

analysis for the mass market is limited to a very brief description of one of the particular services Comcast, Cox, Charter and Time Warner offer to their potential customers.¹⁹⁹ That is insufficient to satisfy the public interest requirements.

b. The Proposed Merger Would Remove One of BellSouth's Two Principal Competitors in the Business Markets

In addition to eliminating a substantial competitor to BellSouth in the mass market, the proposed merger would also eliminate a pervasive and material competitive presence in the small-to-medium-sized and enterprise business markets. Considering the enterprise market, the situation is clear: AT&T touts itself as the premier provider of enterprise services in the country, and BellSouth has been aggressively positioning itself to not only keep its enterprise customers within its region, but to become more competitive on a nationwide basis. Further, despite the Applicants' claims, AT&T and BellSouth vie head to head for small-to-medium-sized business customers as well. Contrary to what is implied in the Merger Application, competitive LECs do not account for enough competitive activity to counterbalance the proposed removal of AT&T from the business service marketplace in the BellSouth region. This, coupled with the loss of BellSouth as a nationwide competitor, will only strengthen AT&T's close-to-dominant presence in the business services marketplace, counterbalanced only by the other behemoth, Verizon. Finally, intermodal market participants – wireless, cable, and VoIP providers – as well as other companies offering telecommunications services to businesses do not and will not anytime soon qualify as significant market participants independent of BellSouth, their principal supplier of network capabilities.

¹⁹⁹ AT&T/SBC Public Interest Filing at 87-88.

(i) AT&T and BellSouth Compete Regularly With Each Other
in the Business Marketplace

In their Application, BellSouth and AT&T try to paint the picture that, within BellSouth's operating region, they rarely compete against each other for the same types of business customers.²⁰⁰ They contend that AT&T focuses on serving the largest business customers nationally and globally while BellSouth concentrates only on local and regional customers, most of them significantly smaller than AT&T's "target customers."

However, BellSouth, on repeated occasions has told a different story, to the Securities and Exchange Commission and the public at large. In its 2006 10-K, BellSouth noted that AT&T, along with MCI, was one of its two most significant local service competitors as of December 31, 2005, only three months before the merger was announced.²⁰¹ In 2005, BellSouth's 10-K made the very same point as of year end 2004,²⁰² confirming BellSouth's expectation that as a result of the AT&T/SBC and Verizon-MCI mergers "the efforts of SBC and Verizon to compete in BellSouth's service area would increase":

Since AT&T and MCI already have significant facilities in place throughout BellSouth's territory, it only makes sense that in a post-merger environment, SBC and Verizon would make use of these facilities to attempt to sell an integrated bundle of services to customers throughout BellSouth's nine-state region. In other words, they would become even more powerful competitors of BellSouth than they are now.²⁰³

²⁰⁰ *AT&T/BellSouth Merger Application* at 64-67.

²⁰¹ BellSouth Corp., Form 10-K, filed with the Securities and Exchange Commission on March 31, 2006 ("2006 BellSouth 10-K"). Found at 15 of 158.

²⁰² BellSouth Corp., Form 10-K, filed with the Securities and Exchange Commission on March 8, 2005, at 7 ("2004 BellSouth 10-K").

²⁰³ Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, BellSouth Reply Comments filed on July 29, 2005, at 42 ("BellSouth Special Access Rates Reply Comments").

In the merger Application, AT&T has emphasized its claim that it ceased to compete actively for traditional mass market customers nearly two years ago, in June 2004.²⁰⁴ AT&T describes a concurrent decision to erode its existing consumer customer base away through churn using its “harvesting” strategy.²⁰⁵ AT&T’s announcements at the time were well publicized, such that BellSouth knew when it prepared both its 2004 10-K and its 2005 10-K of AT&T’s significant de-emphasis in the consumer mass market. Thus, when BellSouth refers to AT&T as one of its prime local competitors, it unmistakably is referring to the local business market.

Moreover, the Application’s efforts to paint BellSouth as a hamstrung regional service provider, unable to meet the complex telecommunications needs of small-and medium-sized businesses is also belied by BellSouth’s SEC filings. In the 2005 BellSouth 10-K, BellSouth states that it will “*continue to expand its capabilities in order to maintain a leadership position in the broadband and data communication market.*”²⁰⁶ Critically, BellSouth’s reach is not limited to customers with needs confined to the historical BellSouth local operating territory, as the Application asserts. By year end 2004, BellSouth had complemented its in-region capabilities through an arrangement with Qwest Communication allowing it to offer “complex services...to enterprise business customers not just in our nine state region, but *throughout the United States.*”²⁰⁷ To bolster its presence in the national enterprise space, BellSouth noted that it intended to pursue additional similar relationships.²⁰⁸ Indeed, in its 2005 10-K, BellSouth reported that it had added an arrangement with Sprint Nextel Corporation to enhance its abilities

²⁰⁴ *AT&T/BellSouth Merger Application* at 84.

²⁰⁵ *Id.*

²⁰⁶ 2005 BellSouth 10-K at 11 of 158.

²⁰⁷ 2004 BellSouth 10-K at 5 (emphasis added).

²⁰⁸ *Id.*

“to meet the needs of sophisticated business purchases of long distance services.”²⁰⁹

Accordingly, just as it is clear that AT&T competes within BellSouth’s region, it is equally clear that BellSouth has not been stagnant, but has been working to improve its position as a competitor for more sophisticated business customers with needs both inside its region *and nationally*. The merger, if approved, would eliminate AT&T as a competitor within the BellSouth region, and would likewise eliminate BellSouth as an increasingly significant competitor to AT&T in the national enterprise space.

When SBC acquired AT&T a year ago, it made plain its intentions to compete for all levels of business customers outside the SBC region against other incumbent LECs, such as BellSouth. SBC emphasized to the Commission in its opposition to the various petitions to deny its merger that “[t]he very purpose of this transaction would be thwarted if the combined company were to limit its focus to SBC’s region.”²¹⁰ And while SBC explained that it was acquiring AT&T “to become a major provider of communications services to national and global business enterprise customers with sophisticated needs,”²¹¹ it also emphasized that

[w]ere it SBC’s intent to forbear from competing for customers beyond [the SBC region], it would not be seeking to acquire AT&T, whose primary assets are its national and international customer base and the network assets needed to serve them – including in Verizon’s regions. *Large and small customers alike located outside SBC’s region constitute profitable customer segments, and SBC will aggressively pursue them. Indeed, customers expect the merger to have precisely this result.*²¹²

²⁰⁹ 2005 BellSouth 10-K at 11 of 158.

²¹⁰ *Joint Opposition of SBC Communications and AT&T Corp. to Petitions to Deny and Reply to Comments*, WC Docket No. 05-65, filed May 10, 2005, at 134. (“*SBC/AT&T Opposition*”).

²¹¹ *Id.*

²¹² *Id.* 135 (emphasis supplied).

SBC touted its national-local strategy, which included 30 out-of-region MSAs in which it provided national and local business services, including nine markets within the BellSouth region.²¹³ SBC noted that it had at least 10 collocations in incumbent LEC central offices in each of these MSAs, and that the strategy “has brought SBC into direct competition with the wireline operations of other incumbent LECs.”²¹⁴ SBC and AT&T claimed that “the SBC/AT&T merger will intensify this out of region competition”²¹⁵ In short, only a year ago, AT&T and SBC had plans to compete out of region for large *and small* businesses and used this as partial justification for the largest merger this Commission has ever seen. Now, in proposing another monumental merger, this time principally RBOC-to-RBOC, they want the Commission to forget the recent past and assume that BellSouth and AT&T are competitive ships passing in the night. Further belying AT&T’s claims that it bypasses the small and medium business market is its reported results for the first quarter 2006:

AT&T’s best growth over the past five quarters in regional small/medium business revenues, up 7.0 percent, driven by strength in transport and IP-based data services.²¹⁶

As noted above, BellSouth identified AT&T as one of its significant market competitors. Its loss as a market participant as a result of the proposed merger will not be offset by competitive LECs. Indeed, in discussing its competition in its 2005 10-K, BellSouth does not mention any competitive LEC as a significant competitor, or even the competitive LECs as a

²¹³ *SBC/Ameritech Merger Order*, ¶ 276. Miami-Ft. Lauderdale, Atlanta, Tampa-St. Petersburg, Orlando, Nashville-Davidson, Memphis, Greensboro-Winston Salem, Louisville, Birmingham.

²¹⁴ *SBC/AT&T Opposition* at 136.

²¹⁵ *Id.* 138.

²¹⁶ AT&T Corporate Press Release, *AT&T Delivers Strong First-Quarter Earnings Growth, With Progress in Wireless, Broadband and Business Services*, dated April 25, 2006, at <http://www.sbc.com/gen/press-room?pid=4800&cdun=news&newsarticleid=22238>.

group. In an April 2006 Yankee Group report, looking at the competitive LEC space before AT&T merged with SBC, AT&T was by far the largest competitive LEC serving the small to medium-sized business market with over a 22% business share.²¹⁷ This was more than twice the size of any other competitive LEC competitor, making clear the fragmented nature of the remainder of the competitive LEC participants.²¹⁸ Moreover, AT&T's competitive presence in the business marketplace in the BellSouth region is a product of multiple factors, not just its current market share or where it has laid fiber. Its extensive deployment of fiber in numerous cities in BellSouth territory makes it a potentially formidable competitor even in cities where it has not laid fiber due to its unparalleled branding, name recognition, marketing and customer service capabilities, and access to capital.²¹⁹ AT&T's market presence in any metropolitan area is defined by its collection of all local assets in that market, including wholesale agreements with the incumbent LEC and other vendors, rights-of-way and building access agreements, as well as the customers contractually locked to its facilities and assets.

Tellingly, the Yankee Group describes competitive LEC efforts over the last three years in gaining market shares as "mixed" with a material decline in the medium-sized business market in 2005 as compared to 2003.²²⁰ Thus, one can hardly expect any competitive LEC to replace a competitor the size of AT&T in the BellSouth region. The reality is that the most significant competitive presence will be lost in the business market – one that cannot be measured simply by market share or where it has established facilities. The anticompetitive consequences of this

²¹⁷ Yankee Group, "How Do SMB's Fare in the competitive LEC Versus incumbent LEC Match-up?", April 2006 at 4, Exhibit 3.

²¹⁸ *Id.* 3.

²¹⁹ *See* Section IV, *supra*, for a further discussion.

²²⁰ *Id.* 1.

development cannot be overlooked and should not be countenanced, especially where competitive LEC performance, as a whole, is already a cause for concern.

c. Intermodal Competitors Do Not Qualify as Significant Participants in Business Markets

The proposed merger eliminates a significant competitor of BellSouth in the business marketplace, which competitive LECs are incapable of replacing anytime soon. Intermodal competitors such as wireless, cable, or VoIP are even less likely to offset the loss of AT&T as a competitor to BellSouth.

While wireless service is now reported to account for approximately 10% of access lines,²²¹ this is almost all attributed to mass market residential growth.²²² At this time, wireless services simply do not offer the quality of service required to meet the increasingly complex needs of even small to medium-sized business services, let alone large enterprise customers. Further, the services that intermodal competitors do provide rely heavily upon the network functionalities of incumbent LECs such as BellSouth. Thus, these competitors are significantly constrained by the prices they can obtain from BellSouth for inputs such as interoffice and other dedicated transport.²²³ Finally, the proposed merger would essentially eliminate Cingular, the most significant of the wireless “competitors” from the marketplace, by making it fully part of the merged entity.²²⁴ The bottom line is that, at most, for the foreseeable future, wireless service may serve only as a complement to the more critical wireline services.

²²¹ See *AT&T/BellSouth Public Interest Filing* at 91-92, 113.

²²² See discussion *supra* at III. A. 3. a. regarding the fact that wireless is not a true source of competition for wireline services even in the mass market.

²²³ In the *Triennial Review Remand Order*, the Commission noted that wireless providers do not offer a viable mode of transmission to support business customers. *TRRO*, ¶ 193, n.508.

²²⁴ See *infra* at 77-78.

Similarly, cable service providers do not, at this point, occupy a meaningful position in the business marketplace. In the *Triennial Review Remand Order*, the Commission stated that cable transmission facilities are not used to serve business customers to any significant degree.²²⁵ Since that time, it may be that some cable service providers have begun to make modest inroads with very small and small commercial businesses, but it is difficult to anticipate, and speculative at best, the degree to which they will be successful. Indeed, the Applicants are able only to claim that competition from cable providers for small and medium-sized businesses may become prevalent only toward the end of the decade.²²⁶ Underscoring the fact that cable is not yet a competitive presence for the business space at any level is that first quarter 2006 results for the wireline industry (including cable) reported by UBS focus solely on results among residential consumers when reporting on the cable industry.²²⁷ Thus, suggestions that cable service providers provide significant intermodal competition in the business markets currently remain more fantasy than reality.

Finally, VoIP is not yet a substitute for wireline business services. Most VoIP services that are much touted in the marketplace, such as Vonage, ride incumbent LEC facilities and do not qualify as an independent source of competition. Like wireless services, VoIP services to business customers are either limited to very small businesses²²⁸ or are merely complementary to incumbent LEC services in nature. Indeed, in light of the unfavorable results of Vonage's recent

²²⁵ *TRRO*, ¶ 193.

²²⁶ *AT&T/BellSouth Merger Application* at 81. As discussed *infra*, at Section IV.C., potential competition is not to be considered if it will not be established within a two-year time frame

²²⁷ UBS Investment Research, *Wireline Postgame Analysis 14.0, Recap of First Quarter 2006 Results*, May 18, 2006, at 6, 33 and 37.

²²⁸ *See, e.g.*, examples in *AT&T/BellSouth Merger Application* 81-82.

initial public stock offering, it is questionable whether over-the-top VoIP providers, such as Vonage, have a significant future in the mass market space.²²⁹ While a number of competitive LECs and incumbent LECs, are beginning to integrate VoIP into their overall package of business services, these facilities based offerings are typically part of a larger service bundle demanded by business customers that stand alone VoIP providers simply cannot match, and do not represent intermodal competition in any meaningful sense. Moreover, integration of such IP-enabled capabilities with a larger suite of business services is needed to meet the complex and diverse needs of an increasing number of small and medium-sized in addition to enterprise business customers and ensure that they receive the quality of service they need.

d. The Variety of Other Providers Described in the Application Does Not Quell the Concerns Created by the Proposed Loss of AT&T

The Applicants cite, in addition to wireless, cable, and VoIP providers, to a wide variety of other firms purportedly competing to serve business customers, including systems integrators, equipment manufacturers, value-added resellers and data/IP network providers, just as they attempted to do in the AT&T SBC merger.²³⁰ But all of these types of firms would become victims of BellSouth's increased power to raise rivals' costs were AT&T removed from the retail business marketplace and, commensurately, as discussed in the next section, were control over AT&T's local transmission capacity consolidated with BellSouth's facilities. An increased number of resellers in a market, while not unwelcome, does not reduce the extent to which each and every one of them is vulnerable to anticompetitive conduct by the firm that controls upstream inputs.

²²⁹ See discussion *supra* at 48-51.

²³⁰ See *AT&T/BellSouth Merger Application* at 74-76, 78-80.

The fact that businesses purchasing telecommunications service are highly heterogeneous is also of little consequence. The Applicants suggest that, because business customers, both small and large, “tend to be highly sophisticated purchasers of communications services” and tend to make choices “based on expert advice,” that a competitive market will be the inevitable result.²³¹ Regardless of the sophistication of customers and the differences in applications they demand, where all such services must ride over the same underlying transmission facilities, dominance over those transmission facilities by one entity yields that party control over the market and harm to consumers.

IV. THE MERGER WOULD ELIMINATE THE MOST SIGNIFICANT COMPETITIVE PRESENCE IN THE WHOLESALE ACCESS MARKET

The proposed merger is likely to affect the business markets in a separate but equally deleterious way as its direct impact on retail business services. In last year’s AT&T/SBC merger, the Commission ruled that the withdrawal of AT&T as a competitor to a regional Bell company’s special access services would likely have anticompetitive effect on the Type I special access services marketplace within that Bell company’s territory.²³² Notably, BellSouth stated ten months ago, while the AT&T/SBC merger was under review, that, “if the Commission is inclined to consider the possible effects of the [AT&T/SBC and Verizon/MCI] mergers on the special access market, then it should be aware that if the mergers have any effect in *BellSouth’s region*, that effect will be to *increase* competition.”²³³ The pro-competitive effect last year’s mergers may have had on the wholesale markets in BellSouth’s region by strengthening AT&T’s already significant presence is now likely to be lost if AT&T is allowed to swallow BellSouth.

²³¹ *Id.* 63.

²³² *AT&T/SBC Merger Order*, at 32.

²³³ BellSouth Special Access Rates Reply Comments at 42 (emphases added).

A. A Robust Wholesale Market is a Necessary Component to Competitive Retail Markets

The wholesale transmission inputs needed to serve business customers are a critical part of this country's telecommunications infrastructure. Local transmission inputs – both loops and transport – have long been recognized as “a distinct and essential ingredient for providing” service to all types of business end-users.²³⁴ Competitive provision of these inputs is a vital factor in determining the extent to which competitive LECs are able to compete for large and small business, as well as mass market, customers. The consequences of increased concentration in local transmission facilities for competition in downstream service markets are well understood. A competitor in downstream markets that also holds market power over upstream inputs needed to provide the downstream services has powerful incentives to raise rivals' costs.²³⁵ Unfortunately, as the Commission has held on multiple occasions, with few exceptions,

²³⁴ *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18041, ¶ 28 (1998) (“*MCI/WorldCom Merger Order*”). The Commission has found that, once a carrier has deployed a fiber facility, “that carrier can then add electronics to channelize or otherwise serve smaller capacity services using existing facilities.” TRRO, ¶86.

²³⁵ *See SBC/Ameritech Merger Order*, ¶ 107 (“In addition, incumbent LECs, which are both competitors and suppliers to new entrants, have strong economic incentive, to preserve their traditional monopolies over local telephone service and to resist the introduction of competition that is required by the 1996 Act. More specifically, an incumbent LEC has an incentive to: (1) delay interconnection negotiations and resolution of interconnection disputes; (2) limit both the methods and points of interconnection and the facilities and services to which entrants are provided access; (3) raise entrants' costs by charging high prices for interconnection, network elements and services, and by delaying the provisioning of, and degrading the quality of, the interconnection, services, and elements it provides. An incumbent LEC has similar, and probably greater, incentive to deny special accommodations required by competitive LECs seeking to offer innovative advanced services that the incumbent may not even offer. As noted at the outset, this view of the incumbent LECs' incentives and abilities is the fundamental postulate of the basic cornerstones of modern telecommunications law – the MFJ and the 1996 Act.”) *GTE/Bell Atlantic Merger Order*, ¶ 188 (“given their monopoly control over exchange access services, each Applicant currently has the ability to discriminate against rivals

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there is a shortage of competitively provided loop and local transport facilities necessary to provide telecommunications and information services to retail customers. By expanding its share of scarce local transmission capacity under its control as a consequence of the proposed merger, BellSouth's incentive to engage in anticompetitive behavior to the disadvantage of its downstream competitors would increase. Such an outcome would be blatantly antithetical to the pro-competition policies embodied in the Act in general and the 1996 Act in particular.

Thus, in reviewing the Application, the Commission must focus on how the proposed merger would constrict the already limited availability of competitive local transmission facilities used by competitive LECs and others to serve business and other retail customers. By examining the competitive harm caused by the merger on wholesale inputs in each of the relevant markets, the Commission will see even more clearly the harms in the downstream retail markets discussed in the previous section.²³⁶ Further, when examining the effect of a proposed merger on the availability of inputs, it is appropriate to focus on the capacity of available inputs, rather than the number of customers served by such facilities.²³⁷

providing interexchange services, in favor of its own interexchange operations, by denying, degrading, or delaying access on the originating and terminating ends.”); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756, ¶ 111 (1997) (“there are various ways in which a BOC could attempt to discriminate against unaffiliated interLATA carriers, such as through poorer quality interconnection arrangements or unnecessary delays in satisfying its competitors’ requests to connect to the BOC’s network.”) (footnote omitted).

²³⁶ See *MCI/WorldCom Merger Order*, ¶¶ 27-28 (the analysis is the same – that the “competitive analysis would be logically equivalent” – regardless of whether the transmission inputs are treated as a distinct product market or the focus is on the effect on the downstream retail markets of increased concentration in the provision of inputs).

²³⁷ See *id.* ¶¶ 43-50.

B. AT&T has the Most Pervasive Facilities-Based Presence of any Rival to BellSouth and the Greatest Capacity to Compete

BellSouth and AT&T are among a small cadre of carriers that control the vast majority of the local transmission capacity upon which this country's commerce depends. National figures regarding market concentration provide a helpful indication that the level of concentration is already dangerously high. For example, the record in the Triennial Review proceeding showed that only "3% to 5% of the nation's commercial office buildings are served by competitor-owned fiber loops,"²³⁸ indicating that an incumbent such as BellSouth controls the vast majority of the loop facilities needed to serve business customers in its region.²³⁹ Nothing offered by the Applicants refutes this. Accordingly, it is BellSouth who is overwhelmingly the dominant market leader in its region, making the competitive provision of transmission capacity a critical check on BellSouth's practices and prices.

AT&T is more ubiquitously present on a facilities basis than any other non-incumbent LEC in BellSouth's region. Although, in the Application, AT&T tries to downplay its presence by claiming that it has fiber in only 11 metropolitan areas in BellSouth's territory,²⁴⁰ information submitted last year BellSouth in the Commission's *Special Access* proceeding, WC Docket No. 05-25, tells a different tale. There, BellSouth reported that AT&T had lit buildings in each of the top 20 MSAs in the BellSouth region.²⁴¹ Only two other LECs, LOAC and Sprint, had facilities

²³⁸ *TRO*, ¶ 298, n. 856.

²³⁹ Moreover, as noted above, the Commission has held that cable transmission facilities are not used to serve business customers to any significant degree (*TRRO*, ¶ 193) and that neither fixed wireless or satellite do not offer a viable mode of local transmission for business customers (*Id.* ¶ 156, n.508).

²⁴⁰ AT&T/BellSouth Merger Application at 55.

²⁴¹ *Reply Declaration of Stephanie Boyles, Managing Director, Service Provider Advisory Services, RHK, Inc., Att. 2, Ex. A at 30, attached to BellSouth Reply Comments, WC Docket No. 05-25, filed July 29, 2005.* Notably, BellSouth reported that AT&T had

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in each of the top 20. However, BellSouth reported that LOAC and Sprint had only about 23% and 20% as many lit buildings as AT&T, respectively.²⁴² No other competitor had lit buildings in more than 15 of the top 20 MSAs, and most were in substantially fewer markets. The former MCI, for example, has a far smaller presence than AT&T. Only a year ago, BellSouth reported that, in the top 20 MSAs within its operating territory, the former MCI only had more lit buildings than AT&T in the Atlanta (101 versus 80), Jackson (9 versus 7), and Knoxville (12 versus 8) markets, whereas AT&T had more lit buildings in the remainder, including materially more in Miami-Ft. Lauderdale (59 versus 14), Jacksonville (28 versus 2), Raleigh (20 versus 4), and Greenville (10 versus none), to name several examples.²⁴³

Outside these top 20 markets, AT&T also had the most pervasive facilities-based presence in terms of lit buildings in BellSouth territory. BellSouth's data showed that AT&T had not only the most lit buildings among competitive LECs region wide (145 to 85 for its next closest competitor), but that AT&T was the clear competitive leader in six states, second in another, and fourth in another (where it had more than 75% the number of lit buildings as the leader).²⁴⁴ Thus, AT&T's efforts to suggest that it has only a minor facilities-based presence in

fewer than 250 lit buildings in the 11 markets where AT&T now claims it has a facilities-based presence. AT&T states in the AT&T/BellSouth Merger Application that it has approximately 330 lit buildings in those 11 markets, suggesting either that its presence has grown about 30% in the 10 months since BellSouth submitted its data, or that BellSouth's data understated AT&T's already substantial competitive presence. While the Applicants focus on the fact that AT&T has facilities to fewer buildings than it did in the earlier SBC-AT&T merger, the BellSouth region is considerably smaller than the former SBC region, which was an amalgamation of three of former seven Bell Sisters with some of the largest urban markets in the country, so the gross numbers are apt to be much smaller.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* 31.

BellSouth's territory is sharply contradicted by the data its merger partner assembled less than a year ago.

As a result of its extensive presence in BellSouth's territory and other factors that cannot be measured solely by the number of fiber miles it has or lit buildings, AT&T is more capable than any other competitor to challenge BellSouth in the wholesale markets within BellSouth territory. Significantly, the competitive success of a carrier in a particular geographic market is not merely the product of its network in that metropolitan area, but is determined by a variety of factors, including its network facilities in other cities and nationally as well as its unrivaled ability to negotiate discounts from BellSouth for transmission services due to its size and scope. Even where AT&T does not make its local transmission facilities available at wholesale in BellSouth's territory, it must be considered one of the few potential entrants into the wholesale market.²⁴⁵ The elimination of one of the largest non-incumbent LEC wholesalers (or potential wholesalers) of local transmission capacity in the SBC region raises obvious risks of harm to consumer welfare that must be carefully examined. For the reasons given above, AT&T is in an unparalleled position among potential and actual competitive wholesale carriers to offer wholesale transmission services because of its more pervasive facilities-based presence within the BellSouth territory, as well as through AT&T's own vast local territory, and there is no doubt

²⁴⁵ Indeed, SBC, prior to its merger with AT&T, strongly implied that the availability of UNEs at TELRIC-based prices prevents competitors that have deployed their own facilities from making those facilities available at wholesale. *See, e.g., SBC Reply Comments*, CC Docket No. 01-338 *et al.* (filed Apr. 5, 2002) at 36-37 ("the Commission should avoid an excessive unbundling regime that undermines (and devalues) the investments made by facilities-based competitors. By making UNEs both ubiquitous and cheap, the Commission effectively 'wrote down' the value of these investments, subjecting them to competition from carriers that had built nothing of their own.") If this is correct, one would expect AT&T to increase the extent to which it makes local transmission facilities available at wholesale in BellSouth's territory.

that AT&T has more ability to negotiate discounts than any other carrier. In short, AT&T has an ability to offer wholesale services that is matched only by BellSouth.

Even on those transport routes and at buildings where BellSouth currently holds a monopoly over local transmission, the proposed merger raises serious concerns. BellSouth and other incumbent LECs have argued repeatedly that they make special access inputs available at discounted rates to competitors willing to make large volume and term commitments.²⁴⁶ Given the enormous volume of special access that AT&T apparently purchases (perhaps an indirect result of the fact that its scale economies make it a more credible threat than other competitive LECs to construct transmission facilities where special access rates are too high), AT&T would be likely to enjoy a steeper discount off of the monthly tariffed special access rates than any other competitor. Other competitors simply would be unable to obtain the level of discounts AT&T likely receives today off BellSouth's month-to-month tariffed prices. As a result, unlike AT&T, other competitive LECs would be less likely to resell the tariffed services and pose as significant a competitive threat as AT&T. If this is so, the elimination of AT&T as a reseller of BellSouth local transmission inputs would itself likely seriously harm competition in the provision of local transmission wholesale inputs.²⁴⁷

²⁴⁶ See, e.g., *BellSouth Reply Comments*, WC Docket No. 04-313 and CC Docket No. 01-338, at 48-50, Oct. 19, 2004; *id. Reply Affidavit of Nancy Starcher*, ¶¶ 4-16 (tariff and contract tariff discounts based on term, volume, product, and/or revenue commitments); *SBC Reply Comments*, WC Docket No. 04-313 *et al.* at 46-48. SBC notes that the largest discounts are "tied to historical volumes of special access use." *Id.* 48.

²⁴⁷ Further, both BellSouth and AT&T own considerable swaths of unused wireless spectrum that could be used to provide broadband services to compete with each other, as well as with their existing carrier rivals. CNET News.Com, Mark Del Bianco, "Perspective: Bumps in the road for AT&T merger?" http://news.com.com/Is+the+AT38T-BellSouth+merger+in+trouble/2010-1037_3-6057214. Allowing the proposed merger entity will not only eliminate AT&T, a principal competitor in the wholesale wireline

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C. Remaining Competitive LECs, Post-Merger, are Highly Unlikely to Fill the Gap Left by AT&T's Departure

The competitive capacity removed from markets in BellSouth's territory through the merger of AT&T with BellSouth would unlikely be replaced any time soon because the entry barriers to deploying local fiber and other facilities remain extremely high. Consequently, if the merger is allowed, BellSouth's already predominant position as a wholesale supplier of transmission facilities will be significantly and unacceptably strengthened in those atypical areas and in those buildings where competition exists and AT&T functions as one of the actual or potential suppliers of wholesale transmission inputs.

The Applicants contend that where AT&T does have local network facilities, there are already numerous competitive LECs that can step in to take AT&T's place.²⁴⁸ They also contend that, in those buildings where AT&T serves customers today, AT&T does not provide wholesale special access services, that other competitive LECs are present, or that other competitive LEC's fiber is close to such buildings.²⁴⁹ In short, the Applicants claim that the loss of AT&T as an actual or potential provider of wholesale special access services in the BellSouth region will not have a material impact on the availability of wholesale transmission inputs for BellSouth's competitors. There are many flaws with these arguments.

First, these two possible indicia for entry cannot carry any weight in an anticompetitive analysis context because all they indicate are the *current* presence of competitive providers on *select* routes only – not the timing, likelihood, and sufficiency of construction of new plant throughout a market to replicate the competitive presence of AT&T. The speed with which any

transport marketplace, but a potentially significant competitor offering an alternative delivery technology.

²⁴⁸ *AT&T/BellSouth Merger Application*, Declaration of Carlton and Snider, ¶¶ 103-106.

²⁴⁹ *Id.* ¶¶ 107-112.

replacement of AT&T's competitive presence occurs is significant. Specifically, the *Horizontal Merger Guidelines* set forth the methodology used by the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") to conduct the required economic and legal analysis of the competitive effects of proposed mergers. Of central concern in such analysis is ability of a firm or group of firms to exercise "market power" after the consummation of a merger, and the *Horizontal Merger Guidelines* discuss the circumstances in which entry might defeat the exercise of market power. The *Horizontal Merger Guidelines* explain that entry which can defeat a conclusion of anticompetitive effects must be "easy," meaning that it is

timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern. In markets where entry is that easy (i.e., where entry passes these tests of timeliness, likelihood, and sufficiency), the merger raises no antitrust concern and ordinarily requires no further analysis.²⁵⁰

The *Horizontal Merger Guidelines* make clear that entry is timely if "achieved within two years from initial planning to significant market impact." According to the *Horizontal Merger Guidelines*, entry that takes longer cannot deter or counteract the anticompetitive exercise of market power. Moreover, the *Horizontal Merger Guidelines* note that entry must be "committed," which is defined as "new competition that requires expenditure of significant sunk costs of entry and exit." Thus, it is critical for the Commission to determine with precision the timing, likelihood and sufficiency of post-merger entry. Vague generalities will not suffice, which are all that the Applicants have had to offer. Even if the Commission believes that, over a much longer term, entry will recreate pre-merger conditions, entry that replicates pre-merger conditions, such entry is considered insufficient to alleviate harms to customers.

²⁵⁰ *Horizontal Merger Guidelines*, § 3.0 (emphasis added).

The stark reality is that no competitive provider constructs infrastructure today using a “build it and they will come” strategy. That approach was essentially abandoned during the industry crash downturn six years ago. Today, capital expenditures are all “success-based.” Competitive providers first get the customer, then build where the volumes are sufficient to overcome the enormous entry barriers. Local telecommunications providers – those that have survived the last six years – and their investors have just lived through a gold rush that wiped out many companies and wasted many hundreds of billions of dollars. The period of expansion that commenced in the years following the passage of the 1996 Act will *not* be repeated, certainly not on the scale to offset the marriage of AT&T and BellSouth.

Second, all providers build based on price signals in the market. AT&T and others have already placed in the record in other Commission proceedings the fact that AT&T’s special access rates produce supranormal profits and that these rates are increasing. Similarly, as Uri and Zimmerman (2004) have documented in their extensive and detailed empirical analysis, incumbent LEC special access rates have increased substantially since they were deregulated.²⁵¹ If entry were indeed as easy as is asserted by the Applicants, incumbent LEC price increases would have been eliminated by competitive LEC entry into local wholesale access markets some time ago, but this has not happened.

Third, costs of construction for competitive LECs along new routes remains very high. As the Commission noted in its *Triennial Review* proceedings, competitors seeking to construct local transmission facilities face “steep economic barriers.”²⁵² For example, not only are most of

²⁵¹ Noel Uri and Paul Zimmerman (2004), “Market Power and the Deregulation of Special Access Service by the Federal Communications Commission,” *Information & Communications Technology Law*, vol. 13, no. 2, at 129-173.

²⁵² *TRO*, ¶ 199.

the costs of building loops sunk costs, but the largest portion of such costs “results from deploying the physical fiber infrastructure into the underground conduit to a particular location.”²⁵³ Similarly, construction of network transport facilities is also characterized by extremely high entry barriers.²⁵⁴

AT&T’s own submissions and presentations to the Commission in the Triennial Review proceedings demonstrated that facilities-based entry or expansion of facilities by competitive LECs will not be timely, likely, or sufficient because the prohibitive costs of such entry or expansion.²⁵⁵ As generally recognized, high costs, in particular high fixed costs, considerably reduce the ease and timeliness of entry and expansion. AT&T’s submissions and presentations to the Commission on the eve of being swept up in the recent mega-merger frenzy highlight the high fixed costs of entry and expansion, as well as the cost advantages enjoyed by incumbent LECs:

²⁵³ *Id.* ¶ 205; *see also TRRO*, ¶ 150. Entities seeking to deploy fiber loops must overcome the “inability to obtain reasonable and timely access to the customer’s premises both in laying the fiber to the location and getting it into the building thereafter, as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop facilities.” *TRO*, ¶ 312.

²⁵⁴ *See TRRO*, ¶¶ 74-77.

²⁵⁵ “AT&T Presentation to the FCC Comparing incumbent LEC and competitive LEC Network Architectures” (“AT&T Presentation”), October 3, 2002, filed in CC Docket 01-338. “Transport UNEs Are a Prerequisite for the Development of Facilities-Based Local Competition” (“Transport UNEs”), AT&T Presentation, October 7, 2002, filed in CC Docket 01-338. “Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Ms. Marlene Dortch, Secretary, Federal Communications Commission” (“Marsh Letter”), November 25, 2002, filed in CC Dockets 01-338, 96-98 and 98-147. “Reply Declaration of Anthony Fea on Behalf of AT&T Corp.” (“Fea Declaration”), October 18, 2004, filed in WC Docket 04-313 and CC Docket 01-338. It should be noted that MCI made similar filings in the Triennial Review proceedings. *See, for instance*, MCI’s Comments and Reply Comments in WC Docket No. 04-313, October 4, 2004 and October 19, 2004.

AT&T explained that facility construction remain very high – generally \$125,000 per mile, and often multiples of that cost, especially in dense commercial areas of large cities.²⁵⁶

Moreover, AT&T's submissions and presentation indicate that a majority of the costs associated with entry or expansion into local access markets is fixed. Indeed, nearly two-thirds of interoffice transport costs are fixed.²⁵⁷ More broadly, at every point of demand aggregation, the majority of the costs are fixed for a relatively large demand set.²⁵⁸ Specifically discussing this issue with regard to investment in both local loops and interoffice transport, Professor Willig also noted that this disincentive against entry is likely to be magnified, since sunk costs are often largely fixed as well.²⁵⁹

²⁵⁶ *Id.* 5.

²⁵⁷ Marsh Letter at 2.

²⁵⁸ AT&T Presentation. In a previous proceeding, AT&T's own economic witness stressed to the Commission the fact that the requirement of large fixed or sunk costs makes new entry risky and unlikely. As explained by Professor Robert D. Willig in 2002 in the FCC's inquiry into incumbent LEC unbundling obligations:

where entry involves sunk costs, it is rational for the incumbent to respond to new entry by pricing all the way down to its short run marginal cost, which (because of the existence of sunk costs) is likely below the incumbent's (and the entrant's) average cost. The rational prospect that the incumbent will do this makes it less likely that an entrant can be profitable, and its entry will thus be deterred. This is particularly true where the incumbent serves virtually the entire market and the new entrant must convince substantial numbers of customers to switch from the incumbent in order to achieve economic viability. Robert D. Willig, Determining "Impairment" Using the Horizontal Merger Guidelines Entry Analysis, attached to Ex Parte Letter from C. Frederick Beckner, III, Sidley Austin Brown & Wood LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Dkt No. 01-338 (FCC Nov. 14, 2002), at 3-4 ("Willig White Paper").

²⁵⁹ See Willig White Paper at 4, 13. Professor Willig explained further: "Where scale economies exist, in order for an entrant to achieve a cost structure comparable to the incumbent, the entrant must deploy substantial capacity. But entry on such a massive scale will flood the market with excess capacity, making it unlikely that the entrant will be able to sell services at a price that will allow it to recover its sunk investment.

... *Cont'd*

Not only does the high cost serve as an entry barrier, but combined with the advantages of the entrenched incumbent, the impact of large capital expenditures is sharpened: “severe short run asymmetries between the incumbent and a competitor that make it very difficult, if not impossible in many instances, for new entrant competitive carriers to deploy bypass transmission facilities.”²⁶⁰ For example, AT&T’s expert noted that “the incremental cost of the transport route capacity . . . is \$1.85 million for the new entrant, compared to \$40,000 for the incumbent – a 46-fold advantage.”²⁶¹ AT&T also observed that incumbents enjoyed a marked advantage in constructing loops:

[T]he new entrant’s cost of constructing a loop to serve a new customer in a new building is easily in the range of \$91,000 compared to the incumbent’s zero incremental investment (in most cases) or an investment less than half that of competitor’s in the minority of cases where additional lines might be required.²⁶²

Fourth, AT&T’s departure from the market as a competitor does not mean that AT&T’s pre-merger capacity simply vanished from the overall market environment. To the contrary, the excess capacity of AT&T post-merger will serve to deter further entry or expansion by competitive LECs to fill the void left by AT&T’s departure from local wholesale access markets. It is important to recognize that the merger as proposed to the Commission will leave in place AT&T’s substantial local network assets in BellSouth territory and BellSouth’s own local network assets all under the ownership of post-merger AT&T. Any firm contemplating entry into these markets to fill the putative gap left by AT&T must take into account the effect that

Knowing this to be the case ex ante, the entrant will be deterred from entering and sinking its costs.” *Id.* 4

²⁶⁰ *Id.* 12.

²⁶¹ *Id.* 25.

²⁶² *Id.* 20.

such capacity being in the incumbent LEC's hands likely would have on post-entry prices. The capacity held by the post-merger AT&T increases the ability of the incumbent LEC to credibly threaten an entrant with low post-entry prices, which in turn further facilitates the incumbent LEC's ability to prevent such entry and maintain high prices. AT&T's pre-1995 submissions and presentations acknowledge that incumbent LEC networks already have substantial excess capacity which can be deployed to expand existing operational capacity without the need for new construction.²⁶³ The proposed merger would expand that capacity and make the incumbent LEC even more formidable. New entrants, on the other hand, must recover incremental costs from sunk plant within the span of a typical customer contract – generally three years.²⁶⁴ This is significant because evidence before the Commission demonstrates that a competitive carrier almost never has in place all of the facilities it will need to respond to an enterprise customer's requirements.²⁶⁵ According to Professor Willig, entry requiring sizeable investment is unlikely “where the market has a low growth rate or where incumbent providers have substantial excess capacity that is sunk,”²⁶⁶ a condition that will be made worse by the proposed merger.

According to recent data published by the Commission, for example, the RBOCs had collectively deployed 43.9 million kilometers of fiber in cable throughout the United States as of December 31, 2003. This total includes both lit and dark fiber. Counting just lit fiber, the RBOCs had collectively equipped approximately 14.6 million kilometers as of year-end 2003, *implying that approximately two-thirds of the fiber in cable deployed to date by the companies is*

²⁶³ Transport UNEs at 5.

²⁶⁴ *Id.* 21.

²⁶⁵ Fea Declaration at 13.

²⁶⁶ Willig White Paper at 6.

currently dark.²⁶⁷ In other words, excess fiber capacity within the RBOCs' networks is roughly twice the capacity that the firms have equipped and lit. The combination of AT&T's in-region fiber with that of BellSouth will only exacerbate this situation to stymie competitive entry into wholesale markets.²⁶⁸

In sum, because of the presence of substantial barriers to entry in local markets, post-merger entry into these markets will not be timely, likely, or sufficient to deter or counteract the demonstrated likely anticompetitive effects of the proposed mergers.

D. The Commission Must Engage in a Thorough Analysis of AT&T's Presence in Wholesale Markets Within BellSouth Territory and of the Competitive Harms That Would Result from AT&T's Departure from Those Markets

It is clear, therefore, that the threat that the proposed merger poses to the wholesale market requires a detailed analysis of the transport routes and building connections that AT&T owns, taking into account the likelihood that other competitive LECs will not be able to step in and replace AT&T. Such an analysis must examine whether several other competitors besides AT&T have deployed transmission facilities along the specific transport routes and to the specific buildings where AT&T has built fiber in a relevant geographic area (wire center, density zone, or other). In those cases where only AT&T and BellSouth have deployed facilities to a particular building, the merged firm would obviously obtain a monopoly over local transmission serving that building. It is hard to conceive of a clearer example of competitive harm caused by a merger. Where the number of providers of transmission inputs would drop from three

²⁶⁷ Federal Communications Commission, *Statistics of Communications Common Carriers* (2003/2004 ed.), at Table 2.6.

²⁶⁸ Not only is there substantial excess capacity in local fiber networks already, but this glut is ever increasing as compression technologies increase the capacity of existing lit fiber more rapidly than network traffic grows. In such an environment, it is highly doubtful that new facilities-based entry would occur, as entrants would be loath to commit to new fiber investment in the face of a large and growing excess of capacity.

(BellSouth and one other competitor) to two as a result of the proposed merger, substantial competitive harm will result from the creation of a duopoly. This is precisely the holding of the Commission's order blocking the proposed merger of DirecTV and EchoStar.²⁶⁹ Finally, even where the number of competitors drops from four to three, significant harm is likely. The *DOJ-FTC Merger Guidelines* support this conclusion, since a market with equal market share held by three competitors is deemed highly concentrated (with an HHI of 3267).²⁷⁰

But the relevant inquiry does not end at an analysis of fiber facilities deployed by AT&T. As explained above, AT&T has a greater capacity than other competitive LECs to enter a new market or compete for customers, including wholesale customers, even where it does not already have facilities. AT&T likely obtains a steeper discount for special access local transport from BellSouth than any other competitor since it is unlikely that any other competitor purchases special access in the volumes needed to obtain such discounts. Thus, the proposed merger would remove a critical source of discounted transmission inputs that competitors cannot duplicate. The public interest harms from the loss of these discounts is enormous. If AT&T is removed from the market for wholesale transmission, wholesale prices will likely increase substantially.

²⁶⁹ Application of EchoStar Communications Corp., 17 FCC Rcd 20559, ¶275 (“EchoStar/DirecTV HDO”). (“The Applicants have failed to meet their burden of proof to show that, on balance, the proposed merger is in the public interest . . . The record before us irrefutably demonstrates that the proposed transaction would eliminate a current viable competitor from every market in the country, whether those markets are currently served by cable systems or are markets in which no cable systems exist, at best resulting in a merger to duopoly . . .”).

²⁷⁰ Horizontal Merger Guidelines § 1.51. The HHI calculation here assumes an equal market share for all competitors, including SBC, that have constructed facilities in a particular location. Given SBC's ability to raise its rivals' costs in obtaining inputs needed to compete and SBC's superior economies of scale, this is a highly conservative assumption.

To fully assess the extent of this risk, Applicants must disclose the extent of the special access discount BellSouth provides to AT&T. Specifically, information is needed on how AT&T's special access discounts compare with the discounts BellSouth offers to other carriers, and the extent to which AT&T has or has planned to share some portion of its special access discount with other carriers who cannot directly enjoy the benefits of such discounts by reselling BellSouth's special access facilities (by themselves or bundled with AT&T's facilities).

V. THE LOSS OF CINGULAR AS AN INDEPENDENT COMPETITOR WOULD MATERIALLY REDUCE COMPETITION IN BOTH RETAIL AND WHOLESALE MARKETS

The loss of AT&T as a competitor in the provision of retail mass market services and wholesale transport would be exacerbated by the elimination of Cingular Wireless as a separate business entity. Cingular is the largest wireless company in the United States with almost 55 million subscribers. It is a joint venture between BellSouth and AT&T and, currently, operates independently from either of the Applicants.²⁷¹

As discussed above, the Applicants argue that wireless services compete directly with wireline services and have obtained almost a 10% share in the retail mass market.²⁷² Were the merger to proceed, Cingular would become fully controlled by the merged entity, vesting complete control over Cingular in a single organization for the first time.²⁷³ To the extent that AT&T and BellSouth are correct that retail wireline local services exert some measure of market discipline, the proposed merger would eliminate the wireless leader, undercutting to a significant extent the claim that wireless services, as a whole, provide effective competition.

²⁷¹ 2005 BellSouth 10-K at 15.

²⁷² See *AT&T/BellSouth Public Interest Filing*, at 91-92, 113.

²⁷³ Currently, although AT&T owns 60% of Cingular, each party has 50% voting control.

Additionally, the proposed merger would take what Cingular itself touts as the nation's largest digital voice and data network,²⁷⁴ and remove it as a separate check on wholesale transport services. There is little doubt that wireless carriers rely heavily on incumbent LEC dedicated transport, whether in the form of UNEs or special access, to provide their services. As AT&T Wireless (now integrated into Cingular) made clear in 2001, "the promise of facility based competition from wireless platforms hinges in large part on the ability of wireless carriers to obtain wireline transport facilities."²⁷⁵ AT&T Wireless explained that wireline transport facilities, most commonly, incumbent LEC facilities by default, "are necessary both to tie the wireless network together, and to transport traffic to the networks of other carriers...."²⁷⁶ Demonstrating that this is still the case is the fact that BellSouth and other incumbent LECs today clearly offer a range of wholesale transmission services to wireless carriers.²⁷⁷ Consequentially, the loss of Cingular as a separate entity will have the undesirable consequence of removing a major buyer of special access and other transport services, which would help keep costs down for all competitors needing this important input.

The adverse consequences would be compounded because AT&T will have an incentive to discriminate in favor of Cingular. If the post-merger AT&T gives its own wholly-owned

²⁷⁴ See Cingular Wireless, "About Us", at http://www.cingular.com/about/company_overview.

²⁷⁵ Comments of AT&T Wireless Service, Inc., NTIA Docket No. 011109273-1273-01 (Deployment of Broadband Network and Advanced Telecommunication), at 14 of 23.

²⁷⁶ *Id.* 15 of 23.

²⁷⁷ See BellSouth: www.interconnection.bellsouth.com/products_and_services/wireless/index.html. (offering wireless providers a host of services including LightGate service (to integrate wireless offices and the BellSouth network), MegaLink Service, MegaLink Plus Service, SmartRing (Sonet based services), and several SPA DS 1 services); Verizon: www22.verizon.com/wholesale/solutions/industry/?indId=200002 (offering wireless providers a variety of entrance facilities and transport facilities).

wireless subsidiary more favorable special access and interconnection arrangements than it offers Cingular's wireless competitors, the adverse consequences for those competitors will even further weaken the nascent competitive presence of wireless competition to wireline carriers beyond the mere loss of an independent Cingular alone.

VI. THE PROPOSED MERGER WOULD FRUSTRATE THE ABILITY OF REGULATORS TO USE COMPARATIVE OVERSIGHT TO IMPLEMENT AND ENFORCE THE MARKET OPENING PROVISIONS OF THE 1996 ACT

Congress has long sought a competitive market that would provide consumers with “a rapid, efficient, nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges.”²⁷⁸ In amending the Communications Act in 1996, Congress made clear that one of the major goals of the Act was to “to provide for a procompetitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”²⁷⁹ Section 251²⁸⁰ detailed the steps to be taken by all incumbent LECs, and section 271²⁸¹ described the further steps to be taken by RBOCs interested in gaining authority to enter in-region interLATA markets, to ensure that their monopoly local markets were opened; however, as the Commission has previously noted, incumbent carriers have a strong incentive to resist this competitive entry in order to retain any monopoly power they may have in a particular market.²⁸² incumbent LEC resistance to the 1996 Act's market-opening requirements may take many forms, including, delaying interconnection

²⁷⁸ 47 U.S.C. §151.

²⁷⁹ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., at 1 (1996) (“*Joint Explanatory Statement*”).

²⁸⁰ 47 U.S.C. § 251.

²⁸¹ 47 U.S.C. § 271.

²⁸² *SBC/Ameritech Merger Order*, ¶107.

negotiations and dispute resolution, driving up competitive LEC costs and limiting the availability of interconnection, all in an effort to thwart competitive entry to the market.²⁸³

The most effective way for the Commission to evaluate whether an incumbent LEC's efforts to limit competition violate the Act is to use comparative or "benchmarking" analysis to compare particular incumbent LEC business practices to those of other similarly situated carriers. A critical requirement of this analysis is that a company's practices be compared to those of another similarly-situated company – a firm that is comparable in terms of its "customer base, access to capital, network configuration, and the volume and type of demands from competitors."²⁸⁴ This comparative analysis enables the Commission to identify and evaluate both the "best practices" and the "average practices" utilized by firms. "Best practices" benchmarking entails a comparison of practices used among an entire group of firms within a market or among a subset of practices utilized by one company, to identify those practices deemed "best practices."²⁸⁵ "Average practices" comparison involves the gathering of information from a number of firms in order to identify the prevailing standard or "average" practice utilized by firms.²⁸⁶ Regulators and competitors can use the information gained from these best and average practice reviews to determine if the actions of a particular company are reasonable in light of the practices used by other companies within the market.

As discussed in greater detail in Section VI.B *infra*, the proposed merger would eliminate one of the few remaining incumbent LECs and benchmark firms, thereby seriously impeding the Commission's ability to use the benchmarking analysis tool in the future. If the Commission is

²⁸³ *Id.*

²⁸⁴ *SBC/Ameritech Order*, ¶160.

²⁸⁵ *Id.* ¶111.

²⁸⁶ *Id.* ¶112.

unable to utilize comparative analysis methods, it will be compelled to engage in intrusive and expensive data collection methods, such as reporting requirements or the imposition of specific network organization and operation mandates, in order to determine the feasibility or reasonableness of a company's practices.²⁸⁷ In addition to being costly, both in terms of time and financial resources, the regulatory regime that would be necessary in the absence of a comparative analysis would conflict with the deregulatory emphasis of the 1996 Act.²⁸⁸

A. Comparative Analysis Has Long been Used by the Commission, Courts, State Regulators and Competitors to Evaluate an incumbent LEC's Compliance with the Act's Market Opening Provisions and the Commission Must Ensure That Use of the Analysis Continues

Comparative analysis has long been used by the Commission, courts, state regulators, and competitors for a variety of reasons, including the evaluation and enforcement of the Act's market opening provisions, the establishment of industry standards and policies, detection of discriminatory treatment and promotion of competition.²⁸⁹ The Commission has described the best practices analysis as "forming the foundation for the Commission's analysis of technical feasibility and collocation issues"²⁹⁰ and has found "the use of comparative practices analyses to be an efficient, pro-competitive method of evaluating the parameters of an incumbents' interconnection or access arrangements."²⁹¹ Similarly, the average practice analysis method has been described as the "primary tool for monitoring service quality and detecting unreasonable or discriminatory costs or practices."²⁹² The Commission clearly depends on the use of

²⁸⁷ *Id.* ¶108.

²⁸⁸ *Id.* ¶113.

²⁸⁹ *Id.* ¶125.

²⁹⁰ *Id.* ¶134.

²⁹¹ *Id.* ¶132.

²⁹² *Id.* ¶134.

comparative analysis to ensure that incumbent LECs continue to act in accordance with the Act's goals of open and competitive telecommunications markets.

Courts and states also have recognized the value of comparative analyses. Federal courts have acknowledged the importance of benchmarking and have utilized benchmarking to evaluate cases concerning RBOC discriminatory pricing under the Act's information services line-of-business restrictions and RBOC marketing of customer premises equipment.²⁹³ The courts also routinely use benchmarking to evaluate business practices among RBOCs.²⁹⁴ State commissions rely on comparative analysis tools as an inexpensive and non-intrusive means of fulfilling their obligation to monitor carrier activity and ensuring that local markets are opened to competition.²⁹⁵ State commission also use benchmarking to compare the business practices of incumbent LECs in their particular state to incumbent LEC practices in other states and regions and to compare business practices of individual LECs that share common ownership.²⁹⁶ If benchmarking ceases to be a reliable tool, due to the elimination of the similarly-situated firms required to utilize benchmarking, state commissions will be forced to implement more intrusive and costly means of gathering information on incumbent LEC compliance with the Act's requirements.

Finally, the use of comparative practices analysis is crucial to the competitors who depend on incumbent LECs for the facilities and functionalities necessary to provide service to their subscribers. competitive LECs often rely on benchmarking information when negotiating interconnection agreements with incumbent LECs and also use the information to recommend

²⁹³ *Id.* ¶¶127-128.

²⁹⁴ *Id.* ¶129.

²⁹⁵ *Id.* ¶136.

²⁹⁶ *Id.* ¶¶136-139.

that an incumbent LEC use another incumbent LEC's business practice as a resolution to a problem or simply as a better, more pro-competitive practice.²⁹⁷ Finally, competitors often use the business practices of one incumbent LEC to refute another incumbent LEC's claims of technical infeasibility.²⁹⁸ Absent this ability competitive LECs will be less able to effectively compete.

The continual and routine reliance on comparative analysis by the Commission, courts, state commissions and competitors highlights the critical need to ensure that comparative analysis continues to be an effective tool. The Commission must deny the instant proposed merger or otherwise ensure that any grant of the merger be conditioned such that it does not result in the elimination of one of the few remaining benchmark firms.

B. A Merger Between AT&T and BellSouth, Two Benchmark Firms, Will Significantly Weaken the Effectiveness of the Benchmark Analysis Tool

The benchmark analysis tool is dependent on the existence of similarly-situated firms to which an incumbent LEC's practices can be compared and as the number of firms decrease, so too does the effectiveness of benchmarking analysis. If AT&T and BellSouth are permitted to merge the number of benchmark firms will be reduced to a level that essentially negates the effectiveness of benchmarking. As the Commission noted in the *SBC/Ameritech Merger Order*, "[b]ecause 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 the benchmark firms renders such comparisons ineffective."²⁹⁹ When the Commission made that statement in 1999 during its evaluation of the SBC/Ameritech merger, there were six major

²⁹⁷ *Id.* ¶¶140-142.

²⁹⁸ *Id.* ¶142.

²⁹⁹ *Id.* ¶124, n.240.

incumbent LEC benchmark firms, including the merging entities.³⁰⁰ Today there are four major incumbent LEC benchmark firms, including both AT&T and BellSouth.

This reduced pool of benchmark firms will result in numerous negative consequences, all of which reduce the usefulness of the benchmark analysis tool. First, as the number of benchmark firms decreases it becomes less likely that a “maverick” firm will emerge with a new “best practice.” When there are few similarly-situated firms with which to compete, an incumbent LEC has no incentive to develop new “best practices” because it does not need to distinguish itself from its competitors. In fact, the “best practices” identified in a market likely will decline in quality because there are simply fewer practices for the Commission to observe. If the instant merger is approved, there will be no similarly-situated firms within the 22 states covered by the merging companies with which to compare the combined AT&T/BellSouth/SBC’s business practices.

Another consequence of a merger of benchmark firms is the resulting trend toward standardization of business practices and away from the experimentation that facilitates the development of business practices with which to compare an incumbent LEC’s practices. Merging firms typically do not have identical business practices and usually will adopt one common set of policies to govern both companies. Any practices that conflict with the acquiring holding company’s business model likely will be rejected, thereby eliminating a source of alternative business practices to be used in a benchmark analysis.³⁰¹ These consolidations of

³⁰⁰ *Id.* ¶145.

³⁰¹ *Id.* ¶147 (noting that “[T]he record from prior RBOC mergers shows that, after both mergers, the acquiring firm quickly eliminated certain policies of the acquired company that were in conflict with those of the acquiring company.”)

business practices decrease the variety of business approaches that the Commission can use to evaluate the business practices of other incumbent LECs in the same market.

The consolidation of business practices at the holding company level almost always leads to similar consolidations at the operating company level and results in even fewer business practices available for use in a benchmark analysis. Prior to a merger, the decisions made at the operating company level can sometimes diverge from those of the holding company as the operating company's practices reflect the particular idiosyncrasies of its local operating market. However, after a merger such divergence is often no longer necessary. Again, the net result is a reduction in the number and variety of business practices to be considered by the Commission when conducting a benchmark analysis. The effect of this consolidation is not mitigated by the fact that the operating companies themselves may not merge. As the Commission has noted, "although the actual number of operating companies may not diminish following [a merger of incumbent LECs], the combined entity will have greater incentive to unify the practices of these companies, resulting in an overall loss of independence at the operating-company level."³⁰²

The Commenters have provided numerous examples of directly conflicting AT&T and BellSouth business practices that almost definitely will be consolidated into standardized, and likely unfavorable, business practices to be used by the merged entity. For example, Xspedius noted that BellSouth requires special construction for unconditioned local loops when no facilities are available; AT&T does not.³⁰³ BellSouth requires the payment of large security deposits; AT&T does not.³⁰⁴ AT&T usually fulfills reasonable expedite requests whereas

³⁰² *Id.* ¶151.

³⁰³ *See* Attachment 1: Declaration of James C. Falvey on Behalf of Xspedius Communications at 4 ("*Falvey Declaration*").

³⁰⁴ *Id.*

BellSouth rarely honors such requests unless they are for special access service.³⁰⁵ Similarly, XO explained that BellSouth's terms governing volume and terms special access agreements are far more favorable than those of AT&T.³⁰⁶ Specifically, BellSouth permits customers to meet volume commitments on a regional basis whereas AT&T does not offer an economically practical circuit portability option.³⁰⁷ Further, BellSouth pays the stipulated damages when it fails to meet a state performance metric; AT&T does not.³⁰⁸ It is highly likely that, in response to these diametrically opposed business practices, the merged entity will adopt the less competitive and less favorable practices.

A final consequence of a merger between benchmark firms is the increased ability and likelihood that the remaining firms in a market will tacitly or explicitly cooperate in an effort to reduce the effectiveness of any comparative analysis tool. When, as a result of a merger, fewer firms remain in a market, it becomes easier for the remaining firms to coordinate their business practices because there will be fewer firms expressing divergent business practices.³⁰⁹ While the incentive to undercut competitors often precludes price fixing agreements between benchmark firms, the remaining firms do have an incentive to work together to conceal or obstruct the collection of information from state and federal regulators.³¹⁰ This coordination can be explicit, with firms discussing and agreeing on certain courses of action or business practices, or tacit, as firms observe and mirror the practices of other firms.

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Id.

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See Attachment 2: Declaration of Lisa Youngers on Behalf of XO Communications, Inc. at 2-3 ("Youngers Declaration").

307

Id.

308

Id. 3.

309

SBC/Ameritech Order, ¶ 121.

310

Id. ¶123.

C. The Use of Benchmarking is Critical when Evaluating Mergers Between RBOCs

The diminished effectiveness of comparative analysis is particularly acute when an RBOC is removed from the market because the RBOC's size, structure, and regulatory treatment under the 1996 Act make it difficult to find similarly-situated companies with which to compare the incumbent LEC's business practices. Mergers, such as the proposed AT&T and BellSouth combination, that result in a decrease in the number of benchmark RBOCs, hinder the Commission's ability to utilize comparative analysis tools to review an RBOC's compliance with the market opening provisions of the Act and should be scrutinized in detail to determine if the beneficial aspects of the merger outweigh the negative consequences.

RBOCs, by default, are larger, in terms of customer base, finances, and service territory, than any other service providers in a market. As a result of their size, RBOCs often are able to exert undue influence on the establishment of industry averages and standard business practices. An RBOC's impact on comparative analysis tools is magnified when merged RBOCs operate in large service region and control a significant percentage of the access line in that region. It becomes nearly, if not totally, impossible to identify a similarly-situated firm with which to compare the combined RBOC.

RBOCs also typically have different structures and operational systems that reflect factors such as the markets in which the RBOC operates, the specific network architecture necessary to serve its subscribers, and the sophisticated traffic management systems designed to handle the large traffic volumes it experiences. Consequently, smaller incumbent LECs and other competitors are not similarly-situated for the purposes of conducting a comparative

analysis.³¹¹ The Commission has previously noted that “smaller incumbent LECs are not likely to provide useful benchmarks for measuring the market-opening performance of major incumbent LECs.”³¹²

As Xspedius has noted, there are very few if any competitors available from which they can obtain needed facilities and services. Xspedius remarked that it is able to purchase facilities and services from competitive telecommunications carriers only on “rare occasions.”³¹³ Irrespective of differences in structure and operational systems, smaller incumbent LECs and other competitors cannot function as benchmark firms if they are not operating in the AT&T or BellSouth markets.

Further, major incumbent LECs, and in particular, RBOCs like BellSouth and the former SBC, are subject to different regulatory treatment than non-incumbent LECs. In order to conduct a meaningful comparative analysis, the Commission must be able to compare the business practices and actions of one RBOC to those of another RBOC. Specifically, only RBOCs are subject to the requirements of sections 251(c) and 271 and it would be useless for the Commission to attempt to evaluate an RBOC’s compliance with these regulatory requirements based on a review and comparison to the business practices of non-RBOCs. The Commission has already addressed this issue and concluded that “the distinct obligations imposed on major incumbent LECs, as compared with other LECs, under the 1996 Act undermines the abilities of

³¹¹ *Id.* ¶168.

³¹² *Id.* ¶168.

³¹³ Xspedius Declaration at 2.

regulators and competitors to draw useful comparisons between the conduct of major incumbent LECs and these other carriers.”³¹⁴

D. The Proposed Merger Would Increase the Incentive and Ability of the Combined AT&T and BellSouth to Discriminate Against Rivals and Decrease Regulators’ Ability to Police this Discrimination

Although incumbent LECs have always had the ability to discriminate against their competitors, both within and outside of their incumbent local operating territories, the ability and incentive to discriminate both increase as the merging entities are able to better coordinate the operations of the formerly separate entities and can realize more of the benefits of discriminatory behavior. The increased discrimination harms the public interest by limiting the ability of competitors to provide service in the combined incumbent LEC’s retail markets and increasing the service costs to consumers, while concurrently reducing consumer choice of service providers and the quality of services received. The incentive to discriminate will be especially high in the instant proposed merger as the combined AT&T and BellSouth will control nearly 70 million end user switched access lines which accounts for slightly less than 50% of the total incumbent LEC switched access lines in the United States.³¹⁵

1. ***If permitted to merge, AT&T and BellSouth will have an increased incentive to discriminate since the combined entity will be able to reap the resulting benefits from throughout the combined entity’s retail markets***

The effects of an incumbent LEC’s discriminatory behavior are not limited to the incumbent LEC’s retail markets as the discriminatory behavior often negatively affects a competitor’s business operations outside the incumbent LEC’s region. The incumbent LEC’s discriminatory practices may increase a competitor’s overall costs or limit a competitor’s ability

³¹⁴ SBC/Ameritech Order, ¶163.

³¹⁵ June 30, 2005 Local Competition Report at Table 7.

to access the inputs needed to serve its customers thereby preventing the competitor from fully serving its customers in other regions. These external or “spillover” effects also can directly or indirectly harm the consumers that incumbent LECs seek to serve. Consumers are indirectly harmed when an incumbent LEC’s discriminatory practices increase its competitor’s general costs and negatively affect the competitor’s ability to provide service to its consumers in other regions.³¹⁶ The competitor may decide to pass the increased costs on to its consumers or exit the market, thereby either increasing a consumer’s costs for service or reducing the consumer’s choice of service providers. Consumers also are directly harmed when the incumbent LEC’s discriminatory behavior affects the consumer’s communications between the incumbent LEC’s region and another region.³¹⁷ For example, an incumbent LEC’s decision to discriminate against a competitor by refusing to terminate calls to a particular city will directly affect the competitor’s customers in that city as they are unable to originate calls to the affected city.

The benefits to be gained from these spillover effects increase dramatically when two incumbent LECs merge and the effects of the merged entity’s discriminatory practices are felt throughout the combined entity’s retail markets. The combined entity likely will be more willing to discriminate because it will benefit not only from the effect of its actions in each of the original separate entity’s local retail markets but also from the effects of the discriminatory actions in the new merged market. For example, an incumbent LEC will discriminate in its region based on the benefits to be gained in that particular region. After a merger, the combined firm would have more incentive to discriminate because the benefits of the discrimination would extend to the retail markets of each merging partner. If AT&T and BellSouth are permitted to

³¹⁶ *SBC/Ameritech Order*, ¶¶192-193.

³¹⁷ *Id.* ¶192.

merge they will have a greater incentive to discriminate because the effects of any such discrimination will be felt throughout the combined entity's 22 state incumbent operating territory.

Further, when incumbent LECs merge, the combined entity has more incentive and is better able to discriminate because it is able to control the policies and actions of the formerly separate entities.³¹⁸ Individual incumbent LECs have less incentive to engage in discriminatory practices because there is no way to guarantee the reaction of incumbent LECs in neighboring regions or reap the full benefits of the discriminatory actions. When incumbent LECs merge, the combined entity has full control over not only the types and timing of discriminatory actions by the formerly separate entities, but also over both ends of calls between the entities. The combined entity can better coordinate its discriminatory actions and the Commission is less likely to be able to detect this behavior because the effectiveness of a comparative analysis of the entity's actions will be reduced due to the removal of one of the entities as a benchmark firm.

2. *AT&T's and BellSouth's incentive and ability to discriminate will harm the public interest*

incumbent LECs have a natural incentive to hinder and delay competition. This incentive, in combination with the use of discriminatory practices to obstruct competitive entry, harms the public interest in numerous ways. AT&T and BellSouth are no different from other incumbent LECs and likely will continue their attempts to thwart competitive carriers' ability to compete in the entity's newly combined service areas.

The merger of two of the remaining four RBOCs will have serious ramifications on the ability of competitors to provide service in the entity's operating territory. Many competitors

³¹⁸ *Id.* ¶194.

continue to rely on incumbent LEC networks in order to serve their subscribers³¹⁹ and the public interest will be harmed if these competitors are unable to obtain the access the network elements necessary to provide service because of discriminatory practices by the combined entity.

Further, whereas a competitor's ability to obtain favorable terms in one incumbent LEC's service area may have balanced out unfavorable terms obtained in another incumbent LEC's area, a merger of AT&T and BellSouth likely will result in unfavorable terms throughout the combined service area. Because AT&T and BellSouth will control the network in a region covering 22 states and well over 60% of end user switched access lines³²⁰ in the country, it is crucial to the public interest that there be alternative sources of competitive supply that can act as a check on the prices and quality of service provided by a combined AT&T and BellSouth.

Consumers also will be harmed as any AT&T and BellSouth discriminatory practices likely will result in consumers having fewer choices in service providers, increased costs and decreased quality of service. The Applicants' incentive and ability to better coordinate the discriminatory practices of their formerly separate entities will enable them to increase costs to intramodal and intermodal competitors and engage in other discriminatory acts which impede each competitor's ability to serve its subscribers. Competitors likely will either pass these costs on to their subscribers – thereby increasing consumer costs for service – or they will choose to cease providing service – resulting in fewer competitive service alternatives for consumers. If competitors choose to exit the market, the remaining incumbent LECs will be able to step in and obtain these subscribers, ultimately charging increased service rates. The lack of alternative

³¹⁹ See, e.g., Xspedius Declaration at 2.

³²⁰ June 30, 2005 Local Competition Report at Table 7.

sources of these services also eliminates a necessary check on the quality of service being provided to consumers.

The scale of the instant merger also is an area of critical concern as the potential harm to the public interest increases with the size of a merger,³²¹ and the instant merger would result in levels of concentration not seen since the era of the Bell monopoly. In this proceeding, AT&T and BellSouth are seeking to combine two of the four remaining RBOCs, resulting in one entity controlling nearly 70 million end user switched access lines (slightly less than 50% of the total incumbent LEC switched access lines in the United States) in a service area covering 22 states.³²² To provide context, the 1999 merger of SBC and Ameritech involved only 55 million local exchange access lines, (approximately 31% of the total switched access lines)³²³ and even then the Commission noted its concern that “the incentive and ability to engage in [] discrimination will increase as a result of the merger between SBC & Ameritech.”³²⁴ The instant merger would result in an entity, and a telecommunications market, that is only one or two steps away from fully recreating the former Bell monopoly. The combined entity that would result from this merger would have every incentive, and the ability, to discriminate against its few remaining competitive rivals with the end result of reduced quality of service, decreased competitive choice and increased prices for consumers.

³²¹ *SBC/Ameritech Order*, ¶228.

³²² *June 30, 2005 Local Competition Report* at Table 7.

³²³ *SBC/Ameritech Order*, ¶31.

³²⁴ *Id.* ¶228.

E. A Combined AT&T/BellSouth Entity Will Have the Incentive and Ability to Engage in Non-Price Discrimination Against Competitive Service Providers

If AT&T and BellSouth are permitted to merge the combined entity would also be able to engage in a variety of forms of non-price discrimination as a means of thwarting and reducing competition in the combined AT&T/BellSouth area. Specifically, the combined entity would be able to limit the ability of competitors seeking nationwide entry into telecommunications markets, refuse to cooperate with providers of advanced services that seek alternative types of arrangements, and discriminate against providers of interexchange services.

Indeed, the Commenters have identified numerous AT&T and BellSouth practices that impair the ability of competitors to enter the market. For example, Xspedius noted that BellSouth's ordering and provisioning practices are unnecessarily anticompetitive.³²⁵ Specifically, BellSouth's ordering system requires carriers to submit many manual orders for complex ports and EELs and is difficult to use.³²⁶ Further BellSouth has longer provisioning intervals, including a five-business day interval for UNEs and ten-business days for special access orders while AT&T's intervals are only three-business days and five-business days, respectively, for the same services.³²⁷ These types of anticompetitive, non-price practices prevent competitive carriers from competing effectively which may explain, at least in part, the dearth of competitive carriers operating in the AT&T and BellSouth regions.

A combined AT&T/BellSouth will be able to discriminate against providers of advanced services, who often need novel service arrangements, thereby thwarting innovation in the market. Providers of advanced or novel services often need interconnection and access arrangements that

³²⁵ Xspedius Declaration at 3.

³²⁶ *Id.*

³²⁷ *Id.*

differ from those needed to provide traditional interexchange and local voice services. Because the services and arrangements are new, it will be easier for the combined firm to assert technical infeasibility or to discriminate and it will be difficult for the Commission to review or dispute the actions. AT&T/BellSouth will have an increased incentive to discriminate because, if the advanced services can be kept out of one market, it will be easier to keep it out of all of the combined entity's service areas, reducing pressure on the incumbent LEC to innovate. The very novelty of the advanced service provider's request, combined with the lack of benchmark firms with which to compare the combined firm's actions, ensures that the Commission will be unable to effectively utilize comparative analysis to police whether AT&T/BellSouth's behavior is discriminatory.

The combined AT&T/BellSouth entity would also have the ability and incentive to discriminate against carriers providing interexchange services operating both inside and outside of the combined entity's service areas. By discriminating against calls originating in areas that were formerly outside of the separate entity's service areas but are now part of the combined service area, AT&T/BellSouth will have the opportunity to induce originating customers to select the merged entity as the subscriber's interexchange service provider. As the incumbent LECs in their service regions, AT&T and BellSouth control the majority of the last-mile facilities that carriers, and particularly providers of interexchange services, must access in order to originate or terminate calls to and from their subscribers. AT&T and BellSouth can discriminate in both the origination and termination of calls of interexchange service providers by delaying or degrading the origination and termination of calls. Such discrimination could induce the independent carrier's subscribers to select AT&T or BellSouth as the subscriber's interexchange service provider in an effort to obtain better quality service. Because the combined AT&T/BellSouth entity will control an extremely large service area, it will be

involved in the origination or termination of a substantially greater number of interexchange calls and thus will have more opportunity and incentive to discriminate.

If permitted to merge, AT&T and BellSouth also will have a greater ability to discriminate against competitive providers of local voice services seeking to enter the combined service region, and particularly those seeking a nationwide entry strategy. competitive LECs typically rely on incumbent LEC "last mile" facilities to provide service to their subscribers and any discrimination affecting the availability of these facilities will negatively affect the ability of competitive LECs to enter and remain in the market. incumbent LEC non-price discrimination can take the form of impaired access to the needed inputs by delaying or discriminating in interconnection, limiting access to "last mile" facilities or simply providing degraded service. These types of discrimination are especially harmful for competitive LECs seeking nationwide entry strategies. Whereas these competitive LECs previously might have been able to obtain favorable terms from one incumbent LEC and either used these results to negotiate similar terms from another incumbent LEC or balanced the results against other unfavorable terms, this ability will be lost if AT&T and BellSouth are permitted to merge and standardize the terms they offer to competitive LECs. The chances of standardization are extremely high since so many of AT&T's and BellSouth's current business practices conflict. For example, Xspedius stated that AT&T's ordering and provisioning practices not only tend to be more favorable than BellSouth's, but in some cases are the exact opposite of those of BellSouth.³²⁸ Similarly, Cbeyond observed that AT&T requires payment of all charges, including disputed charges, when billed while BellSouth does not require the payment of disputed charges until after the dispute is

³²⁸ Xspedius Declaration at 3-4 (noting that BellSouth requires special construction in some situations and also requires large security deposits from carriers while AT&T does not engage either of these practices.)

resolved. Further, in contrast to a competitive LEC that provides service in a limited geographic area, a competitive LEC that seeks to provide nationwide service will be harmed if discriminatory incumbent LEC practices result in the competitive LEC obtaining a reputation for poor service. Such a reputation could cause the competitive LEC to lose or fail to attract consumers in other service areas. The effects of any discriminatory practices by a combined AT&T/BellSouth are likely to be especially acute in the mass market because there will be few, if any, benchmark firms and practices by which to evaluate the combined AT&T/BellSouth's actions.

VII. STRINGENT PRO-COMPETITIVE CONDITIONS CAN PARTIALLY OFFSET THE ANTICOMPETITIVE EFFECTS AND HARMS TO THE PUBLIC INTEREST FROM THE PROPOSED MERGER

A. Review of the Case for Conditions

In their Application, AT&T and BellSouth ask the Commission to take the unprecedented risk of summarily approving a transaction that would undermine competition for most telecommunications users. This is the ultimate in regulatory *chutzpah*. By any objective standard, this proposed transaction is a direct challenge to the Commission's policy to bring competition to all homes and businesses. The Commission is being asked for the first time to approve in a single blow an RBOC-to-RBOC merger, a RBOC-to-competitive LEC merger, an RBOC-to-IXC merger, and an RBOC/RBOC-to-Wireless merger. As amply demonstrated in the preceding sections, the public interest harms that will arise from these mergers are legion – and by all rights should be seen as sufficient for the Commission to deny the Application. More specifically, the proposed mergers would harm users of telecommunications services by:

- Removing one of the very few remaining significant actual and potential participants in the mass market in the BellSouth region;
- Removing an actual significant participant in the retail business market in the BellSouth region;

- Removing an actual significant participant in the wholesale business market in the BellSouth region;
- Removing a significant actual purchaser of wholesale services in the BellSouth and AT&T regions;
- Frustrating the ability of regulators to use comparative oversight to implement and police the market opening provisions of the 1996 Act; and
- Increasing the incentive and ability of the larger merged entity to discriminate against rivals while decreasing the ability of regulators to police this discrimination.

In each instance, new entry will not be timely, likely, and sufficient to offset the harm, and the public interest benefits alleged by the Applicants are relatively insignificant and certainly insufficient to mitigate the harms. Consequently, due to the serious ramifications for competition and consumers, the merger as proposed does not serve the public interest, convenience, and necessity.

Such a conclusion is not surprising. Rather, it is the norm for proposed mergers by RBOCs. Since passage of the 1996 Act, the Commission numerous times has found the proposed acquisition by a RBOC of another major incumbent carrier to be unlawful due to its likely anticompetitive effects. Nonetheless, the Commission has a record of approving such transactions upon the imposition, pursuant to its section 214(c) authority, of terms and conditions to ameliorate the anticompetitive effects. To that end, the commenters propose a set of conditions that when taken a whole, would partially remedy the harms of the proposed merger of AT&T and BellSouth.

1. *Basis for Proposed Conditions*

As stated in the *SBC/Ameritech Merger Order*, the Commission's primary statutory objectives are to open all telecommunications markets to competition, to promote the rapid deployment of advanced services, and to ensure that the public has access to efficient, high-

quality telecommunications.³²⁹ By adopting conditions to achieve these objectives, the Commission has found that it could offset, to a significant extent, the harm to the public interest brought about by the transaction.³³⁰ It is within this already accepted context that the Commenters proffer their proposed conditions.

The Commenters seek to ensure that the substantial competitive presence of AT&T and its affiliates, which will be diminished or eliminated should this merger be consummated, is regenerated so that residential and business customers can receive the benefits of competition. AT&T's competitive presence took well over a decade to develop and was achieved largely because of its uncommon global strength and financial resources. No other competitors in these markets come close to matching these collective capabilities. Thus, there is no sound basis to believe that regeneration of its competitive presence in the absence of Commission intervention will be timely, likely or sufficient. It is for that reason that many of the Commenters' proposals focus on providing competitors with a solid and stable foundation upon which to grow, particularly by ensuring a vibrant wholesale market exists for telecommunications providers serving small and medium-sized business customers.

Finally, because of the RBOC-to-RBOC aspect of the merger – and the considerable harms that flow because of decreased opportunities for regulatory benchmarking and increased opportunities to discriminate in both AT&T's current region as well as to customers in the BellSouth region – select conditions should apply in both regions.

³²⁹ *SBC/Ameritech Merger Order*, ¶ 50.

³³⁰ *Id.* ¶ 52.

B. Proposed Conditions³³¹

1. *Conditions Related to Unbundled High-Capacity Loops and Transport*

UNE Rate Cap - For a period of five (5) years, beginning on the Merger Closing Date, the merged AT&T/BellSouth entity shall not seek any increase in State-approved rates for UNEs that are in effect as of the Merger Closing Date.

Rationale: State rate cases are massive undertakings that demand the expenditure of tremendous administrative and monetary resources. The old AT&T was a principal participant in these proceedings, expending large sums of money and presenting many expert witnesses on behalf of itself and the competitive LEC industry. Participation in State rate cases in a post-AT&T/BellSouth merger environment will sap the resources of even the largest of the remaining competitors. Suspension of these proceedings for a five-year period will provide much needed regulatory and economic stability and permit the remaining competitors to focus on the business of competing rather than litigating. This condition will also help keep consumer prices stable.

UNE Availability Freeze – For a period of five (5) years, beginning on the Merger Closing Date, AT&T/BellSouth shall not seek a ruling, including through the filing of a forbearance petition under section 10 of the Act or any other petition, altering the status of any facility currently offered as a loop or transport UNE under section 251(c)(3) of the Act.

Rationale: AT&T's competitive presence is so significant that it will take time before any of the remaining competitors can be expected to begin replacing it in the market. Many of these competitors are competitive LECs that rely on loop and transport UNEs to fill-out their networks and to reach customers. Post-merger, they will no longer have the presence of AT&T in the BellSouth territory to provide another source of supply to the incumbent LEC. With a freeze on any further "delisting" of UNEs for five years, these competitors will have access to the tools

³³¹ Talk America does not propose that any condition imposed should alter the pricing of services and facilities included in any executory AT&T Local Wholesale Complete agreement for the duration of the initial term of any such commercial agreement.

required to have the opportunity to develop the customer base and revenue streams needed to replace the presence of AT&T.

Establishment of Rates for Section 271 Checklist Elements – Within thirty (30) days of the Merger Closing Date, the merged AT&T/BellSouth entity shall file with each state in its 22-state incumbent LEC operating territory a tariff to offer section 271 network elements (including line sharing) at just and reasonable rates and terms, which shall not exceed 120% of the UNE rates most recently approved by the applicable state commission and which shall, once approved, be incorporated into section 252 interconnection agreements. Competitive LECs will be permitted to convert circuits from special access, including volume and term plans to section 271 elements without penalty.

Rationale: AT&T and BellSouth have an obligation to provide section 271 checklist elements (which includes line sharing) at just and reasonable rates and terms, but to date, they have refused to offer voluntarily rates and terms that comply with their section 271 obligations. They have argued that these rates should be the same as special access rates, which would render meaningless the section 271 requirement of the statute. The Commission has determined that rates for section 271 network elements must meet the just and reasonable and not unreasonably discriminatory standard contained in sections 201 and 202 of the Act.³³² The formula proposed herein will produce rates that meet this standard, and will further network deployment by competitors, thus serving to help replace AT&T's competitive presence in the BellSouth region and to bolster competition throughout the merged AT&T/BellSouth entity's 22-state operating territory.

Removal of DS1 Loop and Transport Caps – The merged AT&T/BellSouth entity shall provide requesting carriers with DS1 loop and transport UNEs without limitation where DS3 UNEs are provided (where impairment exists), and, for a period of five (5) years, beginning on the Merger Closing Date, the merged AT&T/BellSouth entity shall provide requesting carriers with DS-1 loop and transport UNEs without limitation where DS-3 UNEs are not provided (where no impairment exists).

³³² TRO, ¶¶ 663-664.

Rationale: Access to DS-1 loop and transport facilities are fundamental to the development of competition. Further, competitive carriers use DS-1 facilities far differently than DS-3 facilities. As a result, the mere use of more than 10 DS-1 circuits from a building or on a transport route does not normally mean that a DS-3 circuit can be substituted. For instance, many competitive LECs use DS-1 loops and EELs to serve a unique customer in a building and transmit the customer's traffic to a distant collocation site to further the efficient deployment of its network. If a competitive LEC is required to bundle these DS-1 circuits into a DS-3 circuit, additional network equipment would need to be deployed and collocations often would need to be augmented or built. For these reasons, DS-1 facilities should be provided pursuant to section 251(c)(3) without limitation regardless of the status of DS-3 UNEs under section 251(c)(3).³³³

Provision of DS1 Loops Required, Regardless of Loop Plant – The merged AT&T/BellSouth entity shall provide access to DS1 UNEs where impairment exists, regardless of whether available loop facilities are hybrid loops or fiber loops (except where such fiber loops serve residential or predominantly residential buildings).

Rationale: As indicated above, access to DS-1 loop and transport facilities are fundamental to the development of competition. This proposed condition is merely a clarification of current Commission rules and is intended to prevent the Applicants from using the Commission's fiber

³³³

Notably, part of this proposed condition is merely a clarification of current the current Commission rule and order regarding caps on DS-1 transport UNEs, 47 C.F.R. §51.318; *TRRO*, ¶181, and is intended to end or reverse efforts by AT&T to impose unauthorized restrictions on the number of DS-1 transport links competitive LECs can obtain between wire centers where impairment exists for DS-1 and DS-3 transport. Unlike AT&T, BellSouth has agreed with competitive LECs that there is no cap on DS-1 transport circuits on routes where there also is impairment for DS-3 transport UNEs. *In re Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to interconnection Agreements Resulting from Changes of Law*, Case No. 2004-00427, Joint Stipulation Regarding Settlement of DS-1 Transport Cap Issue and Process for Identification of Fiber-Based Collocators, (KY PSC Dec. 9, 2005).

and hybrid loop unbundling relief as a means of curtailing access to DS-1s in wire centers where impairment exists.

Required Escalation Procedures for Chronic Loop Problems – The merged AT&T/BellSouth entity shall establish a process to ensure enhanced monitoring and expedited/escalated maintenance on that loop facilities that are subject to three or more trouble tickets in a 60-day period or are otherwise perceived as circuits with difficult-to-detect problems (perceived as such by the competitive LEC using the loop or its customer).

Rationale: This remedy ensures that AT&T will neither dilute nor replace BellSouth's current practice and procedures for handling chronic loop problems. While far from perfect, BellSouth's current practices and procedures allow for opening of a chronic trouble ticket upon reasonable request and provide for expedited and escalated maintenance on loops with chronic customer-impacting service issues.

2. *Wire Center-Related Conditions*

Recalculation of the Number of Business Lines and Fiber-Based Collocators to Determine Whether the Thresholds Continue to be Met, and, if not, Reimpose the Requirement to Offer UNEs – The merged AT&T/BellSouth entity shall annually review its wire center calculations for the number of business lines and fiber-based collocators. For those wire centers where the number of fiber-based collocators or business lines no longer meets the non-impairment thresholds established in 47 C.F.R. §§ 51.319(a) and (e), and thus impairment exists, the merged AT&T/BellSouth entity shall provide the appropriate loop and transport UNEs.

Recalculation to Exclude Non-Fiber-Based Collocators – In identifying wire centers in which there is no impairment pursuant to 47 C.F.R. §§ 51.319(a) and (e), the merged AT&T/BellSouth entity shall exclude from its count of fiber-based collocators collocation arrangements entities that are only cross-connected to fiber-based collocation arrangements.

Business Line Calculation to Exclude AT&T Special Access Lines – In identifying wire centers in which there is no impairment pursuant to 47 C.F.R. §§ 51.319(a) and (e), the merged AT&T/BellSouth entity shall, in determining the number of business lines, exclude any special access lines obtained by AT&T from BellSouth as of the day before the Merger Closing Date.

Recalculation of Wire Center Impairment Thresholds Because of AT&T's New Affiliation with BellSouth – Within thirty (30) days of the Merger Closing Date, the merged AT&T/BellSouth entity shall exclude fiber-based collocation arrangements established by

AT&T or its affiliates in BellSouth territory in identifying wire centers in which BellSouth claims there is no impairment pursuant to 47 C.F.R. §§51.319(a) and (e), and shall amend its impaired wire center lists and interconnection agreements accordingly.

Rationale: The four wire center remedies described above encompass two general concepts: ensuring consistency with the Commission’s objective that the wire center test should reflect market opportunity, and providing greater opportunity to replace AT&T’s competitive presence in the BellSouth region. The first remedy alters the Commission’s “one-way ratchet” requirement³³⁴ so that the wire center test reflects actual current market opportunity. The second remedy ensures that collocators that are not themselves fiber-based – and who for that reason are not good indicators of the ability to construct facilities – should not be included in any calculation. The third remedy ensures that AT&T continues its current practice of not counting special access lines in the business line count even if such lines are used to provide switched services to customers. The final wire center remedy addresses the fact that AT&T will no longer be unaffiliated with BellSouth, and thus should not be considered a fiber-based collocator.

Commingling of UNEs and 271 Elements – The merged AT&T/BellSouth entity shall permit requesting carriers to commingle UNEs obtained pursuant to section 251 and network elements obtained pursuant to section 271.

Rationale: This remedy, which is consistent with current Commission rules and orders,³³⁵ ensures that competitive providers can efficiently deploy their networks, by not having to place these circuits on different facilities. Moreover, it ensures that competitors may use section 251 UNEs and section 271 network elements to the fullest extent available without uneconomic, discriminatory and anticompetitive restrictions on how serving arrangements are configured.

3. *Conditions Related to Other UNEs and 252 Interconnection Agreements*

³³⁴ TRRO, ¶ 43.

³³⁵ 47 C.F.R. § 51.318; TRO, ¶¶ 579-584.

Access to Decommissioned Copper Loops – The merged AT&T/BellSouth entity shall not retire decommissioned copper loops and shall provide unbundled access to such section 251(c)(3) UNEs upon request.

Rationale: Retiring decommissioned copper loops is at best a deterrent to the development of alternative competitive networks and at worst a brazenly anticompetitive and anti-consumer act. The Commission has repeatedly stated that it wants to encourage the development of facilities-based competition, and this remedy significantly furthers that goal by ensuring competitors and consumers access to legacy copper loop UNEs and all of the innovative voice and broadband services that competitive LECs can provide over such facilities.

Line Sharing – For a period of five (5) years, beginning thirty (30) days after the Merger Closing Date, the merged AT&T/BellSouth entity shall provide line sharing as a section 251(c)(3) UNE. Thereafter, line sharing shall be provided as a section 271 element.

Rationale: By enabling competitors to use only the high frequency band in a loop facility, line sharing facilitates efficient competition in the provision of broadband services to consumers.

Line sharing provides competitive LECs with access to only the sub-loop element they need and, by doing so, should keep unbundled element prices and consumer rates down.

Interconnection Agreement Portability – AT&T/BellSouth shall permit a requesting telecommunications provider to port the entirety of an existing interconnection agreement (except for state-specific rates) from a state where it currently is effective to another state in the merged AT&T/BellSouth entity's 22-state operating territory.

Rationale: These comments have demonstrated the harm that will result from losing BellSouth as a “regulatory benchmark.” To some extent, this problem can be ameliorated by enabling competitive service providers to port current agreements – with their differing terms and conditions – across state-lines throughout the entire 22-state AT&T/BellSouth operating territory.

Freeze SQM/PMAP/SEEMS Performance Measurement Plans – For a period of five (5) years, the merged AT&T/BellSouth entity shall continue in effect the current Performance Measurement Plans of BellSouth in the BellSouth operating territory, except where section

271 elements have been removed from such plans, in which case such elements shall be restored to existing Performance Measurement Plans and except where AT&T has committed to a faster provisioning interval, in which case the corresponding AT&T provisioning interval shall apply. In conjunction with this requirement, the merged AT&T/BellSouth entity shall be subject to a State Commission supervised independent audit, at its own expense, every three (3) years.

Rationale: These BellSouth performance measurement plans, which are generally superior to those of AT&T, were instituted after lengthy regulatory proceedings and are critical to ensuring that competitive providers have full access to section 251 UNEs and section 271 network elements. By continuing these plans, the harm flowing from having BellSouth as a regulatory benchmark is partially ameliorated.

Eliminate EEL Eligibility Criteria – The merged AT&T/BellSouth entity shall not subject EELs to any requirements or restrictions other than those that apply to individual section 251(c)(3) UNEs. The merged AT&T/BellSouth entity shall cease all ongoing or threatened audits and terminate all audit rights, regardless of whether an audit or audit right relates to current EEL restrictions or restrictions that pre-date the Commission’s current high capacity EEL eligibility criteria.

Rationale: The Commission’s EEL eligibility criteria were adopted because of concerns that the major purchasers of special access (AT&T and MCI) would use EELs as substitutes for more expensive interexchange special access facilities.³³⁶ Since these two companies are now owned by AT&T and Verizon, respectively, this concern has been ameliorated, if not eliminated entirely. Moreover, BellSouth has used audits or the threat of audits to harass competitors and mire them in regulatory litigation.³³⁷ As indicated above, the use of EELs ensures the efficient

³³⁶ TRO, ¶593.

³³⁷ See, e.g., *In re Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Docket No. 12778-U (GA PSC); *Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and ITC^DeltaCom communications, Inc. and Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and XO Tennessee, Inc.*, Docket No. 02-01203 (Tenn. Reg. Auth.).

deployment of networks, and, as such, should not be encumbered by any use requirement or criteria not applicable to standalone section 251(c)(3) UNEs.

“Katrina” Caused Upgrades to Loops to Fiber – Any section 251(c)(3) UNE loops that have received accelerated upgrades from copper to fiber as a result of “Acts of God” shall continue to be made available by the merged AT&T/BellSouth entity under section 251(c)(3) without any bandwidth limitations, as if they were still copper UNE loops.

Rationale: The Commission decided not to unbundle certain fiber loops to provide an incentive for incumbent LECs to deploy new fiber facilities to consumers.³³⁸ This rationale, however, does not hold in the case of fiber facilities deployed in response to Acts of God. As such, these replacement loop facilities should continue to be made available without limitation as section 251(c)(3) UNEs, as if the copper loop was still in place. This unbundling requirement will provide consumers with the protection afforded by having competitive choices and will facilitate the deployment of redundant competitive facilities deeper into the network.

Change Control Related to Operations Support Systems (“OSS”) – AT&T/BellSouth shall adopt on a regional basis a standardized practice for notifying competitive LECs in advance of proposed changes to OSS and for accepting competitive LEC proposals for changes to OSS.

Rationale: This remedy will ensure effective access to UNEs through OSS gateways used throughout the merged AT&T/BellSouth entity’s 22-state operating territory.

4. *Conditions Related to Special Access and other Wholesale Services*

Special Access Rate Cap – For a period of thirty (30) months after the Merger Closing Date, the merged AT&T/BellSouth entity shall not increase the rates in their interstate tariffs, including contract tariffs for special access services that the merged AT&T/BellSouth entity provides in its 22-state operating territory and that are set forth in tariffs on file at the Commission as of March 31, 2006.

³³⁸ *TRO*, ¶ 288; *See also*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 19 FCC Rcd 20293, ¶ 17 (2006)(“*FTTC Reconsideration Order*”).

Rationale: This remedy was adopted by the Commission as part of the SBC/AT&T merger to provide a period of stability for competitive providers to build market share.³³⁹ This condition and the rationale for it apply equally to this proposed merger.

Fresh Look – The merged AT&T/BellSouth entity shall permit customers with negotiated service arrangements to terminate their agreements and pay no termination liability for a period of twelve (12) months from the Merger Closing Date. The merged AT&T/BellSouth entity also shall provide terminating customers with a six (6) month post-termination transition period to migrate off the AT&T/BellSouth networks during which they will pay no shortfall charges and will continue to pay the discounted rates established by their contracts.

Rationale: Rapid access to small business and enterprise customers is critical to creating vibrant competition needed to ameliorate the harms that would arise should this proposed merger be consummated. Unfortunately, many of these customers have long-term agreements with AT&T and/or BellSouth and will face large termination penalties – especially in proportion to the immediate benefits – if they leave prior to the end of their agreements. It is therefore important to adopt a Fresh Look remedy, permitting these small business and enterprise customers to choose a competitive provider without incurring any penalty for doing so.

Non-Discrimination in the Provision of Special Access Circuits – With regard to the provision of special access services, the merged AT&T/BellSouth entity shall not (i) give any of their affiliates rates, terms, and conditions that are not effectively available in service options purchased by third parties; and (ii) favor themselves in the provisioning, maintenance, customer care, OSS functionalities, and grooming of special access circuits. The merged AT&T/BellSouth entity shall disclose by filing with the Commission and make available to all competitors for a period of five (5) years any volume and term discounts provided by BellSouth to AT&T that were in effect as of March 31, 2006.

Rationale: This remedy was in large measure adopted by the Commission as part of a group of “special access” remedies in the SBC/AT&T merger to provide enhanced protections against

³³⁹ *AT&T/SBC Merger Order*, Statement of Commissioner Michael J. Copps, Concurring.

discriminatory conduct.³⁴⁰ This condition and the rationale for it apply equally to this proposed merger.

Section 211 Compliance – The merged AT&T/BellSouth entity shall file pursuant to section 211 all currently effective contracts for special access or other wholesale services with other carriers.

Rationale: This condition, which merely compels compliance with the section 211 contract filing requirement is essential to ensuring non-discrimination in the provision of special access and other wholesale services by providing carriers with visibility into the terms and conditions for wholesale services that AT&T and BellSouth have agreed to with other carriers. Thus, the rationale in support of this condition is largely the same as that which supports several of the remedies adopted by the Commission in the SBC/AT&T merger to provide enhanced protection against discriminatory conduct.

Continued Offering of AT&T's Wholesale Service – For a period of thirty (30) months after the Merger Closing Date, the merged AT&T/BellSouth entity shall not increase the rates for existing and new customers of the DS1 and DS3 local private line services that AT&T provides in BellSouth's territory.

Rationale: A similar remedy was adopted by the Commission as part of the SBC/AT&T merger to offset the harm resulting from AT&T's exit from the wholesale local private line market.³⁴¹

This condition and the rationale for it apply equally to this proposed merger.

Implementation of Service Quality Measurement Plan – Beginning thirty (30) days after the Merger Closing Date and continuing for a period of five (5) years, the merged AT&T/BellSouth entity shall implement in the BellSouth territory a Service Quality Measurement Plan for Special Access Services. BellSouth shall provide the Commission with performance measurement results on a quarterly basis demonstrating its monthly performance in delivering interstate special access services within each State.

³⁴⁰ AT&T/SBC Merger Order, at 123, Appendix F: Conditions.

³⁴¹ AT&T/SBC Merger Order, ¶ 51.

Rationale: This remedy was adopted by the Commission as part of a group of “special access” remedies in the SBC/AT&T merger to ensure the provision of special access services is consistent with specific and well-identified performance standards.³⁴² This condition and the rationale for it apply equally to the proposed merger.

Special Access Plan Portability and Commercial Agreement Plan Portability – The merged AT&T/BellSouth entity shall permit a requesting telecommunications provider to port the entirety of an existing special access plan or commercial agreement (except for state-specific rates) from a state where it currently is effective to another state in its territory. More specifically, parties with these plans should be able to move circuits between plans without penalty or additional cost.

Rationale: As stated above, there is real and substantial harm to customers and competition from losing BellSouth as a regulatory benchmark. This harm can be ameliorated to some extent by enabling competitive service providers to port current agreements – with their differing terms and conditions – across state lines throughout the entire 22-state AT&T/BellSouth operating territory.

5. *Divestitures*

Divestiture of Overlapping Metro Private Line Assets – Within three (3) months after the Merger Closing Date, the merged AT&T/BellSouth entity shall file with the Commission a plan for the auction of AT&T’s Metro Private Line Assets, including all facilities and related operations, in the BellSouth territory. The Commission may alter the auction procedures in the plan consistent with the public interest, convenience, and necessity. The auction shall be conducted six (6) months from the Merger Closing Date, and the transfer of all assets to the purchaser shall be completed within twelve (12) months of the Merger Closing Date.

Divestiture of Wireless Spectrum – Within three (3) months after the Merger Closing Date, the merged AT&T/BellSouth entity shall file with the Commission a plan for the auction of BellSouth’s wireless assets, including licenses, in the 2.5Ghz band. The Commission may alter the auction procedures in the plan consistent with the public interest, convenience, and necessity. The auction shall be conducted six (6) months from the Merger Closing Date, and the transfer of all assets to the purchaser shall be completed within nine (9) months of the Merger Closing Date.

³⁴²

Id.

Rationale: The best long-term remedy for harms caused by this merger are the divestiture of overlapping metropolitan area network assets. By placing these duplicative assets in the hands of competitors, the Commission maximizes the opportunity to create vibrant competition, including facilities-based last-mile competition consistent with the competitive goals of the 1996 Act. The two divestitures proposed here involve local private line (wireline) assets and important local wireless assets both of which can be used to provide voice and high-speed data products in competition with the BellSouth network.

VIII. CONCLUSION

The thousands of pages of rhetoric submitted by the Applicants cannot avoid one overriding fact -- the absorption of BellSouth into AT&T will significantly reduce competition across virtually all telecommunications product markets throughout nine Southeastern states where AT&T will no longer compete with BellSouth. In addition, the existing market power of AT&T in already extensive incumbent LEC operating territory will be materially enhanced. While the Commission, rightly or wrongly, has tolerated a series of enormous AT&T acquisitions over the past few years, in each case the transactions raised serious concerns. There comes a point where AT&T's corporate engorgement must do more than raise eyebrows, and instead set off alarm bells. That time is now. By further reducing the initial slate of seven RBOCs to only three, and putting AT&T in effective control of approximately one half of all of

the access lines in the nation, the proposed merger clearly impedes telecommunications competition substantially without offering any significant offsetting public benefits. Hence the Application is not in the public interest and should be summarily denied, or at a minimum heavily conditioned as required to offset the anticompetitive effects of the proposed merger.

Respectfully submitted,

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