to speedily gain, the greatest capabilities and incentives to compete most effectively and soonest in the relevant market. Some of these capabilities are basic to the operation of a local telephone company, relatively technical, and concern access to the necessary facilities, "know how," and operational infrastructure such as sales, marketing, customer service, billing and network

management. Other capabilities are less tangible. They include brand name recognition in the mass market, a reputation for providing high quality, reliable service, existing customer relationships, or the financial resources to obtain these intangible assets. Another factor is whether the actual or precluded competitor had plans to enter the relevant market or was engaged in such planning. Such plans would be probative evidence of a perception of possession of capabilities and incentives necessary to affect the market.²⁷

The generally prevailing duopoly structure for broadband services means that, in any given geographic market, consumers may (at best) choose between cable modem service and incumbent LEC-provided DSL for broadband transmission service. Although satellite broadband service is available nationwide, it is substantially more expensive than either cable or DSL, and it is generally unsuitable for voice. Broadband-over-powerline (BPL), wireless, and other emerging broadband technologies might eventually take meaningful market share from cable and DSL, but their very small market share today (less than 2% combined for satellite, wireless, and BPL) and their slow growth rates show that they are competitively irrelevant for the purposes of evaluating this merger. With respect to current competitors, cable and ILEC-provided DSL are the beginning and the end of the market for purposes of competition analysis.

As the Commission stated in the *Bell Atlantic/NYNEX* and *SBC/Ameritech* merger orders, the relevant analysis involves determining how many realistic, “most significant market participants” exist pre-merger,

²⁷ *Bell Atlantic/NYNEX Order* at ¶ 62.

how many will exist post-merger, and how that change will affect competition. Applying that analysis in this case is simple. Cable already participates in both AT&T and BellSouth territories, so the question of what other significant players exist in the broadband transmission marketplace turns on which of the incumbent LECs may be likely participants in those territories. The only companies with the financial capacity, network assets, geographic proximity, and brand name recognition to compete with BellSouth for the provision of broadband transmission services in its region are AT&T and Verizon. By the same token, only Verizon and BellSouth have the realistic capability to compete with AT&T with respect to those services in AT&T's historical region.²⁸

AT&T's position on the western edge of BellSouth territory makes it a likely potential entrant into the BellSouth market; multiple AT&T states border BellSouth states. This type of geographic proximity was one of the factors that led the Commission in the Bell Atlantic/NYNEX merger to conclude that the merger was likely to foreclose cross-border competition that would otherwise occur.²⁹

It is beyond argument that AT&T has the financial and technical resources to compete for broadband service customers in BellSouth territory.

²⁸ Qwest does not appear to be a likely competitor to BellSouth because of its debt position and its relatively small current plans for fiber deployment. Geographic separation also argues against Qwest as a likely competitor in BellSouth territory.

²⁹ See, e.g., *Bell Atlantic/NYNEX Order* at ¶ 69.

Indeed, if AT&T cannot effectively compete with BellSouth, then no wireline company can. The question then is whether AT&T is in fact likely to enter the broadband market in BellSouth territory if it does not acquire BellSouth.

Objective criteria support AT&T entry absent the merger. The Commission has found that with respect to “greenfield” fiber deployments (the most likely long-term broadband entry strategy) the revenue potential for services offered over fiber provides an adequate incentive for companies to build into new markets.³⁰ Combining that profit incentive with the fact that AT&T already has a nationwide long-distance customer base, a nationwide cellular customer base through Cingular, and a nationwide Tier I Internet backbone network, it appears that there are ample objective indicators that AT&T could be expected to enter BellSouth’s territory for the purpose of offering broadband transmission and the associated services that can be transmitted over a broadband network.

Subjective factors (i.e. the plans of the acquiring company pre-merger) also support the conclusion that AT&T would enter the broadband transmission market in BellSouth territory absent the merger. One of the claims of the SBC/AT&T merger was to “assemble a true *nationwide* end-to-

³⁰ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (August 21, 2003) at ¶ 274 (“*Triennial Review Order*”).

end broadband network”³¹ in order to “offer the most efficient, highest quality capabilities to government, business, and residential customers *nationwide*.”³² The applicants expressly promised that “the merger will *enhance* competition outside of SBC’s region”³³ In light of these statements, the Communications Act requires the Commission to obtain all available information about the merging companies’ out-of-region plans before it makes any determination with respect to the application. Indeed, as the Commission made clear in the *Bell Atlantic/NYNEX* order, the parties should have already presented this information to the Commission:

We wish to make clear for the future that we consider all plans, regardless of whether they have been formally adopted or backed by a commitment of resources, as potentially relevant to the analysis of market participants. Accordingly, the facts and circumstances concerning such planning should be forthrightly presented to the Commission.³⁴

To summarize, in BellSouth territory today there are two major broadband service providers – BellSouth and the cable provider in each applicable geographic market. There are also two potential entrants – AT&T and Verizon. Of the two, AT&T is more likely to enter. Therefore, post-merger, the competitive equation changes from one in which there are two

³¹ AT&T/SBC Public Interest Statement, Executive Summary at p. iii (emphasis added).

³² *Id.* at p. iv (emphasis added).

³³ *Id.* at p.v (emphasis in original).

³⁴ *Bell Atlantic/NYNEX Order* at ¶ 75.

actual competitors and two potential competitors to one in which there are two actual competitors (AT&T/BellSouth and cable) and one potential competitor (Verizon). Given the size and geographic scope of the proposed merged company, the remaining potential competitor (Verizon) would likely become a substantially less viable potential competitor in BellSouth territory post-merger than it is today. The merger thus threatens real harm to both actual and potential competition, and must be denied.

V. CONCLUSION

As demonstrated above, the proposed merger of AT&T and BellSouth would have serious anti-competitive effects. In the market for broadband services, the merger will eliminate the single most likely potential entrant in BellSouth territory. Moreover, there would be several competitive harms in the special access market. First, the proposed merger will eliminate AT&T as the primary special access service competitor to BellSouth in BellSouth Territory. Second, it will allow the combined company to discriminate against competitive wireless carriers that depend on BOC-provisioned special access services. Third, it will greatly increase the likelihood that the combined company will engage in exclusionary behavior in the market for special access services. Finally, the proposed merger will facilitate collusion between the merged company and Verizon.

The applicants have failed to adequately address any of these competitive concerns in their application, and therefore have failed to meet their burden of proving that the merger is in the public interest. Accordingly, the Communications Act requires the Commission to deny the petition.

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