BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from	)	WC Docket No. 06-74
BELLSOUTH CORPORATION **Transferor**	)	
to	)	
AT&T INC. **Transferee**	)	

JOINT OPPOSITION OF AT&T INC. AND BELLSOUTH CORPORATION TO PETITIONS TO DENY AND REPLY TO COMMENTS

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INTRODUCTION AND EXECUTIVE SUMMARY

The merger of AT&T and BellSouth will take place amid an onslaught of competition in communications markets. Cable companies are aggressively marketing voice service to residential and business customers of all sizes, and are winning upwards of 258,000 new customers every month. Nationwide, there are now more wireless customers than wireline customers (and more wireless long distance calls than wireline long distance calls). Half of all U.S. households are expected to be broadband subscribers by the end of the year. ILECs collectively lost eight million access lines in 2005 and are expected to lose another seven million in 2006.

Against this backdrop of vibrant and growing competition, the proposed merger is overwhelmingly in the public interest. The merger will unify ownership over Cingular Wireless, and thereby increase efficiency and facilitate the development of new products and services that consumers want. It will enable AT&T to speed the deployment of IPTV services to BellSouth's customers and increase the efficiency with which AT&T can deploy those services to all of its customers – thereby providing much needed competition in a market long frustrated by the stranglehold of the dominant cable incumbents. It will improve services to government customers, especially in the increasingly important areas of national security and disaster preparedness. And it will benefit *all* customers – from single-line mass market customers to large multi-location international enterprises – through increased research and development, network integration and substantial cost savings.

Opponents of the merger cannot credibly challenge these benefits. None of them disputes, for example, the benefits that will flow from unifying ownership over Cingular, arguing instead that the same benefits might be achieved absent the merger. But these claims ignore the

reality that the merger will permit the combined company to bring new products to consumers faster and more efficiently than would otherwise be the case. Likewise, opponents do not seriously dispute that the merger will enhance competition for video services or create a combined company that is better prepared to assist the government in fulfilling the vital roles of national security and disaster response and recovery. And, although some opponents question the benefits stemming from network integration and other efficiencies and cost savings as difficult to quantify, the Commission has properly acknowledged similar benefits in approving past mergers. As we have demonstrated in the Public Interest Statement and reinforce here, consumers are *already* realizing such benefits from the SBC/AT&T merger. The combination of AT&T, BellSouth and Cingular promises to provide much more of the same.

These public interest benefits will be achieved without any harm to competition. Opponents' claims to the contrary are rooted in a worldview that is at least a decade old – one in which local markets have changed little since divestiture, in which market-opening procedures have not yet been fully implemented and competition remains fragile, and in which certain classes of competitors require special protection by regulators. But the truth is that, as noted at the outset – and as the Commission recognized last year in approving the SBC/AT&T and Verizon/MCI mergers – competition has never come from as many varied and sustainable sources as it does today. AT&T and BellSouth face aggressive competition from multiple sources in every facet of their businesses, and the merger will do nothing to change that.

For example, although opponents claim that the merger will harm competition in the market for special access services, they do not identify a single location in which that could possibly be the case. The reason for this is simple: out of the more than 200,000 commercial buildings with special access level demand in BellSouth's region, only 32 even arguably involve

a reduction in competition where there are no immediately available substitutes, and all 32 are in the intensely competitive special access markets of Atlanta and Miami/Ft. Lauderdale. In each of those 32 buildings, moreover, other providers could readily provide service, and in none of them does AT&T have a single wholesale access customer. Since any arguable impact on competition stemming from this handful of buildings would be, at most, truly *de minimis*, the merger should be approved without any special access conditions.

Opponents' competitive claims regarding other markets are likewise insubstantial. Although two competitors allege that the merger will lessen competition for retail business services, they do not advance any evidence that would question the Commission's express findings in the *SBC/AT&T* and *Verizon/MCI Merger Orders* that competition in this market is "robust," that historic data do not accurately reflect "the rise in data services, cable and VoIP competition, and the dramatic increase in wireless usage," and that "myriad providers" stand ready to compete aggressively. As shown in the Public Interest Statement and here, competition in the enterprise segment has continued to grow since the Commission made these findings, only further discrediting the largely recycled and previously rejected arguments that this merger will harm competition for retail business services.

Claims that the merger will decrease mass market competition are equally fanciful. As the Commission recognized in the *SBC/AT&T Merger Order*, the former AT&T Corp. stopped competing in this market two years ago. Accordingly, this Commission's holding last year that "SBC's acquisition of AT&T is not likely to result in anticompetitive effects for mass market services due to AT&T's actions to cease marketing and gradually withdraw" from the market applies at least as strongly here.

Some opponents speculate that the efficency-producing integration of the AT&T and BellSouth networks may have "foreclosure" effects by depriving independent IXCs and CLECs in the BellSouth region of a customer for their long distance and special access services. But none of the parties that these opponents contend might be affected by consolidation of the merging parties' traffic on their own networks even opposed the merger on those grounds, and for good reason. It is economically inconceivable that the merger will meaningfully affect the ability of any individual long-haul or special access provider to compete – much less have any actual anticompetitive effect in any relevant market – given the many customers that remain to these suppliers (including AT&T for special access services outside its local service areas).

There also will be no loss of competition for broadband services. AT&T and BellSouth do not compete with each other for consumer broadband customers today, so, contrary to commenters' claims, the merger will not reduce competition for those customers. And there is no basis to conclude that the merger will harm competition for consumer wireless broadband services. The merger will not increase the aggregation of wireless spectrum, and the combined company will hold less than one sixth of the spectrum suitable for consumer wireless broadband. That ownership level is plainly insufficient to threaten harm. Nor will the merger have any effect on Internet backbone competition or do anything to facilitate "de-peering," for the simple reason that BellSouth has no nationwide backbone.

The merger does not raise any other public policy concerns. Invoking a theoretical argument raised in connection with ILEC mergers that took place in the late 1990s and 2000, opponents argue that, by increasing AT&T's footprint, the merger will encourage it to discriminate against its competitors. But that argument has no resonance here, for the simple reason that AT&T and BellSouth cannot plausibly be said to possess monopoly control over

inputs that competitors need to provide local and long-distance service. Section 271 authorization has been granted in all states; local markets are fully and irreversibly open to competition; the interconnection requirements of Section 251 have become routine; and incumbents face aggressive inter- and intra-modal competition from multiple sources. Moreover, the conditions imposed by the Commission in the SBC/Ameritech and Bell Atlantic/GTE mergers expired several years ago without incident, and such conditions have no place in today's robustly competitive markets.

For the same reasons, opponents' argument that the merger will result in the loss of BellSouth as a "benchmark" is misplaced. The Commission decisions holding that benchmarking was an important regulatory tool were released during the period when Sections 251 and 271 of the Act had not been fully implemented. Since ILECs now lack the power to discriminate against rivals, there is no need artificially to preserve a certain number of ILECs as benchmarks to detect discrimination that cannot occur. Rather, as the Commission recognized in those decisions, the vibrant competition in today's open markets will prevent discrimination far better than regulatory benchmarks. Furthermore, regulators now have seven additional years of experience in implementing the local competition provisions of the 1996 Act, and they have established comprehensive rules and regulations, including detailed performance metrics, to prevent discrimination. Regulators thus do not need to engage in benchmarking to identify unlawful discrimination.

Finally, opponents recite a number of alleged infractions and disputes that have nothing to do with the merger. These are transparent attempts to use this proceeding to gain leverage in ongoing business negotiations with AT&T and BellSouth, and they have no bearing here. Similarly, opponents have raised a number of issues, such as net neutrality, franchising,

redlining, and alleged disclosure of call records for national security purposes, that do not involve the merger and must be raised, if at all, in other forums.

For the reasons set forth in the Public Interest Statement and this Joint Opposition, the Commission should grant the applications promptly and without any conditions.

TABLE OF CONTENTS

Attachments:

- Reply Declaration of Parley C. Casto
- Reply Declaration of William L. Dysart, Ronald A. Watkins & Brett Kissell
- Reply Declaration of Ronald Pate & Kevin Graulich
- Reply Declaration of Dennis W. Carlton & Hal S. Sider
- Reply Declaration of Marius Schwartz
- Appendix A: Detailed Response to Specific Allegations
- Appendix B: Customer Statements

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I. INTRODUCTION

The merger of AT&T and BellSouth will provide myriad public interest benefits without harming competition in any relevant market. Although merger opponents raise a number of issues, they cannot seriously challenge the public interest benefits of this transaction, and their claims ignore the realities of today's intensely competitive marketplace. For the reasons set forth below and in the Public Interest Statement, none of their claims has any merit. Accordingly, the Commission should grant the transfer applications promptly and without any conditions.

II. THE MERGER WILL PRODUCE NUMEROUS PUBLIC INTEREST BENEFITS

Applicants demonstrated in the Public Interest Statement that the merger will produce numerous, significant public benefits.

- By unifying the ownership of Cingular Wireless, the merger will enable the faster introduction of new, converged services, while allowing the combined company to

produce significant efficiencies and offer a service plan for consumers with a single monthly recurring charge for all access devices.

- The merger will create a more efficient video competitor and enable the faster roll out of IPTV in BellSouth's region, thereby enhancing video competition.

- The merger will improve services provided to government customers, particularly in the areas of national security and disaster preparedness.

- The integration of AT&T and BellSouth will bring the same kinds of efficiencies and public benefits recognized by the Commission in its approval of the SBC/AT&T transaction.

- The merger will foster more efficient research, development and innovation.

- The merger will produce substantial cost savings.

Merger opponents, for the most part, do not even attempt to rebut Applicants' showings on these points, and to the limited extent that they do challenge them, they simply ignore the Commission's dispositive conclusions in the *SBC/AT&T Merger Order* rejecting the very same arguments.

A. Unification of Cingular's Ownership Will Enable a Quicker Roll Out of New Converged Services and Enhance Efficiency

Applicants demonstrated in the Public Interest Statement that unifying the ownership of Cingular would lead to substantial public interest benefits.[1] Merger opponents offer only a few baseless challenges to these showings.

1. The Combined Firm Will Be a More Effective Supplier of Wireless Services to Business Customers

No opponent disputes that the proposed merger will enable the combined firm to integrate Cingular offerings to business customers in ways that are not possible under the current joint venture structure. As just one example, the combined firm will be able to fulfill business

[1] Description of Transaction, Public Interest Showing and Related Demonstrations ("Public Interest Statement") at 6-19.

customers' demand for one monthly recurring charge for a combined bucket of wireless and wireline minutes of usage.[2] The combined firm also will have significantly more flexibility to combine wireless services in existing package discount programs to business customers.[3] And the combined firm will be able to offer business customers a single point of contact for all billing and service issues.[4] Business customers value these benefits,[5] and they cannot be fully or timely achieved without the merger.[6]

2. The Proposed Transaction Will Result in Synergies in the Development and Provision of Converged Wireline/Wireless Services

The merged firm also will be able to provide much more effectively the converged services that customers want.[7] Contrary to merger opponents' assertions,[8] Applicants never have claimed that the joint venture structure of Cingular prevents the company from providing

[2] *Id.* at 18-19.

[3] *Id.*

[4] *Id.*

[5] *See, e.g.*, Statement of Gene Warren, ACT Teleconferencing ("ACT Teleconferencing Stmt.") ¶ 10 ("We like the fact of wireline and wireless services coming together. We believe that wireless connecting with wireline will cut our costs"); Statement of Joe Shea, Los Angeles Times ("LA Times Stmt.") ¶ 7 ("This transaction, by consolidating the ownership of Cingular, should help us achieve our wireless goals. I would expect that we would be able to leverage our wireline purchases with AT&T to negotiate a better rate with Cingular."); Statement of Marie Escoto, Yamaha Motor Corp. ¶ 10 ("we expect to receive benefits from wireless/wireline integration").

[6] *See* Reply Declaration of Dennis W. Carlton and Hal S. Sider ("Carlton & Sider Reply Decl.") ¶¶ 143-49, 154-68.

[7] *See, e.g.*, Statement of Michael E. McDevitt, Children's Hospital of Alabama ("Children's Hosp. Stmt.") ¶ 8 ("the AT&T/BellSouth merger could benefit Children's by accelerating the convergence of wireless and wired technologies"); Statement of Terry Dymek, EMC, Inc. ¶ 8 (the merger "will bring wireless into a rationalized set of product offerings for business, and will encourage the convergence of wireless and wireline offerings"); Statement of Howard Hirth, Southern Orthopedic Specialists LLC ("Southern Orthopedic Stmt.") ¶ 5 ("the combined company will be able to offer packaged services which are not currently available from BellSouth, such as integrating Cingular service with our wireline service").

[8] *See* Petition to Deny of Consumer Fed'n of America, *et al*. ("CFA Pet."), Joint Declaration of Mark M. Cooper and Trevor Roycroft ("Cooper & Roycroft Decl.") at 29-31; Petition to Deny of Access Point, Inc., *et al*. ("Access Point Pet.") at 52.

converged solutions. Rather, Applicants explained – and opponents do not refute – that a combined AT&T-BellSouth-Cingular will be able to provide the next-generation converged wireless/wireline services *more* quickly, *more* efficiently and *more* economically than they can under the current ownership and management structure.[9] The DOJ and FTC confirm in their *Commentary on the Horizontal Merger Guidelines* that such efficiencies often can be achieved only by merger and not by contract.[10]

Only common ownership of AT&T, BellSouth and Cingular will permit the development of a unified strategy for designing and implementing IMS across multiple networks. One of the key capabilities that is necessary for the provision of such converged services is the ability to track customer data such as location, device capabilities, customer preferences with respect to that device, services purchased, and content requested. If a customer requests the transmission of streaming video from a PC to a mobile phone (or vice versa), the network needs to identify, among other things, where the devices are located, what their capabilities are for transmitting and displaying the data, and how the customer has set up his or her individual preferences for the transmission and display of such data. In the current scenario, where Cingular, AT&T and BellSouth all have separate IMS networks (and customer databases), these data would need to be pulled and integrated from those separate networks to enable the service. Currently, Cingular does not have a system for tracking all of these data components, so for either parent to provide this service, the parties would have to agree that Cingular should change its data schema to track

[9] Public Interest Statement at 14-18.

[10] U.S. Dep't of Justice and Fed. Trade Comm'n, *Commentary on the Horizontal Merger Guidelines* 50 (Mar. 2006) (emphasis added) ("That an efficiency theoretically could be achieved without a merger – for example, through a joint venture or contract – does not disqualify it from consideration in the analysis. *Many joint venture agreements* or contracts may not be practically feasible or *may impose substantial transaction costs* (including monitoring costs). In their assessment of proffered efficiency claims, the Agencies accord appropriate weight to evidence that alternatives to the merger are likely to be impractical or relatively costly.").

additional data at the same level of priority and in a method compatible with that parent's network. Such decisions are difficult and cumbersome given the different incentives and technology strategies of the parties involved.[11]

B. The Merger Will Enable Faster Deployment of IPTV and Enhanced Video Competition to the Benefit of Customers of the Combined Company

The Public Interest Statement detailed how the merger will allow the combined company to bring IPTV to BellSouth's customers much more quickly than would occur otherwise.[12] In addition, both BellSouth's and AT&T's customers will reap the substantial benefits of a stronger wireline video entrant because the combined entity will be a more effective video competitor than either company on its own. For example, the efficiencies created by the merger will result in lower per-subscriber costs.[13] Moreover, the transaction will promote competition in the market for video programming.[14] And the combined company's larger potential subscriber base, along with the switched, interactive IP-based technology used by U-verse[SM],[15] should permit it to increase the amount and diversity of programming available to the public at a lower cost than either company could do alone.

There is abundant evidence that consumers benefit from the introduction of another wireline competitor to cable operators.[16] Both this Commission and the GAO have noted the

[11] Public Interest Statement at 13-14. In addition, IMS technologies are relatively new and therefore challenging to implement for even a single network. After the merger, the combined firm will be able to design services across a single, unified IMS platform, which will significantly expand the variety of converged services that can be provided, and such services will be provided sooner and more efficiently.

[12] *Id.* at 23-25.

[13] *Id.* at 24-25; Carlton & Sider Reply Decl. ¶¶ 174-76.

[14] Public Interest Statement at 25.

[15] "U-verse[SM]" is the brand name of AT&T's IPTV offering.

[16] Just this month, the House Energy and Commerce Committee, in reporting a bill that recently passed the House, stated that a national franchise process for wireline providers would result in "increased competition, lower prices, enhanced service quality, and the deployment of new and

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positive effect of a wireline competitor on rates and services.[17] Moreover, the benefits to BellSouth subscribers of a more rapid roll out of IPTV would be substantial. Drs. Carlton and Sider estimate that the overall consumer welfare benefits as a result of faster video deployment could range from more than $1 billion up to $2.9 billion, depending on the price decline, demand elasticity and acceleration period assumed.[18]

Unlike AT&T, BellSouth has made no decision to proceed with a broad-scale commercial roll out of IPTV,[19] and BellSouth's development of IPTV lags behind AT&T's.[20]

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innovative broadband video . . . services over advanced, facilities-based networks." House Energy and Commerce Comm., Communications Opportunity, Promotion and Enhancement Act of 2006, H.R. Rep. No. 109-470, at 4 (2006).

[17] *See* Public Interest Statement at 20. *See also* Carlton & Sider Decl. ¶¶ 176-78; *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984, as Amended, Ex Parte Submission of the Department Of Justice*, MB Docket No. 05-311 (May 10, 2006) at 3 ("additional competition, particularly from wireline providers, has the potential to provide lower prices, better quality services, and more innovation to consumers").

[18] Carlton & Sider Reply Decl. ¶ 180 and Table 6.3. These figures are likely to understate the consumer benefits resulting from an acceleration of IPTV service because they do not take into account, for example, the consumer welfare impact of the increased number of cable channels or improved service that might be provided due to increased competition. *Id.* ¶ 182. On the other hand, these figures do not take into account any delay that may be caused by local franchise requirements.

[19] BellSouth's decision to provide video services on a limited scale to a small number of newly constructed multifamily communities, which may be provided using IPTV technology, will not position it to offer that service broadly. Any IPTV offerings to these communities by BellSouth would not require the investments in infrastructure (such as super hub offices) or back office and other support systems that AT&T has made and that would be required to support a broad-scale commercial launch of IPTV. *See* Supplemental Declaration of William L. Smith (submitted May 31, 2006).

[20] Access Point claims that, because BellSouth is investing $2.2 billion over a five-year period to upgrade its broadband access network, it has therefore "made a decision to deploy IPTV," but ignores BellSouth's statements that the upgrade was being made to permit it to provide a "wide range of IP-based interactive services," with IPTV only "potentially" being provided. *Compare* Access Point Pet. at 48 *with* Smith Decl. at 4. BellSouth noted that it would require a "substantial additional investment" in order to provide IPTV over these facilities, and that it was still "evaluating the feasibility of" such an investment. Public Interest Statement at 23.

Similarly, Access Point improperly relies on a paper published by Broadband Everywhere that misconstrued comments BellSouth made to a Louisiana House Committee, when what BellSouth made clear in its testimony was that statewide franchising legislation would "position" BellSouth

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AT&T, on the other hand, has taken concrete steps to commence a large-scale commercial roll out of IPTV and has recently accelerated the pace of that deployment. It now expects to deploy U-verse[SM] to nearly 19 million households in its 13-state region, including 5.5 million low-income households, by the end of 2008.[21]

The combined company is poised to become a formidable new video competitor that can take advantage of cost savings and economies of scale and scope not otherwise available to AT&T and BellSouth individually. Consumers stand to benefit substantially, not only from lower prices and higher quality of service, but also in terms of more diverse content and greater programming choice.[22]

C. The Merger Will Substantially Improve Services to Government Customers and Strengthen National Security and Emergency Preparedness

The Public Interest Statement demonstrated that the merger will create a financially strong, U.S.-owned and U.S.-controlled telecommunications company whose resources and capabilities will improve services to government customers, strengthen national security, and

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to offer IPTV if it decided to do so. *See* Hearing Before the Louisiana House of Representatives, Committee on Commerce, (May 9, 2006), *available at* http://house.louisiana.gov/rmarchive/2006/May2006.htm.

[21] Press Release, AT&T Inc., AT&T Initiatives Expand Availability of Advanced Communications Technologies (May 8, 2006), *available at* http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22272; Public Interest Statement at 21-22, 24.

[22] Access Point mistakenly suggests that AT&T has stated that the pricing for U-verse[SM] service will be higher than the price for the average cable service subscription, based on its reliance on an article in *XChange* magazine. *See* Access Point Pet. at 48. A review of the audio recording of the remarks cited by Access Point clarifies that AT&T's CFO, Richard Lindner, was discussing the higher prices that AT&T must pay for content compared to cable, and he did not state that U-verse[SM] subscription prices would be higher than cable subscription prices. *See* Q1 2006 AT&T Earnings Conference Call, http://phx.corporate-ir.net/phoenix.zhtml?p=iroleventDetails&c=113088&eventID=1258419.

enhance preparedness for, and the response to, natural disasters and other emergencies.[23] No merger opponent seriously challenges these benefits.

The Public Interest Statement described in detail the specific ways in which the merger will enhance national security and result in better service for government customers, such as greater end-to-end security, increased R&D, faster and more efficient deployment of advanced facilities and networks, and access to the unique resources of both companies.[24] The merged company also will provide government customers with a single point of contact to coordinate the delivery of service during normal operations and to accelerate service restoration efforts after a hurricane or other emergency.[25] Similarly, the merger will enhance the combined company's ability both to prevent and to manage the scope and severity of any problems affecting the consolidated network for the benefit of government customers of both AT&T and BellSouth.[26]

D. The Merger Will Bring Vertical Integration Efficiencies

Applicants demonstrated in the Public Interest Statement that the vertical aspects of this merger will yield numerous substantial efficiencies.[27] As was the case with the SBC/AT&T merger,[28] the AT&T/BellSouth merger will combine the complementary assets of AT&T's global fiber optic long distance network and BellSouth's extensive local fiber network within its nine-state region, resulting in the same vertical integration benefits the FCC has found significant. Consumers already have started to benefit from the similar integration of SBC's and

[23] Public Interest Statement at 28-40.

[24] *Id.* at 30-32.

[25] *Id.* at 31.

[26] *Id.* at 29-31.

[27] *Id.* at 40-46.

[28] *In re Applications of SBC Commc'ns Inc. & AT&T Corp.*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, 18387-88, ¶¶ 190-192 (Nov. 17, 2005) ("*SBC/AT&T Merger Order*").

AT&T's networks. Although actual network integration activities only began in January, AT&T has made significant progress and integration activities are on track. In May, the domestic AT&T and SBC IP backbones began to peer directly, which means that traffic between legacy SBC and AT&T customers is now exchanged without any intermediary network, resulting in service improvement for all AT&T customers. Once AT&T completes the upgrade of its network core to OC-768 circuits, the IP network cores of AT&T and SBC will be consolidated and network integration completed. AT&T anticipates that it will begin to move to the new network core by the end of 2006.[29]

As described in detail in the Public Interest Statement, network integration benefits include, among others, (1) improved network efficiency and performance; (2) improved network security; (3) accelerated investment in network upgrades; and (4) increased availability of products and services.[30] AT&T's recent record of quickly providing the benefits of integration confirms that Applicants can produce similar network integration benefits after this merger. And customers of both AT&T and BellSouth likewise foresee significant benefits from the integration of the companies' networks.[31]

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[29] Public Interest Statement, Declaration of Christopher Rice ("Rice Decl.") ¶¶ 7, 9 (discussing plans to connect directly domestic backbones of legacy SBC and AT&T and to upgrade network core in 2006).

[30] Public Interest Statement at 42-46.

[31] *See, e.g.*, Statement of Bob Gilmore, Cal Maine Foods, Inc. ("Cal Maine Foods Stmt.") ¶ 4 ("Combining AT&T's and BellSouth's complementary services and network will undoubtedly provide efficiencies that will reduce costs to customers like Cal Maine Foods. . . I expect the merger will lead to better rates, as well as better network function"); Statement of Patrick O'Brien, ADC Telecommunications ¶ 5 ("mergers like AT&T and BellSouth will encourage investment in networks and infrastructure by the newly combined company"); Statement of Roger Graves, Mississippi Dep't of IT Servs. ¶ 10 ("The combined company might be able to lower long distance costs if the company did not have to purchase these resources from other suppliers. . . I expect that there would be savings and operational advantages from having both the local and long distance services together again under the same roof."); METCO/Milwaukee Electric Tool ¶ 9 ("A merger between AT&T and BellSouth will produce a company able to

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Access Point claims that network integration and other vertical benefits are too speculative or are already being achieved by virtue of the SBC/AT&T merger, and, conversely, if they are in fact realized, will not benefit consumers.[32] But the Commission specifically recognized in the *SBC/AT&T Merger Order* "the significant benefits [that] are likely to result from the vertical integration of the largely complementary networks."[33] Likewise, the Department of Justice credited the "exceptionally large merger-specific efficiencies" in approving the SBC/AT&T and Verizon/MCI transactions.[34] Similar benefits will result from this merger and, for reasons discussed here and in the Public Interest Statement, those benefits will reach consumers through more reliable, innovative and flexible services at better prices than either company could offer alone.

E. The Merger Will Benefit Customers Through Increased Research, Development and Innovation

Applicants also have demonstrated how, as in the SBC/AT&T merger, this merger will permit more efficient research and development and allow BellSouth customers to benefit from innovations developed by AT&T. The Commission found such efficiencies important in the SBC/AT&T merger,[35] and the same conclusion should apply here. As described in the Public Interest Statement, AT&T has made significant progress since the consummation of the SBC/AT&T transaction in bringing innovative products and services to a wider set of customers

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provide complementary services and create an integrated network capable of offering a high quality of service").

[32] Access Point Pet. at 57-60.

[33] *SBC/AT&T Merger Order* ¶¶ 190-192.

[34] Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Verizon's Acquisition of MCI and SBC's Acquisition of AT&T (Oct. 27, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/October/05_at_571.html.

[35] *SBC/AT&T Merger Order* ¶ 195.

in the SBC region.[36] Opponents can offer no legitimate reason why Applicants would not be able to deliver similar innovative products and services to the small business and mass market customers of BellSouth and Cingular. Indeed, the customers of both AT&T and BellSouth anticipate that the proposed transaction may result in enhanced research and development.[37]

F. The Merger Will Produce Substantial Cost Savings

Applicants showed in the Public Interest Statement that many of the same cost synergies and corresponding savings that the Commission credited in the SBC/AT&T merger will occur in this merger.[38] The Commission has squarely held that cost savings are a public benefit and, in the *SBC/AT&T Merger Order*, the Commission expressly credited and relied upon the substantial merger benefits associated with such cost synergies.[39]

In the wake of the SBC/AT&T merger, the cost savings in this merger are anything but speculative. The estimate of cost savings in the SBC/AT&T merger has, in fact, proven to be conservatively low. As AT&T reported publicly on January 31, the net present value of SBC/AT&T synergies is now estimated at $18 billion, 20% greater than originally forecast.[40]

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[36] *See* Public Interest Statement, Rice Decl. ¶11.

[37] *See, e.g.*, Statement of Brett Bidinger, American Bureau of Shipping ¶ 9 ("the merger may better enable AT&T to invest in network systems and research and development."); ACT Teleconferencing Stmt. ¶ 12 ("It will better enable AT&T to invest in research and development"); Statement of John Leonowich, Mannington Mills ("Mannington Mills Stmt.") ¶ 7 ("the merger will enable AT&T to invest more in research and development and to bring better products to market faster."); Statement of Jeffrey Marshall, Transtar Industries ("Transtar Stmt.") ¶ 5 (the merger "will help spawn new services and lead to the development of more advanced technolog[ies]").

[38] Public Interest Statement at 51-54.

[39] *SBC/AT&T Merger Order* ¶¶ 196-204; *see also id.* ¶ 193 ("We find that the merger of SBC and AT&T is likely to give rise to significant economies of scope and scale, as well, although these are difficult to quantify."). The Commission also acknowledged that certain employment-related cost savings are cognizable public interest benefits.

[40] *See* Public Interest Statement at 42; *see also* AT&T Analyst Conference Presentation, at 51 (Jan. 31, 2006), *available at* http://library.corporate-ir.net/library/11/113/113088/items/181348/analyst06_b.pdf (noting that synergies are now estimated at $18 billion vs. $15 billion).

This demonstrates that the cost savings claimed by AT&T in its merger with SBC were real, and similar cost savings should not be ignored in the AT&T/BellSouth transaction. Customers of both AT&T and BellSouth believe cost savings resulting from the merger will be a benefit and may be passed on to them in the form of lower prices.[41]

III. THE MERGER WILL ENHANCE, NOT LESSEN, COMPETITION

A. The Merger Will Not Harm Wholesale Special Access Competition

Merger opponents never come to grips with the truly *de minimis* nature of Applicants' overlapping special access facilities. AT&T has local fiber connections to only a few hundred of the more than 200,000 commercial buildings with special access level demand in BellSouth's territory. After applying the competitive analysis used in prior mergers to eliminate buildings for which there is plainly no competitive concern, only 32 buildings remain in the entire BellSouth region. And there is no basis for concern even as to them.

Nonetheless, some merger opponents take the opportunity to propose a host of expansive "remedies" that go well beyond those that the Commission approved in the SBC/AT&T and

[41] *See, e.g.,* Southern Orthopedic Stmt. ¶ 5 ("I anticipate that the cost savings associated with the merger may be passed on to customers such as our company"); Statement of Allen Van Meter, Dialogic Commc'ns Corp ("Dialogic Stmt.") ¶ 7 ("as a result of the AT&T-BellSouth merger we may in fact see lower access prices for last-mile services due to the economies of scale of the combined entity. I am hopeful that as network costs are reduced, those reductions will be passed along to us."); Statement of Jack Storey, Children's Healthcare of Atlanta ("CHOA Stmt.") ¶ 7 ("I hope it will allow the combined company to achieve back office savings which would benefit us."); Statement of Chris Gruenwald, Affiliated Computer Services, Inc. ("Affiliated Computer Stmt.") ¶ 5 ("The merger will enable AT&T to drive out inefficiencies which will, in turn, lower prices"); Statement of Cathy Abbott, City of Hollywood, FL ¶ 5 ("the merger will provide reduced prices through economies of scale"); Statement of Rick Van Akin, Sanofi-Aventis Group ¶ 5 ("the prices that the combined company charges will no longer need to include the cost of paying a different company for access to that company's lines or equipment"); Statement of Carlos Cabrera, Exide Technologies ¶ 6 (the merger "would create a much stronger player for U.S.-based companies, which should result in lower cost and better service"); Statement of Larry Sanderson, Computer Services Inc. ¶ 4 ("I believe that the proposed AT&T-BellSouth merger can potentially benefit retail business customers like CSI by bringing down prices for telecommunications services").

Verizon/MCI mergers. They advocate theories that either have already been rejected by the Commission or fail on their own terms. These merger opponents: (1) complain that the Commission and the DOJ got it all wrong in the prior mergers and that much broader divestitures are necessary to remedy the loss of AT&T as an independent supplier of "Type I" wholesale special access services in BellSouth's territory; (2) insist that AT&T has some special status, even with respect to buildings to which its local fiber network is *not* connected, notwithstanding that many other CLECs have deployed fiber in the same areas and the same BellSouth wire centers as AT&T and have equal ability to provide the same "Type II" special access resale arrangements; (3) raise the same coordinated interaction, mutual forbearance and vertical harm theories that the Commission and DOJ rejected last year; and (4) interject generic complaints about special access rates, returns and performance that have nothing to do with the merger and that the Commission has repeatedly held must be raised, if at all, in ongoing industry-wide rulemaking proceedings.

1. Any Type I Special Access Effects Are *De Minimis*

In the SBC/AT&T merger proceeding, the Commission and the DOJ found that the elimination of AT&T as an independent wholesale special access supplier could have potential competitive significance *only* in the subset of AT&T "lit" buildings without actual or potential competition from one or more of SBC's other facilities-based competitors.[42] In that case, hundreds of such buildings remained after application of the DOJ's competitive screens. To obtain swift merger approvals, the merging parties agreed to provide other CLECs ten year

[42] *See generally SBC/AT&T Merger Order* ¶¶ 24-55; Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Verizon's Acquisition of MCI and SBC's Acquisition of AT&T (Oct. 27, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/212407.htm; Plaintiff United States' Response to Public Comments, *United States v. SBC Commc'ns, Inc.*, Civ. A. No. 1:05CV02102 (EGS) (D.D.C. Mar. 21, 2006) ("DOJ Response to Public Comments").

indefeasible rights of use ("IRUs") in AT&T's local fiber connections to these buildings.[43] Here, in contrast, based on the same competitive screens, the number of buildings that raise even potential competitive concern is less than 10% of what it was in each of the prior mergers. No remedy is necessary for this *de minimis* issue.

a. Application of the Competitive Analyses Endorsed in the Prior Mergers and Examination of the Specific Buildings at Issue Confirms That Any Type I Effects Are Far Too Limited in Scope and Magnitude To Justify Merger Conditions

AT&T operates local fiber networks in only 11 BellSouth metropolitan areas. The vast majority of the buildings connected to AT&T's local fiber in these areas are either currently served by other CLECs or could be served by rivals "given the . . . proximity of competitive fiber to that building, and the capacity required by the building."[44] Many buildings are also competitively insignificant for other reasons identified by the DOJ and the Commission, *e.g.*, the buildings are vacant or solely occupied by AT&T or an affiliate.[45]

The only metropolitan areas with buildings remaining after application of the competitive screens used in the prior mergers are Miami/Ft. Lauderdale and Atlanta, two of the most competitive areas in the entire nation.[46] Applicants reported in the Public Interest Statement that fewer than 50 buildings in those areas might require further review under the competitive screens.[47] Applicants have continued to collect information on these buildings, and can now report that no more than 32 such buildings actually exist – 18 in Miami and 14 in Atlanta.

[43] *See, e.g.*, DOJ Response to Public Comments at 6; *SBC/AT&T Merger Order* ¶ 40.

[44] DOJ Response to Public Comments at 23; *see* Carlton & Sider Reply Decl. ¶¶ 20-21 and n.12 (applying these criteria).

[45] DOJ Response to Public Comments at 22; *see* Carlton & Sider Reply Decl. ¶ 20 & n.12 (applying these criteria).

[46] *See* Carlton & Sider Reply Decl. ¶ 20.

[47] Public Interest Statement at 59 & n.169.

The number of buildings at issue is too small to warrant any merger conditions.[48] The Commission has long recognized that its public interest review of proposed mergers – which focuses on ensuring that the public interest benefits of a merger exceed any harm to the public interest – does not and cannot demand a "remedy" for every claimed harm, no matter how small.[49] Merger conditions, like regulations generally, are costly to implement and can reduce flexibility and efficiency. Thus, such conditions can make sense only when they are shown to be necessary to address a significant competitive problem.[50] But the Commission need not even engage in that line-drawing here, because a closer examination of the competitive characteristics of the 32 remaining buildings confirms that no remedies are warranted for even the theoretical concerns that animated the remedies in the prior mergers.[51]

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[48] *Accord* Carlton & Sider Reply Decl. ¶ 22.

[49] *See, e.g., In re Joint Applications of One-Point Commc'ns Corp. and Verizon Commc'ns,* Memorandum and Order, 15 FCC Rcd. 24165, ¶ 7 (CCB Dec. 8, 2000); *see also In re Applications of AT&T Wireless Servs. Inc. & Cingular Wireless Corp.*, Memorandum Opinion and Order, 19 FCC Rcd. 21522, 21580-82, ¶ 107 (Oct. 26, 2004) ("*Cingular/AT&T Wireless Merger Order*") ("[T]he loss of a competitor with such a small market share is *de minimis* and would not likely cause significant, merger-related anticompetitive effects."); *In re Application for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast, Transferee,* Memorandum Opinion and Order, 17 FCC Rcd. 23246, ¶ 63 (Nov. 14, 2002) ("*AT&T/Comcast Merger Order*") (finding no merger harms in areas where "the merger's effect on the Applicants' subscriber share would be *de minimis*").

[50] *See, e.g., In re Section 272 (B)(1)'s "Operate Independently" Requirement for Section 272 Affiliates,* Memorandum Opinion and Order, 19 FCC Rcd. 5102, ¶ 35 (Mar. 17, 2004) ("[b]ecause we conclude that the costs outweigh the benefits of the [rule], the costs of the . . . [merger] condition must logically outweigh the benefits"); *Comsat Study-Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, 77 F.C.C.2d 564, ¶ 354 (1980) ("while divestiture has its benefits, it would impose some additional costs and require tradeoffs which may outweigh those benefits"). The antitrust authorities likewise have consistently held that divestiture conditions are not appropriate where the "costs . . . associated with the continuing divestiture and hold separate requirements seem significant" and such "potential harm to the respondent outweighs any further need for [divestiture]." *S.C. Johnson & Son, Inc.*, 116 F.T.C. 1290 (1993); *see also Rite Aid Corp.*, 125 F.T.C. 846 (1998) (modifying consent decree after determining costs of previously imposed divestiture would outweigh potential benefits).

[51] *See* Carlton & Sider Reply Decl. ¶ 22.

First, the merger will not eliminate any *actual* wholesale special access competitive service because AT&T does not have any wholesale private line customers in any of these buildings.[52]

Second, the majority of the remaining buildings are within one tenth of one mile of at least one CLEC's fiber network.[53]

Third, to the extent any CLEC is interested in purchasing wholesale access from the merged firm to serve these buildings, low-priced DS1 and DS3 UNE loop facilities remain available to nearly two thirds of the buildings at issue.[54]

Fourth, other carriers could provide access to many of these buildings using low-cost broadband wireless networks that have already been deployed in both Miami and Atlanta. In Miami/Ft. Lauderdale, for example, XO reports that it has ubiquitous or virtually ubiquitous last mile access to commercial buildings throughout the area using its broadband fixed wireless facilities, and XO's coverage maps indicate that its service areas encompass all of the AT&T local fiber-connected buildings at issue here.[55] In Atlanta, a joint venture of First Mile Communications and Southern Telecom recently "transform[ed] the Inforum . . . building," located in downtown Atlanta, to allow First Mile "to offer broadband wireless connections to

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[52] *See* Carlton & Sider Reply Decl. ¶ 20.

[53] *Id.* at 21.

[54] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, 2614, 2525-32, ¶¶ 146, 167-81 (Feb. 4, 2005) ("*TR Remand Order*").

[55] *See* XO Communications Coverage Map, http://www.xo.com/about/network/maps/wireless_large.html. These services, according to XO, eliminate "the need to lease local access facilities from incumbent telephone companies." Press Release, XO Communications Inc., Apr. 24, 2006, available at http://www.xo.com/news/300.html.

some 5,600 businesses in 1,500 office buildings within a five-mile radius of the building," and "as a result, businesses throughout the downtown Atlanta areas will be able to connect with telecommunications carriers in the Inforum."[56] In short, the impact of *this* merger on potential wholesale special access competition is truly *de minimis* and does not warrant the conditions agreed to in the SBC/AT&T and Verizon/MCI merger or any other conditions.

b. The Commission Should Reject Merger Opponents' Requests for Broader Conditions

Recognizing that the conditions they seek cannot be justified under the analytical framework used in the prior mergers, merger opponents grossly mischaracterize AT&T's competitive significance in BellSouth's territory. COMPTEL and TWTC complain that the analytical framework used in the prior mergers ignores the "harmful effects of a merger to duopoly" in "three to two" buildings where the merger will reduce the number of CLECs serving the building from two to one (and also fails to address supposed building-specific effects in "four-to-three" buildings).[57] But COMPTEL and TWTC have no response to the DOJ's finding that "[t]o conclude . . . that a merger is anticompetitive simply because the number of competitors is reduced from, *e.g.*, three to two, is incorrect."[58] As the DOJ explained, "[m]any other considerations relating to market structure are also relevant," such as "whether coordinated [or] unilateral effects are likely, whether entry likely will occur, and whether a merger will

[56] Press Release, First Mile Commc'ns, LLC, First Mile Communications and Southern Telecom Introduce Fixed Broadband Wireless Solutions at the INFORUM (Apr. 18, 2006), *available at* http://www.firstmile.com/content/40.htm. There is ample spectrum available to carriers to provide such wireless last-mile facilities. As one example, AT&T provides fixed wireless building connections using spectrum in the 39 GHz range. That spectrum band alone has 14 channels that are separately licensed to carriers by the Commission.

[57] Petition to Deny of Time Warner Telecom ("TWTC Pet.") at 21-23; Petition to Deny of COMPTEL ("COMPTEL Pet.") at 8-9.

[58] DOJ Response to Public Comments at 24.

generate efficiencies."[59] The DOJ considered "millions of pages of documents, scores of interviews, network maps, lists of online buildings and other information from the parties and numerous other industry participants" and found no evidence to support the contention of a "competitive problem[s] in . . . 3-to-2 situations."[60]

The DOJ further recognized that "the fact that at least two CLECs [*i.e.*, AT&T and at least one other CLEC] had added the buildings in question to their networks suggested that the characteristics of the buildings (*e.g.*, location, capacity demand) made them susceptible to entry."[61] Thus, the DOJ concluded that "where the number of competitors went from three to two," "the evidence did not support a finding of likely unilateral anticompetitive effects in these buildings" and that it was "unable to conclude that the mergers would significantly increase the risks of coordinated interaction."[62] On this record, there is no different prospect that elimination

[59] *Id*.

[60] Reply of the United States to Actel's Opposition to the United States' Motion for Entry of the Final Judgments, *United States v. SBC Commc'ns, Inc.*, Civ. A. No. 1:05CV02102 (EGS), at 16 (D.D.C. May 31, 2006) ("DOJ Tunney Act Reply").

[61] DOJ Response to Public Comments at 26.

[62] *See* DOJ Response to Public Comments at 26; *see also SBC/AT&T Merger Order* ¶ 52 ("it [is] unlikely that the merger will lead to tacit collusion or other coordinated effects"). TWTC's coordinated interaction assertion is quite ironic because, at bottom, TWTC's claim is that TWTC itself will engage in "coordinated interaction" with BellSouth after the merger. And, contrary to TWTC's claims, neither Commission nor court precedent establishes that a merger to duopoly always likely leads to coordination. The Commission recently found that intense "duopoly" competition between ILECs and cable companies for broadband Internet access would drive these companies to offer unaffiliated ISPs "commercially reasonable" wholesale access. *See, e.g., In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* Report, and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, ¶ 75 (2005). *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001) is not to the contrary. Despite TWTC's suggestion, TWTC Pet. at 21, there, as the court emphasized, a merger of the second and third largest baby food firms may have anticompetitive effects because "there had been no significant entries . . . in decades and that new entry was difficult or improbable."

of AT&T as an independent fiber-based supplier to buildings that already are connected by at least one other CLEC will have material anticompetitive effects.[63]

Rather than confront these explicit DOJ assessments, merger opponents assert that they conflict with, and are somehow trumped by, the DOJ's *Horizontal Merger Guidelines*' "HHI" formula.[64] But, those Guidelines make clear that the HHI tool is merely an "aid to the interpretation of market data," to be used in appropriate circumstances.[65] And the DOJ – a sponsor of the Guidelines – and the Commission have now twice concluded, after exhaustive review of the relevant market data for wholesale special access competition, that the HHI is *not* an appropriate tool for assessing the competitive impact of an increase in concentration in these circumstances.[66] The DOJ "considered a large evidentiary record . . . but did not find significant

[63] Cbeyond contends that "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." Comments of Cbeyond Communications, *et al*. ("Cbeyond Comments") at 67. But most of AT&T's local fiber connected buildings are *already* served by at least one other CLEC with excess capacity that could obviously "replace" AT&T. Many of the remaining buildings are locations with sizeable demand and near other CLECs' local fiber facilities. And other CLECs' transport facilities overlap the vast majority of AT&T's local fiber networks. Public Interest Statement at 56-57. In fact, other CLECs often purchase fiber IRUs that are located in the *same sheath* from which AT&T purchases fiber IRUs to provide transport. Competitors thus do not have to "replace" AT&T's footprint – they already serve that footprint (and more). *See, e.g.*, DOJ Tunney Act Reply at 22 ("there generally is no bottleneck or competitive problem for transport circuits"); *see also* DOJ Response to Public Comments at 18 (finding that the potential "bottleneck" was due to the "reduction from two to one in the number of providers of *last-mile* connections," not transport facilities) (emphasis added).

[64] *See, e.g.,* TWTC Pet. at 22 ("the only appropriate market concentration test would be one that hews closely to the DOJ's *Horizontal Merger Guidelines* [*i.e.*, the HHI]").

[65] *See* U.S. Dep't of Justice and FTC, *Horizontal Merger Guidelines* §§ 1.5, 1.521 (1997).

[66] The Commission twice rejected proposals to rely on a HHI test to estimate the competitive impact of the merger on special access competition and instead relied on its own exhaustive investigation of the special access markets and other relevant marketplace facts. *See SBC/AT&T Merger Order* ¶ 49; *In re Applications of Verizon Commc'ns Inc. & MCI, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, ¶ 51 (Nov. 17, 2005) ("*Verizon/MCI Merger Order")*; *see also Applications of Western Wireless Corporation and ALLTEL Corporation*, Memorandum Opinion and Order, 20 FCC Rcd. 13053, ¶ 51 (July 19, 2005) (HHI and market share data "are the beginning and not the end of the competitive analysis" and serve only as an "initial screen . . . to ensure that we did not exclude from further scrutiny any geographic areas in which any potential for anticompetitive effects exists").

reliable corroborating evidence to support the claimed competitive problem in 4-to-3 or 3-to-2 situations."[67]

High-demand buildings that are not currently connected to other CLECs' networks, but that are near those networks, also raise no competitive concerns. As the DOJ explained, "two of the most important factors in determining whether entry is likely in a given building are the proximity of competitive fiber to that building, and the capacity required by the building."[68] "The closer a building is to a competitor's fiber, the less it is likely to cost that competitor to install additional fiber to reach that building" and the "larger the demand for capacity in a building, the greater the expected revenues."[69] Accordingly, where there was OCn-level demand sufficiently near another CLEC's existing local fiber, the DOJ determined that competitive "entry would be likely" and would forestall any theoretical potential for anticompetitive merger impacts.[70] The Commission has reached the same conclusion for OCn-level circuits,[71] and merger opponents cannot explain why those findings are not dispositive here.

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[67] *See* DOJ Tunney Act Reply at 16.

[68] DOJ Response to Public Comments at 24; *see also* DOJ Tunney Act Reply at 22 ("As previously noted, the best indicators of the likelihood of entry into a particular building are the capacity demand in that building (and thus the revenue opportunity) and the distance from a carrier's fiber network (and thus the costs of extending that network to the building).").

[69] DOJ Response to Public Comments at 23 n.40.

[70] DOJ Tunney Act Reply at 22; *see also* DOJ Response to Public Comments at 23. TWTC misstates the criteria used by the DOJ and endorsed by the Commission in the prior merger proceedings. TWTC points out that the Commission has previously determined in the *TR Remand Order* that it may not be economically feasible for competitors to deploy services to low-demand buildings, even where they have nearby transport. TWTC Pet. at 24. But the analysis used by the DOJ and endorsed by the Commission in the prior merger proceedings (and used by Applicants in this proceeding) determined that special access competition is likely in buildings where there is *high* demand (*i.e.,* at least three DS3s) and nearby competitive transport.

[71] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶ 7 (2003) ("*Triennial Review Order*"), *aff'd in part, remanded in part, vacated in*

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Merger opponents nonetheless contend that more expansive "remedies" are required here than in the prior mergers because, they claim, the new AT&T is a more competitively significant provider of wholesale special access services in the BellSouth region than legacy AT&T was in the SBC region. In fact, the *opposite* is true. Legacy AT&T had local fiber connections to about 2,000 buildings in the SBC region; the new AT&T has local fiber connections to only about 300 in the BellSouth region.[72] And the new AT&T's *annual* wholesale local private line sales in the BellSouth region are less than the *monthly* sales of those services by legacy AT&T in the SBC region.[73]

Nor is there any merit to COMPTEL's unsupported assertion that AT&T has been a price leader for wholesale special access services in the BellSouth region[74] – a claim that is impossible to reconcile with AT&T's extremely small wholesale sales in those areas. In fact, based on detailed evidence that it obtained from CLECs and AT&T, the DOJ concluded in the SBC/AT&T proceedings that "AT&T was often among the *highest-priced* CLECs for Local Private Lines."[75] The same is true in the BellSouth region.[76]

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part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313, 316, 345 (2004).

[72] *See* Carlton & Sider Reply Decl. ¶ 38.

[73] Public Interest Statement at 56. AT&T sells less than 1% of the billions of dollars of total wholesale special access services sold annually in BellSouth's region. *Id*. And AT&T's sales are less than one tenth the amount that AT&T pays to the other CLECs that sell wholesale special access services to AT&T in this region. *Id*.

[74] COMPTEL Pet. at 7.

[75] DOJ Tunney Act Reply, at 17 n.49 (emphasis added). *See also id.* at 18 n.51 ("the Department did not discover substantial evidence suggesting that prices for Local Private Lines correlate to network size").

[76] For example, in the BellSouth region, AT&T's rate for a DS3 Type I zero-mile special access circuit for a one-year term is higher than the rate that AT&T pays for such access from at least eight alternative suppliers of special access. AT&T's rate for a DS1 Type I zero-mile special

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There is also no merit to merger opponents' assertion that AT&T is one of the two "best positioned" firms (along with Verizon) to provide alternative wholesale special access services in the *future* in the BellSouth region merely because AT&T has significant financial resources and name recognition.[77] AT&T makes decisions to connect additional buildings to its local networks in the BellSouth region based on whether such facilities would be justified, on individual business cases, to serve new retail enterprise customers that choose AT&T. Moreover, other CLECs in the BellSouth region continue to extend their local networks. TWTC reports that its fiber-connected buildings increased 17% between March 2005 and March 2006, and that its fiber route miles increased by more than *one thousand* miles during the same period.[78] And TWTC has plans to implement a 130-mile expansion of its Atlanta metro fiber network that will "enable[TWTC] to offer . . . communications solutions to more than 6,000 additional businesses located in the Atlanta area."[79]

AT&T's relative insignificance as an existing and potential supplier of wholesale special access services in the BellSouth region is further confirmed by the BellSouth study filed in the Commission's ongoing special access proceedings and touted by Cbeyond in this proceeding. Cbeyond mistakenly concludes that this study shows that AT&T has more expansive local

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access circuit for a one-year term is higher than the rate that AT&T pays for such access from at least seven other alternative suppliers of special access. This reflects AT&T's principal focus on providing high-quality, price competitive services to retail customers, not on providing wholesale special access alternatives.

[77] *See, e.g.*, TWTC Pet. at 17-18; Cbeyond Comments at 65.

[78] *See* Press Release, Time Warner Telecom Inc., Time Warner Telecom Reports Solid First Quarter 2006 Results at 11 (May 2, 2006), *available at* http://www.twtelecom.com/Documents/Announcements/News/2006/TWTC_Q1_2006_Earnings_Release.pdf.

[79] Press Release, Time Warner Telecom Inc., Time Warner Telecom Extends Atlanta Fiber Network (Jan. 20, 2006), *available at* http://www.twtelecom.com/Documents/Announcements/News/2006/Atlanta_Extension_Final_1_06.pdf.

networks in the BellSouth region than AT&T reported in the Public Interest Statement.[80] In fact, the study confirms how limited AT&T's local presence is in the BellSouth region, particularly in comparison to other special access providers. In Charlotte and Greensboro, for example, the study states that AT&T has only 3% of the lit buildings, compared to 42% (Charlotte) and 28% (Greensboro) for TWTC.[81] In Atlanta and Miami, the report states that AT&T has 8% and 4% of the lit buildings, compared to 10% and 8%, respectively, for Verizon. The study further confirms what AT&T demonstrated in the Public Interest Statement: there are dozens of alternative special access providers in the BellSouth region, and intense competition in each of the metropolitan areas in which AT&T has local network facilities.[82] In short, competitive analysis of the evidence here, together with DOJ's parallel review of the same issues and the Commission's ongoing special access proceedings, leads to the conclusion that no special access conditions are necessary or appropriate.

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[80] Cbeyond misinterprets the study and asserts that it shows that AT&T has local fiber-lit buildings in all of BellSouth's 20 largest markets (not just the 11 markets discussed above). Cbeyond Comments at 63. But the BellSouth study purports to identify *all* buildings where competitive carriers have fiber, not just those where competitors have connections to local networks. The lit buildings in the other 9 areas are situations where AT&T extended fiber from its long distance POP to nearby commercial buildings or local offices to connect the individual customer locations or BellSouth offices to AT&T's long distance network, not to provide wholesale special access services.

[81] Ironically, this study shows that merger opponent TWTC has more lit buildings than any other competitor in the BellSouth region. Reply Comments of BellSouth, *In re Special Access Rates For Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (July 29, 2005), Declaration of Stephanie Boyles at 5, 7.

[82] For the most part, merger opponents agree that competition should be assessed on a building-specific basis. *See, e.g.*, Cbeyond Comments at 63-66; NJRPA Baldwin & Bosley Decl. at 125, 128; Sprint Nextel at 12-13. TWTC however, urges the Commission also to consider supposed MSA-wide effects of the merger. TWTC Pet. at 8-9. But the Commission held in the prior mergers that any potential MSA-wide anticompetitive effects are merely "derivative[]" of any potential building-specific competitive effects. *SBC/AT&T Merger Order* ¶ 48. Moreover, the number of buildings at issue here is far too small to support any plausible claim of MSA-wide effects.

2. There Are No Type II Special Access Effects To Remedy

As to Type II special access, some merger opponents rehash the same arguments that the Commission rejected in the SBC/AT&T and Verizon/MCI proceedings. These merger opponents again assert that AT&T has some special advantage in providing Type II services, from either the scope of its local transport facilities or the tariffed special access discount arrangements AT&T has signed with BellSouth. These arguments should, again, be rejected.

In the *SBC/AT&T Merger Order*, the Commission properly found no Type II issue because many other facilities-based CLECs have equal ability to "use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and . . . purchase special access loops or UNEs to provide [such] Type II services."[83] In particular, "AT&T's . . . sales of resold circuits are relatively small and of limited competitive significance. Moreover, because numerous CLECs have extensive fiber-optic networks in metropolitan areas . . . as well as contracts . . . providing them with discounts similar to those of AT&T . . . , other competitors could likely replace any competition that might be lost by the elimination of AT&T . . . as [an] independent reseller."[84] The same is true here. Other carriers have extensive local networks in the same areas and wire centers as AT&T where AT&T operates local networks in the BellSouth region.[85] Indeed, AT&T, with sales of less than $200,000 a month and rapidly declining, is only a minor provider of these Type II wholesale local private line services.

Merger opponents reiterate their assertion that AT&T has unique Type II advantages because it has more extensive local fiber networks and more fiber-based collocations than other

[83] *SBC/AT&T Merger Order* ¶ 41.

[84] DOJ Response to Public Comments at 48 n.80.

[85] *See* Public Interest Statement at 60-61; Carlton & Sider Reply Decl. ¶¶ 113-18

CLECs, and these merger opponents seek complete divestiture of AT&T's entire local fiber networks.[86] But just as was the case in SBC's region,[87] "carriers besides AT&T have fiber networks in the [same] geographic areas,"[88] and "existing competitive collocations and the threat of competitive entry through collocation allow for [Type II] special access competition in . . . in-region wire centers where AT&T competes today."[89] Indeed, there are on average more than four CLECs collocated in the central offices where AT&T has collocations, and there are only four central offices with no CLECs (and two of those four central office collocations have only AT&T long distance, not local, fiber).[90] Thus, as the Commission concluded in the *SBC/AT&T Merger Order*, many other carriers "can use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and can purchase special access loops or UNEs to provide Type II services."[91]

There is likewise no merit to the claim that AT&T receives large discounts and so is a uniquely situated Type II wholesale reseller of BellSouth special access.[92] Here, as in the prior mergers, BellSouth's special access discount plans are made available on a nondiscriminatory basis "pursuant to contract tariffs or generally available tariffs."[93] Here, as in the prior mergers, BellSouth "provides special access discounts in a variety of ways with differing conditions in

[86] *See, e.g.*, Comments of PAETEC Communication, Inc. ("PAETEC Comments") at 5-8; Cbeyond Comments at 109.

[87] Public Interest Statement at 60; Carlton & Sider Decl. ¶¶ 113-18.

[88] *SBC/AT&T Merger Order* ¶ 45.

[89] *Id.* ¶ 44. *See also id.* ¶ 50 ("other carriers besides AT&T have fiber networks in these geographic areas and are possible suppliers of short and intermediate haul traffic" and thus "AT&T is [not] able to provide local transport on an MSA-wide basis more efficiently than other competing carriers").

[90] Carlton & Sider Reply Decl. ¶ 26, n.17 & Table 2.1.

[91] *SBC/AT&T Merger Order* ¶ 41; *see also id.* ¶ 33.

[92] *See, e.g.*, Cbeyond Comments at 65-66.

[93] *SBC/AT&T Merger Order* ¶ 43; Public Interest Statement at 61-62.

different states and regions, including discounts available even to those carriers that might not qualify for the precise discount plan used by AT&T."[94] Here, as in the prior mergers, there is "at least one smaller competitor [that] receives a larger discount off the tariffed rate than does AT&T."[95] And here, as in the prior mergers, "regardless of whether competitors are able to negotiate significant discounts, where competitive duplication of the last-mile facility is not economic, competing carriers will be able to rely on high-capacity loop and transport UNEs priced at . . . TELRIC[] where they are available."[96] Moreover, this claim is impossible to reconcile with AT&T's insignificant sales of wholesale Type II services in the BellSouth region.[97]

3. The Merger Will Not Increase the Likelihood of Mutual Forbearance

COMPTEL's speculation that AT&T/BellSouth and Verizon may agree not to compete[98] was properly rejected by both the Commission and the DOJ in the prior mergers. The "billions of dollars" SBC and Verizon spent to acquire AT&T and MCI create "strong incentives to fully utilize [their] assets" in each others' regions.[99] Likewise, this merger will enhance AT&T's ability to use all of its assets to compete vigorously with Verizon (and the many other robust competitors). This merger will thus *expand* the scope of aggressive head-to-head facilities-based competition between AT&T and Verizon.[100] In all events, as the Commission pointed out, the

[94] *SBC/AT&T Merger Order* ¶ 43; Public Interest Statement at 61-62, n.179.

[95] *SBC/AT&T Merger Order* ¶ 43. There are, in fact, two smaller carriers that received higher overall percentage discounts in the BellSouth region than AT&T in 2005.

[96] *Id*.

[97] Public Interest Statement at 60-62; Carlton & Sider Decl. ¶ 114.

[98] COMPTEL Pet. at 14.

[99] *SBC/AT&T Merger Order* ¶ 54.

[100] COMPTEL's suggestion that AT&T/BellSouth will have greater incentives or ability to coordinate with Verizon on recently deregulated broadband services (those over 200 Kbps in at

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"mutual forbearance" theory would be competitively irrelevant even if it accurately predicted AT&T's behavior, because "even if [AT&T] forbears from offering competitive special access services in Verizon's region, competitive alternatives will remain for those locations where AT&T offered competing special access services."[101]

4. The Consolidation in Ownership of Cingular Will Not Result in Anticompetitive Special Access Pricing

Merger opponents claim that the combination of AT&T's and BellSouth's ownership interests in Cingular will increase the likelihood of special access price discrimination against Cingular's wireless rivals.[102] According to these opponents, each Cingular owner today realizes only a "fraction of the benefit" of discrimination, but, after a merger, "[t]he AT&T-BellSouth entity would now be able to realize 100% of the benefits that would flow to Cingular in the wireless market from a strategy of unreasonable discrimination in favor of Cingular in the upstream special access market."[103]

The Commission has repeatedly recognized that such special access "price squeeze" or "raising rivals' costs" arguments should not be addressed in merger proceedings, but rather in the ongoing industry-wide rulemaking proceedings "based on a full record that applies to all

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least one direction) is frivolous. COMPTEL Pet. at 17-18. The services deregulated by the Verizon forbearance petition are packet-based services and high-capacity optical services that are unquestionably suitable to competitive supply – which is precisely why deregulation of those services was proper.

[101] *SBC/AT&T Merger Order* ¶ 54. PAETEC's *ipse dixit* statement that AT&T has diminished the vigor of its competition with Verizon since the SBC/AT&T merger is unsupportable. PAETEC Comments at 7. AT&T continues to offer wholesale local private line services in every market where it has deployed local network facilities and with the same discounts that it offered before the SBC/AT&T merger.

[102] COMPTEL Pet. at 9-11; Comments of Mobile Satellite Ventures Subsidiary LLC ("MSVS Comments") at 7-13; Comments of Sprint Nextel Corporation on Application for Transfer of Control ("Sprint Nextel Comments") at 9-11.

[103] Sprint Nextel Comments at 10; *see also* COMPTEL Pet. at 8-10; MSVS Comments at 7-13.

similarly-situated incumbent LECs."[104] In any event, these claims are baseless. ILECs have been vertically integrated wireless service providers since those services were first offered. And, while AT&T, BellSouth and Verizon today participate in wireless joint ventures, these carriers initially had complete ownership of their wireless affiliates.[105] Likewise, Sprint Nextel until very recently wholly owned both its wireless and ILEC operations.[106] Despite this legacy of ILEC participation in the wireless business, the provision of wireless services is vigorously competitive. The success of Verizon, Cingular and Sprint Nextel outside the footprints served by their ILEC "parents," as well as the success of T-Mobile, Nextel (since acquired by Sprint), and AT&T Wireless (since acquired by Cingular), confirm that the discrimination theories posited by merger opponents have no competitive significance.[107]

The Commission's decision to eliminate UNEs for wireless carriers underscores this point. In overturning the Commission's initial decision that wireless carriers should be able to purchase UNE transport facilities, the Court of Appeals observed that "[w]here competitors have access to necessary inputs at [special access] rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling."[108] On remand, the Commission rejected such claims, agreeing with the Court of Appeals that non-ILEC providers of wireless services had competed successfully against ILEC

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[104] *SBC/AT&T Merger Order* ¶ 55; *see also Cingular/AT&T Wireless Merger Order* ¶ 183 (rejecting claims that the expansion of Cingular's footprint and operations would "significantly increase BellSouth's and SBC's incentives to discriminate against Cingular's wireless competitors" because "such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing").

[105] Carlton & Sider Reply Decl. ¶ 46.

[106] *Id*.

[107] *Id*. ¶ 47.

[108] *U.S.Telecom Ass'n, v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004).

wireless providers while purchasing special access services and that the market was fully "competitive."[109]

Further, merger opponents do not and cannot claim that ILEC special access charges are a significant cost of wireless service. The evidence before the Commission in the *TR Remand Proceeding* was that special access costs represented less than 5% of the overall costs of wireless providers,[110] and that remains true today.[111]

Merger opponents are likewise wrong to suggest that the merged company would have any incentive to price squeeze. As the Commission has recognized, predatory conduct involving profit sacrifice is only rational if a firm achieves durable market power in downstream markets such that it can recoup the losses associated with the predatory conduct.[112] The Commission has held that the conditions that would permit a company to recoup the sacrificed profits rarely exist in dynamic telecommunications markets subject to active Commission oversight.[113] Accordingly, the Commission has repeatedly rejected claims that ILECs could use market power

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[109] *TR Remand Order* ¶ 36 & n.106.

[110] Reply Comments of AT&T, *In re Unbundled Access to Network Elements*, WC Docket 04-313, at 80-81 (Oct. 19, 2004) (citing Selwyn Decl. ¶ 102 & Benway-Lesher-Dionne Reply Decl. ¶ 6).

[111] Carlton & Sider Reply Decl. ¶ 49 (noting that Cingular's costs of special access and transport services accounted for less than 5% of its overall costs in 2005).

[112] *See In re Merger of MCI Commc'ns Corp. and British Telecomms. PLC*, Memorandum Opinion and Order, 12 FCC Rcd. at 15351, 15413, ¶ 162 (Sept. 24, 1997); *see also Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 23 (1st Cir. 1990) ("the extension of monopoly power from one to two levels does not *necessarily*, nor in an *obvious* way, give a firm added power to raise prices") (emphasis in original).

[113] *In re Applications of Tele-Commc'ns, Inc. & AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd. 3160, 3215, ¶ 118 n.327 ("We find that firms in dynamic industries such as telecommunications generally do not have the incentives to engage in predatory practices, because the success of such practices rests on a series of speculative assumptions."); *In re Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23891, 23979, ¶ 199 n.405 (Nov. 26, 1997); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986) (predatory conduct that requires profit sacrifice is "rarely tried, and even more rarely successful").

in local services to effect vertical price squeezes that will foreclose competition in downstream markets, where, as here, the existence of numerous established carriers with sunk investments in national networks renders improbable any claim that an ILEC could recoup forgone profits.[114]

5. Merger Opponents' Generic Complaints About Special Access Prices, Returns and Service Quality Raise No Merger-Specific Issues

A few merger opponents rehash generic, meritless, non-merger specific complaints about special access services. These opponents essentially mount collateral attacks on the Commission's *Pricing Flexibility Order*, arguing that there is insufficient competition in areas where ILECs have received Phase II pricing relief, that ILECs' special access rates in these areas are too high, that ILECs are earning excessive returns, and that ILECs impose various "anticompetitive" conditions on carriers seeking to obtain the available large volume and term discounts.[115]

As the Commission has "found previously, to the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors using special access inputs, such concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing."[116]

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[114] *See, e.g., In re Application by SBC Communications Inc., et al. for Authorization to Provide In-Region, InterLATA Services in California*, 17 FCC Rcd. 25650, 25737-38, ¶¶ 157-59 (Dec. 19, 2002); *see also WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001) ("the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed," because "that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market"); *In re Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, 16102-03, ¶ 281 (May 16, 1997); *TR Remand Order*, ¶ 36 & n.107.

[115] *See, e.g.*, Access Point Pet. at 35, 66; Cbeyond Comments, Declaration of James C. Falvey ("Falvey Decl.") at 5; Cbeyond Comments, Declaration of Lisa R. Younger ("Younger Decl.") at 2; Consumers Union Cooper & Roycroft Decl. at 41-62; MSVS Comments at 9-12; New Jersey Ratepayer Advocate Comments at 4-11, 18.

[116] *SBC/AT&T Merger Order* ¶ 55 (internal quotation omitted).

In any event, the allegations raised by merger opponents are baseless. Competition has resulted in *reductions*, not increases, in special access prices since 2000.[117] The data presented by merger opponents distort AT&T's and BellSouth's actual prices by focusing solely on base rates (*i.e.*, list prices) that do not reflect available discounts. TWTC concedes this point, acknowledging that "the availability of volume and term discount plans permits most competitors to purchase special access services at reasonable rates."[118] Indeed, TWTC recently signed a contract tariff with AT&T that provides steep special access discounts that, in TWTC's own words, "strengthens Time Warner Telecom's ability to compete effectively for the nationwide business market."[119]

Unable to dispute that AT&T and BellSouth offer substantial discounts, merger opponents erroneously allege that AT&T conditions discounts on overly restrictive terms. TWTC repeats claims that COMPTEL made in the Commission's special access proceeding that AT&T "conditions its volume and term contracts on the customer agreeing to . . . eliminate its purchases from a competitive carrier wholesaler."[120] But TWTC cites only a single individually

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[117] Reply Comments of SBC, *In re Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 at 27–31 (July 29, 2005) ("SBC *Special Access* Reply Comments") (citing Reply Declaration of Parley C. Casto ("Casto Reply Decl.") ¶¶ 59-65)); Reply Comments of BellSouth, *In re Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 at 10-19 (July 29, 2005) (citing Declaration of Drs. Furchtgott-Roth and Hausman).

[118] TWTC Pet. at 14. TWTC does not dispute that it is "able to take advantage of these" discounts, and merely speculates that other carriers – none of whom have opposed this merger – may not receive such discounts. TWTC Pet. at 14-15.

[119] Press Release, Time Warner Telecom, Inc., AT&T, SBC Commc'ns, *Time Warner Telecom, AT&T, SBC Extend Long-Term Service Agreement* (June 1, 2005), available at http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21695&phase=check. TWTC complains that AT&T charges 12 DS3 mileage charges when a customer purchases 12 DS3s even though, TWTC claims, the cost to deploy 12 DS3s is not twelve times the cost to deploy one. The Commission has found that there is substantial competition for high capacity circuits – such as 12 DS3s – which forecloses any implication that AT&T has an incentive or ability to impede competition in the provision of such high-capacity circuits.

[120] TWTC Pet. at 15.

negotiated contract tariff[121] designed, in part, to provide incentives to the customer that chose that arrangement to use AT&T's services. And special access customers can choose from among many existing and differing discount plans or negotiate their own individualized contract tariff arrangements – as TWTC is well aware, having recently entered its own individually negotiated contract tariff with AT&T.[122]

TWTC's complaint about AT&T's fees for moving circuits to a CLEC also is wrong. TWTC relies on statements by WilTel and Sprint Nextel in the Commission's special access proceedings.[123] But as AT&T explained there, the data relied on by WilTel were based not on fees for special access, but on inapposite *switched* access arrangements.[124]

Nor is there merit to TWTC's assertion that AT&T will "only transfer an apparently artificially limited number of circuits to competitors."[125] These transfers are referred to as "grooming," and TWTC's claims are again based solely on allegations raised by WilTel, Broadwing and SAVVIS in the Commission's special access proceeding. There, AT&T demonstrated that these claims are baseless, that AT&T, in fact, offers "very favorable grooming options and timelines," and "that customers often cannot complete the amount of network grooming offered by [AT&T]."[126] Moreover, AT&T recently *increased* the number of grooms it can complete for a customer in a given time frame.

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[121] *Id.* at 15 & n.23.

[122] SBC addressed these same allegations in the Commission's ongoing special access proceeding. *See* SBC *Special Access* Reply Comments, Casto Reply Decl. ¶¶ 67-70.

[123] TWTC Pet. at 15 & n.24.

[124] *See* SBC *Special Access* Reply Comments, Casto Reply Decl. ¶¶ 17-20.

[125] TWTC at 15 & n.25.

[126] *See* SBC *Special Access* Reply Comments, Casto Reply Decl. ¶ 16.

Cbeyond erroneously asserts that AT&T does not offer carriers the option of fulfilling special access volume and term commitments on a region-wide basis (an option that essentially allows "circuit portability" throughout a region).[127] In fact, AT&T offers separate special access tariffs in each of its RBOC regions (*i.e.*, SWBT, Ameritech, and PacBell regions). These tariffs permit customers to fulfill their special access commitments with circuits purchased across the entire region governed by the tariff for that region. There is thus no basis whatsoever to suspect that the merger will in any way limit the ability of customers in the BellSouth region to satisfy their commitments with circuits purchased throughout the BellSouth region.

Some opponents try to make an issue of the special access returns reported in the most recent ARMIS reports. But as AT&T, economists and other carriers have repeatedly explained, and the Commission has acknowledged, these segment-specific ARMIS data are *not* accurate reflections of AT&T's or BellSouth's actual returns. The ARMIS data that carriers must report are artifacts of (1) the ARMIS rules for allocating network investment among services and (2) the "frozen" separations rules.[128]

The need to allocate shared and common costs means that this process will inevitably yield arbitrary results. But the current rules yield especially unreliable allocations. As the Commission has acknowledged, the "outdated" rules result in allocations that are "out of step with today's rapidly evolving marketplace."[129] While special access revenues continue to increase, the "frozen" allocation rules make AT&T's and BellSouth's costs appear artificially

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[127] Falvey Decl. ¶ 12.

[128] *See, e.g.*, Reply Comments of SBC Communications Inc. at 35-43 in *In re Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (July 29, 2005); Reply Comments of Qwest Communications International, Inc. at 6-9 in *id.*; Comments of SBC Communications Inc. at 24-37 in *id.* (June 13, 2005).

[129] *In re Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd. 11382, ¶ 1 (May 22, 2001).

low, producing artificially overstated special access rates of return – and correspondingly artificially low switched access rates of return (*negative* 4.49% for AT&T in the last ARMIS report).

Finally, the Commission should reject the wish lists of special access conditions that merger opponents do not even attempt to link to any merger-specific harm – and, in many cases, do not discuss at all in their comments.[130] Many of these proposals simply rehash arguments for conditions that the Commission and the DOJ properly rejected in the SBC/AT&T merger case.[131] Others seek relief that would duplicate the Act's existing nondiscrimination and other requirements.[132] And the remaining proposals[133] all have one common theme – each seeks price breaks or competitive advantages that are unwarranted and entirely unrelated to the merger.

[130] *See, e.g.*, Access Point Pet. at 65-75; Cbeyond Comments at 99-109; CFA Pet. at 8-9; MSVS Comments at 15-17; PAETEC Comments at 9-10; Sprint Nextel Comments at 14-15.

[131] For example, Global Crossing again requests that the Commission consider adopting a "base-ball-style" alternative dispute resolution process for special access agreements, asserting that it may in some instances lack resources to bring a Section 208 complaint. But, "to the extent that the resources required for Global Crossing to pursue a section 208 complaint against SBC outweigh the possible benefits in particular instances, this is not a merger-specific concern to be addressed in this proceeding." *SBC/AT&T Merger Order*, ¶ __ n.499. Access Point rehashes the argument that AT&T should be required to divest *customers*, as opposed to fiber facilities. But as the DOJ has explained, any such customer divestiture requirement would be affirmatively harmful. DOJ Tunney Act Reply at 37 n. 65.

[132] For example, Cbeyond seeks remedy provisions that essentially mirror the non-discrimination provisions in the Act, and have no relevance whatsoever to the proposed merger. Cbeyond Comments at 75. Likewise, Cbeyond asks that the merged entity be required to file pursuant to § 211 of the Act all currently effective contracts for special access. But to the extent that Cbeyond believes that any contracts should be file pursuant to § 211 that are not already being filed, that is an industry-wide issue, or an issue for the Commission's complaint processes.

[133] *See e.g.*, Fones4All Comments at 17-21; N.J. Division Ratepayer Advocate Comments at 22; Access Integrated Networks Comments at 2-4; Access Point Pet. at 65-75.

B. The Merger Will Not Decrease Competition in the Provision of Retail Services to Businesses

Only two filings express concern about the elimination of competition between AT&T and BellSouth for retail business services, and both are from competitors, not customers.[134] Remarkably, these submissions do not even acknowledge the Commission's recent findings regarding the strength of competition for retail business services; nor do they attempt to suggest that BellSouth is a more significant competitor to AT&T than SBC was prior to its merger with AT&T. As described in greater detail below, the evidence is clear that (1) in the short time since the Commission's most recent findings, competition in the retail business sector has continued to increase, most notably through intensified efforts by cable companies as well as new activity by merger opponents themselves, (2) the attempts to undermine Applicants' showings that the respective enterprise businesses of AT&T and BellSouth are largely complementary are both baseless and irrelevant, and (3) customers large and small recognize the facts that establish that the proposed merger will not harm enterprise competition.

1. Nothing in the Comments Undermines the Commission's Conclusion That Retail Business Competition Is "Robust"

Opponents' filings ignore the Commission's recent conclusions regarding retail business services competition and fail to offer any evidence to undermine the obvious application of those conclusions to this case. The Commission held in the *SBC/AT&T Merger Order* that "competition in the enterprise market is robust,"[135] and opponents fail even to acknowledge the Commission's specific findings that:

[134] *See* Cbeyond Comments at 51-59; Access Point Pet. at 7-13.

[135] *SBC/AT&T Merger Order* ¶ 73 n.223.

- "myriad providers are prepared to make competitive offers;"[136]
- there has been a "rise in data services, cable and VoIP competition, and [a] dramatic increase in wireless usage;"[137]
- "[f]oreign-based companies, competitive LECs, cable companies, systems integrators and equipment vendors and value-added resellers are also providing services in this market;"[138]
- "systems integrators and the use of emerging technologies are likely to make this market more competitive, and this trend is likely to continue in the future;"[139] and
- customers are "highly sophisticated" and are able to take full advantage of the numerous options available to them and to "negotiate for significant discounts."[140]

Merger opponents nonetheless claim that cable operators, CLECs and VoIP providers are not meaningful enterprise competitors and thus implicitly challenge the Commission's findings to the contrary. The Commission was clearly right: the already intense enterprise competition has further intensified since the SBC/AT&T merger.

a. Cable Competition

Merger opponents' attempt to trivialize growing business sector competition from cable companies flies in the face of overwhelming evidence to the contrary. In fact, cable companies not only have significant business offerings now, but they have taken point blank aim at this segment. For example, the April 2006 National Cable and Telecommunications Association meetings featured this theme:[141]

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[136] *Id.* ¶ 73.

[137] *Id.*

[138] *Id.*

[139] *Id.* ¶ 74.

[140] *Id.* ¶¶ 74-75.

[141] *Weekend Media Blast #14: Georgia on My Mind: What to Look for at the National Show. . . Even If you Don't Go,* Bernstein Research, at 2 (Apr. 7, 2006).

- "The *commercial services opportunity* (*i.e.* voice and data for small and medium sized businesses) will also draw lots of attention. The opportunity is *a large one*, and is the most likely candidate for the '*next big thing*' to drive sustained revenue growth."[142]

- The "*biggest natural opportunities for cable* appears to be . . . *business* services, with Cablevision indicating that it has only penetrated 20% of the revenue opportunity in its footprint."[143]

And the cable companies' public announcements confirm this specific intent:

- Comcast COO Stephen Burke recently stated that *the next big focus for Comcast is small and medium business customers*, noting that the company's wires "cross a huge percentage of small and medium business" in its footprint.[144]

- *Time Warner Cable* announced "*strong continued growth*" in *business services*, noting its "Road Runner Business Class" was awarded the 2005 J.D. Power and Associates Award for "Highest Customer Satisfaction with Business Broadband and Data Service Providers."[145]

- In April 2006, *Charter* Communications announced the "deployment and implementation of an optical solution providing highly reliable, secure network services for *enhanced business continuity* between the U.S. Corporate Office of automaker BMW and its new state-of the-art research facilities" located in South Carolina. Robert Carter, vice president of Charter's Southeast operating division, commented that "Charter is committed to providing industry-leading multi-service connectivity to our *growing base of enterprise customers*."[146]

- Motorola recently announced "*Cable operators now have a new weapon in their arsenal for addressing business customers*": a wireless broadband solution for cable companies to deploy last-mile access.[147]

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[142] *Id.* (emphasis added).

[143] *Cable/Satellite Spotlight NCTA Wrap-Up – Business As Usual*, Deutsche Bank, at 2 (Apr. 11, 2006) (emphasis added).

[144] Stephen Burke Presentation, 2006 Bank of America Media, Telecommunications and Entertainment Conference (Mar. 30, 2006), *available at* http://www.veracast.com/webcasts/bas/media06/id76206158.cfm (emphasis added).

[145] Akron Beacon Journal, Time Warner Cable, (Oct. 23, 2005) (emphasis added).

[146] Press Release, Nortel, Charter and Nortel Announce Optical Solution to Strengthen BMW's Data Network Connectivity (Apr. 10, 2006), *available at* http://www2.nortel.com/go/news_detail.jsp?cat_id=-8055&oid=100198567&locale=en-US (emphasis added).

[147] Carol Wilson, *Motorola Offers Cable Wireless Alternative*, Telephony, Apr. 7, 2006, http://telephonyonline.com/home/news/Motorola_cable_Canopy_040706/index.html. ("Motorola on April 6 announced a version of its Motorola MOTOwi4 Canopy wireless broadband solution

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b. VoIP Competition

In the *SBC/AT&T Merger Order*, the Commission properly recognized the importance of the rapid transition by enterprise customers to VoIP and other IP technologies and the "increased competition" that this evolution brings from a host of new and existing providers.[148] The Commission has also recognized that this trend is accelerating across the country, with the continuing entry and expansion of next-generation carriers that provide services using IP technology.[149] For example, XO announced the nationwide expansion of its enhanced VoIP service targeted at medium-sized businesses.[150] Overall, analysts estimate that 30% of large and medium-sized business customers nationally have already deployed VoIP across their entire business and that all such businesses are expected to deploy some VoIP technology within the next five years.[151] Another study found that a full 100% of the businesses surveyed plan to install VoIP in the next five years.[152] Merger opponents' attempts to downplay the importance of this new competition are empty rhetoric.

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specifically aimed at the cable industry. Cable Canopy uses Motorola's widely deployed broadband wireless technology to allow cable companies to quickly deploy last-mile access to commercial customers from their existing hybrid-fiber coax networks, said Jeff Walker, senior director of marketing at Motorola.").

[148] *See SBC/AT&T Merger Order* ¶ 65.

[149] *Verizon/MCI Merger Order* ¶ 75 n.229.

[150] *See* Press Release, XO Commc'ns, Inc., XO Communications Expands Industry-Leading Business VoIP Services Bundle (Feb. 22, 2006), *available at* http://www.xo.com/news/286.html.

[151] *Enterprise Survey: Wireless May Determine Carriers' Seat at the Table*, Goldman Sachs Global Investment Research, at 17 (March 2, 2005).

[152] *Id*. *See also Businesses Look to VoIP Solutions*, Newsfactor, Oct. 24, 2005, *available at* http://www.newsfactor.com/story.xhtml?story_id=12000002RVK0 (discussing estimates that half of new business installations in 2005 will contain VoIP technology); Al Senia, *Discovering VoIP Profitability*, America's Network, Jan. 15, 2005, at 16 (noting that a third of enterprises have already deployed VoIP, with more than half expected to deploy it by 2006).

c. CLEC/IXC Competition

Merger opponents' attempts to downplay CLEC/IXC competition likewise cannot be squared with the evidence, including their own press releases and actions. Indeed, the industry analyst report upon which opponents primarily rely finds that "CLECs have exhibited a . . . *resurgence*," that CLECs engage in "*aggressive sales tactics*" with "*leading-edge SMB offerings*," and predicts "*robust SMB competition from facilities-based CLECs* such as XO and increasingly the multiple system [cable] operators."[153] These conclusions are well founded and underscored by marketplace developments.

For example, Level 3 recently agreed to acquire TelCove, which announced in April that it "has taken *a dominant position in Florida* as a state-wide provider of metro and intercity services to enterprise customers and carriers."[154] Last year, TelCove expanded from seven to 14 metropolitan areas in Florida and significantly increased its fiber density up to 1,400 route miles.[155] The combination of TelCove with three prior acquisitions – WilTel, Progress Telecom and ICG Communications – and the more recent addition of Looking Glass Networks, has allowed Level 3 continually to expand its successful Metro Services business unit.[156] And TWTC

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[153] *How Do SMBs Fare in the CLEC Versus ILEC Matchup?*, Yankee Group, at 1, 3 (Apr. 2006) (emphasis added). The competitor group misstates BellSouth's view of CLECs. What BellSouth actually said was that "it is clear that CLECs are capable of competing with BellSouth to provide the 'last mile' or tail circuits of special access services, and they are doing so in a rapidly increasing number of locations." Reply Comments of BellSouth to AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services in WC Docket 05-25 (July 29, 2005) at 32.

[154] Press Release, TelCove, Inc., TelCove is the Largest Competitive Telecom Provider in Florida Offering State-Wide Metro and Intercity Network Services (Apr. 7, 2006) *available at* http://www.telcove.com/press/pr040706.asp (emphasis added).

[155] *See id.*

[156] Press Release, Level 3 Commc'ns, Inc., Level 3 to Enhance Focus on Growing Metropolitan and Content Business Segments (May 26, 2006) *available at* http://www.level3.com/press/7248.html (Level 3 "will focus on delivering a full set of services to customers who make

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reports that its fiber-connected buildings increased 17% last year, and that its fiber route miles increased by more than 1000 miles.[157]

Other competitors that oppose the merger have made recent moves:

- In March 2006, Cbeyond boasted of capturing its 20,000th small/medium business customer, mentioning Atlanta as one key area of its activity.[158]
- TalkAmerica launched new digital business services in Atlanta in April 2006, following-upon its acquisition last year aimed at capturing business "market share in the Southeast." [159]
- Supra Telecom announced just a month ago its expansion of services in Florida.[160]
- Xspedius even more recently revealed growth plans in Alabama, Florida and Tennessee (as well as Texas).[161]
- New Edge Networks was acquired by EarthLink as part of a strategy to further penetrate the business segment.[162]

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bandwidth decisions on a local or regional basis, such as state and municipal governments, universities, enterprise customers and regional wholesale accounts").

[157] *See* Press Release, Time Warner Telecom, Time Warner Telecom Reports Solid First Quarter 2006 Results (May 2, 2006), *available at* http://www.twtelecom.com/Documents/Announcements/News/2006/TWTC_Q1_2006_Earnings_Release.pdf.

[158] Press Release, Cbeyond Commc'ns, Cbeyond Communications Driving Rapid Growth of Managed IP Communications Solution Among Small Businesses (Mar. 20, 2006) *available at* http://ir.cbeyond.net/ReleaseDetail.cfm?ReleaseID=190657.

[159] Press Release, Talk America, Talk America to Acquire Network Telephone (Oct. 19, 2005) *available at* https://www.talk.com/web.cgi/user/about-press-release.htm?date=2005-10-19&tabid=ata&tabid2=press; Press Release, Talk America, Network Telephone, A Talk America Company, Launches New Business Service in Atlanta (Apr. 5, 2006) *available at* https://www.talk.com/web.cgi/user/about-press-release.htm?date=2006-04-05&tabid=ata&tabid2=press.

[160] Press Release, Supra Telecom, Supra Telecom Launches Service Market Expansion: Competitive Option Now Available for Tampa and Orlando Customers (Mar. 20, 2006), *available at* http://supratelecom.com/about/news10.html.

[161] Jerri Stroud, *Xspedius Looks for Organic Growth*, St. Louis Post-Dispatch, May 31, 2006 ("expansion could occur in Texas; Arizona; Alabama; Florida; Memphis, Tenn.; or Little Rock, Ark").

[162] Carolyn Duffy Marsan, *Broadband Buyers Turning Over the Reins to MSPs*, Network World, June 5, 2006, http://www.networkworld.com/news/2006/060506-dsl.html?page=5.

- US LEC has launched an "aggressive deployment of IP-based services across its footprint," which is now available in 11 of US LEC's switching facilities, including Atlanta, Charlotte, Fort Myers, Jacksonville, Miami, Orlando and West Palm Beach.[163]

- Pac-West is "executing on a planned nationwide expansion that will allow service providers to provide communications services to an addressable market of more than 150 million end-users in the second-half of 2006."[164]

In addition, as described above, a number of CLECs, including XO and the Southern Telecom/First Mile Communications joint venture are rapidly expanding their fixed wireless footprints to "significantly expand the reach of [their] network[s] and help reduce the costs of local network access in serving enterprise customers."[165] The continuing investment in business service offerings is powerful evidence of the increasing competitiveness in this sector.[166]

2. Claims That AT&T and BellSouth Are Each Others' "Principal" Enterprise Competitors Are Baseless

In the face of irrefutable evidence (and Commission findings) that myriad providers compete intensely for the business of enterprise customers, the competitors that oppose the merger contend that competition between BellSouth and AT&T is uniquely important and cannot be replaced. In support, they rely on the unremarkable propositions that BellSouth competes with AT&T for "local service" in some circumstances (as SBC did), that BellSouth was

[163] Press Release, US LEC, US LEC Broadens Ethernet Service (Apr. 20, 2006), *available at* http://www.uslec.com/NewsDigital-_Press%20Center-376.

[164] Press Release, Pac-West, Pac-West Adds Philadelphia, Jacksonville and Baltimore to Nationwide Expansion (June 7, 2006), *available at* http://www.pacwest.com/pacwest/about-pac-west/press-room.shtml.

[165] Press Release, XO Commc'ns, Inc., XO Communications to Utilize Nextlink Broadband Wireless Technology (Apr. 24, 2006), *available at* http://www.xo.com/news/300.html.

[166] Carlton & Sider Reply Decl. ¶¶ 126-30.

"working to improve" its business services in-region and out-of-region (as SBC was), and that the new AT&T intended to be a better national competitor (it did).[167]

Opponents do not even attempt to dispute that BellSouth has no assets, facilities or sales offices outside its region, and no plans to expand.[168] Rather, they rely on the fact that AT&T – like many others, including these very competitors – offers some services to small and medium business customers in the BellSouth region.[169] Applicants, of course, do not claim that AT&T and BellSouth do not compete at all. Rather, Applicants have shown that AT&T is "focused on the requirements of customers with the most geographically dispersed, complicated needs"[170] and thus that the instances in which AT&T and BellSouth compete head-to-head are even more limited than the SBC and AT&T enterprise overlaps the Commission found competitively insignificant. In the SBC/AT&T merger, the Commission found that AT&T and SBC "compete for a range of customers in the enterprise market,"[171] yet properly concluded that the merger could not harm the intense competition for those customers. The same conclusion is compelled here.

3. Customers Confirm the Key Points in the Competitive Analysis

In addition to the overwhelming evidence of continuing competitive activity by other suppliers, numerous *customers* have confirmed the competitive nature of the retail business

[167] Cbeyond Comments at 52-55; Access Point Pet. at 7-12.

[168] Declaration of Barry L. Boniface ("Boniface Decl.") at ¶¶ 5, 7, 8, 11-15. Opponents' citation to BellSouth's wholesale agreements with Qwest and Sprint does not remotely show that BellSouth is a leading national provider, as they claim. As Mr. Boniface explained, BellSouth tried to pursue out-of-region opportunities through a teaming agreement with Qwest, but that relationship was abandoned as a failure in 2002. *Id.* ¶ 19. BellSouth's agreement with Sprint is quite limited; it is designed to stem BellSouth's loss of in-region, large business customers, not to enable BellSouth to compete for national customers. *Id.* ¶ 20.

[169] Cbeyond Comments at 55-56.

[170] Public Interest Statement at 67.

[171] *SBC/AT&T Merger Order* ¶ 68.

sector. AT&T and BellSouth are submitting for the record, as Appendix B hereto, over 140 signed statements from a wide range of retail business customers that provide real-life details about procurement methods, the numerous alternative providers they consider, and the intensity of competition. As the Federal Trade Commission and Department of Justice recognize, "[c]ustomers typically are the best source . . . of critical information" relevant in assessing likely competitive impacts of a proposed merger.[172]

First, numerous customers, both large and small, confirm the vibrant competition for retail business services. For example, the Senior Vice President of Information Resources at Marriott International states that "[a]fter examining the current state of the market for telecommunications providers, I would say that the market is *extremely competitive*, and I don't believe that the proposed merger between AT&T and BellSouth will have a negative impact on the competitiveness of the market or lead to increased prices."[173] BNSF Railway Company calls the telecommunications market "*very competitive*."[174] And the president of a dry cleaning company with 44 locations says, "It's an *extremely competitive market* and I've seen prices

[172] *Commentary on the Horizontal Merger Guidelines* at 9. In the *SBC/AT&T Merger Order*, the Commission noted that customer statements submitted by the merging parties did not provide "representative or reliable evidence regarding enterprise competition for any particular class or classes of enterprise customers." *SBC/AT&T Merger Order* ¶ 77 n.234. To be clear, Applicants are not offering these statements as a scientific survey or statistical sample, and we appreciate the concern about "form letter" campaigns such as one occurring in this proceeding against the merger. But the statements of sophisticated customers provide detailed and reliable *facts* about the actual purchasing experience of customers across a broad and diverse range of sizes, demand levels and services.

[173] Statement of Dave Ruby, Marriott Int'l ¶ 4 (emphasis added).

[174] Statement of John Hicks, BNSF Railway Co. ¶ 5 (emphasis added).

continue to drop year after year."[175] These informed observations are shared by numerous others.[176]

Second, large and small retail business customers confirm the extremely long list of competing providers – over 100 different providers are identified in the statements submitted.[177] Florida Power and Light recognizes that "there are *plenty of good suppliers* available."[178] The Tribune Company states that it has "*plenty of competitive providers*."[179] The E-911 Coordinator in Pickens County, South Carolina, states that "[t]here are *25-30 CLECs*, including BellSouth, that provide wireline service."[180] Community First Bankshares, a bank holding company based in Union City, Tennessee, "has *a lot of choices* among telecom providers. We seem to get a *call almost once a week* from someone interested in our telecommunications business."[181] And the Atlanta Zoo is "*continuously bombarded* with solicited and unsolicited offers to provide a wide array of telecommunications services,"[182] including "Sprint, MCI … ITC Deltacom, Nuvox, XO, Covad and Global Crossing."[183] The statements are filled with similar facts.[184]

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[175] Statement of Chris Edwards, ACW Management Co. ("ACW Mgmt. Stmt.") ¶ 4 (emphasis added).

[176] *See e.g.* Statement of Joy Brinker, Hilton Hotels ¶ 7 ("I believe that the telecommunications market is *very competitive*. There are *more than ample vendor options* at this point") (emphasis added); Statement of Frank Spina, Command Alkon Inc. ¶ 5 ("the long distance voice market is *very competitive* and Command Alkon has *many providers to choose from* . . . . The data market is also *very competitive*") (emphasis added); Statement of Dennis Klinger, FPL Group, Inc. ¶ 3 ("the market across the entire range of telecommunications services and equipment is quite competitive") (emphasis added).

[177] *See* Customer Statements Attachment.

[178] FPL Stmt. ¶ 4 (emphasis added).

[179] L.A. Times Stmt. ¶ 7 (emphasis added).

[180] Wade C. Dodgens, E-911 Coordinator, Pickens County, South Carolina, ¶ 5 (emphasis added).

[181] Statement of Larry Robinson, Community First Bancshares ¶ 5 (emphasis added).

[182] Statement of Fred Vignes, Zoo Atlanta ¶ 3 (emphasis added).

[183] *Id.*

Customers confirm specifically that cable companies compete with traditional telephone companies, particularly for small and medium businesses. The Bossier County School System, for example, purchases its data and Internet access services from Cox Communications.[185] And "North Carolina's cable companies (Cox, Charter and Time Warner) have also emerged to become very responsive and aggressive competitors for [the North Carolina Research and Education Network's] bandwidth requirements."[186]

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[184] *See e.g.*, ACW Management Stmt. ¶ 4 ("there are *so many different options* for communicating now, with VoIP, cellular, cable companies and many different carriers – like BTI – that provide services") (emphasis added); Statement of John Killebrew, North Carolina Research and Education Network, MCNC ("MCNC Stmt.") ¶ 5 ("there are *more than 10 carriers that we work with*.") (emphasis added); Statement of Joey Oden, Bank Independent ¶ 4 ("there are a number of competitors of BellSouth that could meet Bank Independent's technology needs, including InterMedia and ITC DeltaCOM"); Statement of Iris Register, H.J. Russell & Co. ¶ 3 ("there are *a host of other telecommunications companies* to which we could turn for these and other services if we so desired, including Broadwing, Cypress, DeltaCOM Granite, Qwest, Sprint, Verizon/MCI, and XO, among others") (emphasis added); CHOA Stmt. ¶ 6 ("There are . . . a *great variety of competitors* including many CLECs constantly knocking on our doors . . . we have a *host of other options* to which we could turn") (emphasis added); Statement of Ronald Moore, University of Louisville ¶ 4 ("a number of telephone and cable companies are in the running for this business"); Statement of James Strickland, Community Loans of America, Inc. ("Community Loans Stmt.") ¶ 4 ("In many areas there are other companies to which we can turn for these and other telecommunications services, including Cox, Netiface, Nextel, Qwest, Sprint, Verizon/MCI, and XO, among others."); Statement of Michelle Huddelston, Commercial Bank ("Commercial Bank Stmt.") ¶ 4 ("*we receive proposals all the time* from other firms, particularly for our data services. Among the firms that have sought to sell data services to Commercial Bank are CSI of London, Kentucky, Comcast in Knoxville, and Powell Valley Electric Cooperative") (emphasis added); Declaration of F. Donald Kirkland Jr., State of Louisiana ("State of Louisiana Decl.") ¶ 6 ("we have alternatives, including a number of CLECs, such as TelCove, Adelphia, KMC Telecom, Level 3, CenturyTel and Eatel and cable companies, such as Cox and Charter."); Statement of Robert Zelazny, Palm Beach County, Florida ¶ 3 ("While obtaining telecommunications services from a sole source is beneficial to the County, there are *various competitive providers* for each of the services offered by BellSouth. We have considered and met with these providers, such as USLEC, DeltaCOM, and Priority Communications") (emphasis added); Statement of Michael Shooster, Global Response at 1 ("there are competitive alternatives"); Statement of Wayne Shumate, Charlotte-Mecklenburg Schools ¶ 4 ("We received bids [for long distance service] from US LEC, Southeastern Telecom, VarTec Telecom, South Carolina Net (now known as Spirit Telecom), BellSouth, LDExpress, Sprint and Teligent").

[185] Declaration of William Allred, Bossier County Schools ("Bossier County Schools Decl.") ¶ 3.

[186] MCNC Stmt. ¶ 5. *See also* Statement of Chris Smith, Security Bank ¶ 4 ("Cox Cable has been very active in pitching their fiber network services to Security Bank"); Commercial Bank Stmt. ¶ 4 ("Among the firms that have sought to sell data services to Commercial Bank are . . .

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Business customers also confirm that their use of VoIP instead of traditional telephone services is increasing.[187] For example, Bancorp South currently uses VoIP in approximately 10-15 branches, but "[b]y the end of 2006, this could grow to 30 to 40 locations."[188] Jewish Hospital and St. Mary's Health Care, with 70 locations, uses VoIP and "expects that [it] will move [its] call center, which is used to schedule patient procedures to VoIP. That may ultimately grow to allow the physicians' offices to utilize the Internet to make their calls as well."[189] Many other businesses are in the process of transitioning to VoIP.[190]

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Comcast"); Statement of Glenda McLaren, DeSoto Family Medical ¶ 4 ("I know that . . . our cable company could provide us with many of the same services."); Statement of Mike Thompson, Elon University ¶ 3 ("Other vendors with which Elon does substantial business include . . . Time Warner Cable"); Statement of Crawford Gallimore, The Hamilton-Ryker Group, LLC ¶ 2 ("We also have a cable backup system through Charter"); State of Louisiana Decl. ¶ 6 ("we have alternatives, including . . . cable companies, such as Cox and Charter."); Declaration of Michael Emmone, AHS Information Services ¶ 6 ("the merger will provide greater competition against the cable companies who are putting voice over cable"); Statement of Glen Ducote, Kinetix Broadband, LLC ("Kinetix Stmt.") ¶ 3 ("I am aware of several other available competitors, including . . . Cox").

[187] *See, e.g.*, Statement of John Gentile, Adams Brothers Produce ¶ 4 ("we use VoIP internally and expect to continue to adopt this technology in the future"); CHOA Stmt. ¶ 4 ("Other than 911 calls, all of our voice and data communications now use IP . . . VoIP allows us to relocate our highly mobile employees to new workplaces without the substantial time and expense of reassigning switched telephone numbers"); Declaration of Robert Andres, Crescent Bank ¶ 10 ("Crescent has begun a transition to VoIP, which we will roll out over the next 24 months"); Declaration of Hugh Crombie, Kentucky Bank ¶ 4 ("Kentucky Bank is currently making a transition to VoIP"); Declaration of James Deats, Fred's Inc. ¶ 6 ("Fred's has converted the voice network connecting its stores and distribution centers to VoIP").

[188] Statement of Andrew Hughs, BancorpSouth ¶ 4.

[189] Declaration of Bob Greenwell, Jewish Hospital and St. Mary's Health Care ¶ 6.

[190] S*ee also, e.g.*, Declaration of Finley W. Reed III, Place Properties, L.P. ¶ 4 ("We currently have a pilot VoIP program underway at one of our facilities and I look forward to moving our organization further in the direction of VoIP as our company continues to grow"); Louisville Stmt. ¶ 4 ("Our goal is to eventually roll out VoIP to the entire University"); Statement of Charles Stubbs, ER Snell Contractor, Inc. ¶ 5 ("We are already prepared to transition service to VoIP as our current commitments wind down."); Declaration of E. Scott Fotrell, Gwinnett County Public Schools ¶ 3 ("We also use voice over IP for our central office and expect to expand that technology in conjunction with our planned growth"); Declaration of Kevin Steffey, Bryan-Alan Studios ¶ 3 ("We are talking to several small providers about moving to VoIP"); Declaration of Claudia Melancon, Louisiana Machinery ¶ 3 ("We are in the process of considering how to move our voice services to the Internet").

Moreover, numerous enterprise level retail business customers explain that they do not consider BellSouth a viable alternative for their national telecommunications needs.[191] As Air Jamaica puts it, "AT&T and BellSouth operate in different spaces. AT&T provides national services whereas BellSouth provides primarily local services."[192] The converse is also true, as many customers confirmed they do not consider AT&T a viable local competitor in BellSouth's territory.[193]

[191] *See e.g.*, Transtar Stmt. ¶ 4 ("I have never considered BellSouth as a viable alternative to AT&T for national services because it lacks the experience and national coverage"); Dialogic Stmt. ¶ 6 ("we don't really view BellSouth as being a particularly viable option for us as a telecommunications provider because we see them as a regionally-focused player that can't readily meet our needs for our national and international customers"); Statement of Larry White, MACTEC ¶ 4 ("I have never considered BellSouth to be a viable alternative to AT&T or other Tier 1 telecoms because it does not have the necessary geographic coverage"); Mannington Mills Stmt. ¶ 5 ("I view BellSouth as a regional provider that cannot compete on a national level with AT&T").

[192] Statement of Keith Smith, Air Jamaica ¶ 5; *see also* Community Loans Stmt. ¶ 6 ("I can recall no particular service for which both AT&T and BellSouth have competed against each other for our business in recent years"); Statement of Don Laffey, Vesta Insurance Group, Inc. ("we feel that BellSouth and AT&T provide complimentary services"); Statement of Rick Honeycutt, Haywood County, North Carolina ¶ 4 ("We do not perceive BellSouth and AT&T as direct competitors in terms of the services each provides in our area").

[193] *See, e.g.,* Statement of Angel Petisco, Miami-Dade County, Florida ¶ 3; Statement of Bob Donley, Member's Credit Union ¶ 6 ("I do not consider AT&T to be an option in Member's market because they do not have appropriate offers and services for enterprises of our size in our area"); Children's Hosp. Stmt. ¶ 9 ("While we have considered AT&T for long distance and cellular service in the past, recently, AT&T has not actively marketed to us and does not actively compete with BellSouth for our business"); Statement of Gil Bailey, Harrison County, Mississippi Emergency Commc'ns Comm'n ¶ 7 ("I have not had any recent experience with AT&T. I do not consider it a competitor for the services provided to the County by BellSouth. . . . I consider it more of a long-haul provider"); Kinetix Stmt. ¶ 4 ("I do not consider BellSouth and AT&T to be competitive substitutes for each other (for instance, I do not compare BellSouth's prices to those of AT&T when reevaluating our BellSouth contract)"); Statement of Harley Langerfelt, Savannah College of Art and Design ¶ 5 ("AT&T has not been an active bidder for SCAD's business over the last few years"); Bossier County Schools Decl.¶ 7 ("the school district's telecommunications needs are overwhelmingly local – a segment in which, from my perspective, AT&T is not a participant").

C. The Merger Will Not Harm Mass Market Competition

Legacy AT&T ceased competing for mass market customers in the BellSouth region almost two years ago,[194] and BellSouth's mass market services face fierce price-constraining competition from numerous cable, wireless, VoIP and other providers, all of which will be unaffected by the merger. Under these circumstances, as the Commission found in the *SBC/AT&T Merger Order*, the merger of AT&T and BellSouth raises no possible mass market competitive issues.

None of the claims to the contrary has merit. Commenters' reliance on 1990s merger orders for the proposition that AT&T is a unique and especially important competitor to BellSouth[195] ignores the obvious and revolutionary changes in recent years in both the marketplace and AT&T's mass market strategy. AT&T has no unique capabilities in over-the-top VoIP, which is populated by scores of other providers. And no amount of speculation about how AT&T and BellSouth might individually have deployed new wireless technologies to compete with each other can overcome the reality that neither AT&T nor BellSouth has unique wireless capabilities or assets.

1. The Merger Will Not Remove a Uniquely Important Mass Market Competitor to BellSouth

a. Wireline Residential Services

Cbeyond claims that the Commission's early ILEC merger orders establish that AT&T "is *the most significant potential market participant* in the mass market throughout the BellSouth

[194] *See* Press Release, AT&T, AT&T Announces Second-Quarter 2004 Earnings, Company to Stop Investing in Traditional Consumer Services; Concentrate Efforts on Business Markets (July 22, 2004), *available at* http://www.att.com/news/2004/07/22-13163.

[195] *See, e.g.*, Cbeyond Comments at 5-6, 33.

operating region."[196] But these early merger orders arose in a marketplace with no intermodal competition and only emerging intramodal resale competition. The Commission's very recent findings in the *SBC/AT&T Merger Order* establish conclusively that AT&T is not, in today's very different marketplace, the uniquely important market participant that BellSouth's active competitors contend: AT&T implemented a "harvest" strategy in 2004 and is "no longer a significant provider (*or potential provider*)" of mass market services.[197] The Commission found accordingly that AT&T was not a price-constraining force in the mass market and held that "SBC's current and future pricing incentives are based more on likely competition from intermodal competitors and the remaining competitive LECs."[198] And the Commission dismissed merger opponents' suggestion that "AT&T could readily and easily reverse its decision" as "speculative and unrealistic."[199]

These conclusions apply with even greater force here. AT&T's mass market presence in the BellSouth region never approached the size of AT&T's presence in the SBC region, and an additional year of implementation of AT&T's harvest strategy has caused substantial further erosion in AT&T's customer base. Indeed, AT&T has not actively marketed mass market services in the BellSouth region for almost two years.

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[196] *Id.* at 42 (emphasis in original).

[197] *SBC/AT&T Merger Order* ¶ 103 (emphasis added).

[198] *Id.*

[199] *Id.*; *see also id.* ¶ 103 ("The record demonstrates that once AT&T determined that mass market services were no longer a viable business opportunity, it implemented steps to close down its mass market operations in an orderly fashion, and there is no indication that, absent the merger, AT&T would reverse this decision").

Cbeyond asks the Commission to pretend that the mass market has remained frozen in time, solely because UNE-P resale competition is now in decline.[200] In the late 1990s, only a few cable companies were starting to offer telephone service in a few markets; today, all of the major cable companies offer telephony services, price them aggressively, and are rapidly winning millions of customers.[201] In the 1990s, there was no significant price-constraining competition between wireline and wireless carriers; today, wireless services account for the majority of long distance calling and many customers are cutting the cord altogether. In the 1990s, VoIP did not exist; today, a single provider (Vonage) has gained more than 1.6 million customers, and scores of other VoIP providers are actively competing. And in the 1990s, "broadband over powerlines" was a new concept; today, electric utilities have active plans to implement that technology and offer telephone services. Today, with a whole range of *actual*, active, price-constraining, facilities-based competitors, there is no possible justification for mechanically applying the framework that the Commission devised in its early merger orders.[202]

BellSouth's intermodal competitors that are truly the most significant market participants in BellSouth's region have one particularly important capability that AT&T lacks – an in-region distribution network. Cbeyond claims that AT&T has a "very significant 'advantage of

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[200] *See* Cbeyond Comments at 45 ("Today, there is an even more limited universe of significant market participants").

[201] Comcast's CEO recently announced that it expects to add eight million new Comcast Digital Voice customers by 2009. Press Release, Comcast Corp., Comcast Holds 2006 Annual Meeting of Shareholders (May 18, 2006), *available at* http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=858567&highlight=.

[202] *See, e.g., In re Applications of Ameritech Corp. & SBC Commc'ns Inc.*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, 14950, ¶ 100 (Oct. 8, 1999) (subsequent history omitted) ("*SBC/Ameritech Merger Order"*); *In re Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd. 14032, ¶ 105 (June 16, 2000) ("*Bell Atlantic/GTE Merger Order")* ("[w]e similarly examine unsuccessful plans to enter a relevant market in the past," and recognize that "a failed attempt could suggest that a firm is not a significant market participant"); *In re Application of Alascom Inc., AT&T Corp. and Pacific Telecom, Inc.*, Order and Authorization, 11 FCC Rcd. 732, ¶ 3 (Aug. 2, 1995).

adjacency.'"[203] Setting aside that, for example, Texas is hardly adjacent to Georgia or Florida, this supposed advantage is illusory. History has disproven predictions in the Commission's early merger orders that adjacent ILECs were particularly likely to enter each others' markets.[204] This is unsurprising in retrospect, for proximity gives an ILEC no advantage in providing mass market services in the territory of a neighboring incumbent. An ILEC's *in-region* distribution networks, trucks or repair personnel have no ready use beyond the ILEC's borders and, outside their regions, ILECs are therefore no different than, and have no advantages relative to, any other non-facilities-based entrant; all are faced with the necessity either to build their own networks from scratch or to rely on resale.

Cbeyond complains that, with the demise of UNE-P, "commercial agreements have not provided competitive LECs with an economically rational opportunity to continue to provide mass market local voice services."[205] But Cbeyond cannot have it both ways. Either commercial resale agreements provide an economically viable means of entry – in which case AT&T cannot be among a few most significant competitors, because there are many others, including Cbeyond and its peers, that can use such agreements to provide resold services[206] – or it does not, in which case AT&T would have to build its own local distribution network to compete with BellSouth.[207]

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[203] Cbeyond Comments at 44.

[204] *See SBC/Ameritech Merger Order* ¶¶ 84-87.

[205] Cbeyond Comments at 40.

[206] *See, e.g., SBC/Ameritech Merger Order* ¶ 100 (no need to conduct full-blown significant potential competitor analysis where out-of-region RBOC is merely one of many potential competitors with similar capabilities).

[207] The "brand name recognition and . . . reputation as a provider of reliable, high-quality services" that Cbeyond says that AT&T possesses, Cbeyond Comments at 43, are hardly unique; numerous other providers in the BellSouth region, including BellSouth's much better positioned VoIP, cable, wireless, and other network-based competitors, also have strong brand recognition and reputations, as well as established customer bases and relationships.

Finally, Cbeyond's observation that AT&T "doubtless also has the financial resources to acquire and deploy any additional facilities and other physical assets required to compete effectively in the mass market throughout the BellSouth region"[208] says nothing about the likelihood of such entry. Financial resources alone do not make a viable business case, and there is no evidence that, absent this merger, AT&T would build local networks for mass market services "throughout the BellSouth region," particularly given its other priorities, including broadband deployment in its own service areas. Nor could AT&T rationally commit financial resources to reverse the basic harvest decision and "ramp up its marketing efforts"[209] through resale arrangements, as the Commission already has found.

b. VoIP

No one has rebutted Applicants' showing that AT&T is just one of many over-the-top VoIP competitors and lacks any unique advantages over these other competitors. Vonage alone has more than 1.6 million access lines nationwide and continues to grow rapidly.[210] These other VoIP providers market their services more actively, price their services more aggressively, and will continue to compete vigorously in the BellSouth region regardless of the merger.[211]

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[208] *Id.* at 43.

[209] *Id.* at 43-44.

[210] Vonage recently offered 20 percent of its stock to the public in an initial public offering and raised more than $500 million. *See* Shawn Young, *Vonage Expects Its Stock to Debut At $17 a Share*, Wall St. J., May 24, 2006, at C4. CFA, Cbeyond and NJ Ratepayer Advocate interpret the drop in the price of Vonage's stock following the IPO as confirmation that over-the-top VoIP providers are not important competitors. *See* Cooper & Roycroft Decl. at ¶ 15-16; Cbeyond Comments at 50; Declaration of Susan Baldwin and Sarah Bosley on behalf of the New Jersey Division of the Ratepayer Advocate ("Baldwin & Bosley Decl.") ¶ 116-17. But the fact remains that Vonage's IPO raised a large amount of capital, and Vonage remains a well-funded and extremely aggressive competitor. Moreover, those now purchasing Vonage's stock at its current price certainly have every expectation that Vonage will continue to be successful.

[211] CFA wildly mischaracterizes the Kahan Declaration as saying the customer growth rate for AT&T's CallVantage service was 100% in the last year. *See* CFA Cooper Decl. at 34 (citing Kahan Decl. ¶ 52, which does not discuss growth rates). In reality, Mr. Kahan states that the

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The supposed "contradictions" in AT&T's descriptions of its VoIP service[212] are an invention of CFA. As Applicants previously noted, AT&T continues to examine its options for the marketing of its AT&T CallVantage service out of region.[213] In fact, although AT&T remains alert to other opportunities, the options contemplated by AT&T do not entail a massive ramp-up on the scale of Vonage. Even if AT&T were to become a more active VoIP provider out of region, the Commission's essential conclusions in the *SBC/AT&T Merger Order* would still control: AT&T is only one of many over-the-top providers, and, with only about 14,000 customers in the entire BellSouth region, AT&T is a small player by any measure. In such circumstances, the Commission previously concluded that it could not "find that AT&T is a significant provider of this service."[214]

c. Small Business

The suggestion that AT&T remains a significant actual and potential competitor for small business customers[215] is refuted by the facts. While AT&T is harvesting this customer base outside its ILEC region,[216] other CLECs, in contrast, continue to compete actively for small

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customer growth rate for AT&T CallVantage service in the past year was "well under 50%." *Id.* ¶ 51. But whatever the growth rate, it would be impossible to consider AT&T a most significant mass market competitor on the basis of a customer base of 14,000 VoIP customers for the entire BellSouth region.

[212] *See* Cooper & Roycroft Decl. 34-35.

[213] *See* Public Interest Statement at 97 n.345.

[214] *SBC/AT&T Merger Order* ¶ 88 n.263. Consistent with its merger commitments, AT&T will shortly begin offering stand-alone DSL service. Contrary to CFA's claim, Cooper & Roycroft Decl. at 16-17, AT&T has no intention of requiring customers who purchase stand-alone DSL to purchase AT&T CallVantage service as well. CFA argues that the fact that BellSouth does not offer a stand-alone DSL product is "anticompetitive," *id.*, but the Commission has already rejected that claim and has granted BellSouth a declaratory ruling specifically authorizing its current practices. *In re BellSouth Request for Declaratory Ruling*, Memorandum Opinion and Order, 20 FCC Rcd. 6830 (Mar. 25, 2005).

[215] Cbeyond Comments at 54-57.

[216] Public Interest Statement at 107.

business customers in the BellSouth region. ITC Deltacom, US LEC, Nuvox, Cbeyond, Network Telephone, and FDN are major BellSouth competitors for small business customers on a region-wide basis. The picture is even more varied at the state level: Birch Telecom, PAETEC, MCI, XO, Cinergy and AIN are all major competitors in particular BellSouth states. Cable companies are also major competitors for small business customers. Time Warner, Cox, Knology, Comcast, Charter and Mediacom are aggressively (and effectively) marketing small business services in BellSouth's region. Cox is now consistently BellSouth's biggest competitor, by a wide margin, for small business customers in Louisiana. Knology is now one of BellSouth's most important competitors for small business customers in Alabama.[217]

d. Broadband Services

EarthLink's claim that AT&T is BellSouth's most significant "potential" broadband competitor because of AT&T's commercial DSL resale arrangement with Covad[218] is incorrect. As noted above, the Commission specifically found in the *SBC/AT&T Merger Order* that AT&T "has ceased to operate as a significant competitor for mass market broadband services."[219] AT&T has only 3,000 remaining DSL customers in the entire BellSouth region, a decline of nearly 20% from a year ago, and AT&T is not engaged in any active marketing of the service. AT&T has not budgeted any money for expansion of its DSL service in the BellSouth region. And given that AT&T provides DSL service out-of-region exclusively through wholesale relationships with other CLECs, "other competitors will be equally able to do so post-merger."[220]

[217] *See* Public Interest Statement at 87-92.
[218] EarthLink Pet. at 7-8.
[219] *SBC/AT&T Merger Order* ¶ 103 n.317.
[220] *Id*.

Other merger opponents suggest that AT&T and/or BellSouth are among the most significant potential broadband competitors in each others' regions using new broadband wireless technologies such as WiMax.[221] But AT&T and BellSouth clearly have no special advantages in this area; wireless spectrum is readily available to the wide range of competitors that are exploring and deploying wireless broadband strategies. As discussed in Section III.E.1, below, AT&T has no spectrum in BellSouth's region that could be used for mass market broadband services, other than a 2.3 GHz license that covers part of one county in rural Kentucky. BellSouth does own some WCS spectrum in AT&T's ILEC service territories, but the combined company will hold only a small fraction of the spectrum relevant to broadband services, and many other spectrum bands can be used to provide the same kinds of services that WCS permits.

2. The Merger Will Have No Adverse Unilateral Effects

a. Market Share-Based Claims

CFA, Cbeyond, and the New Jersey Ratepayer Advocate contend that the merger necessarily will harm mass market competition because the existing customer bases of BellSouth and AT&T will be combined.[222] As the Commission recognized in the *SBC/AT&T Merger Order*, however, a simplistic focus on historic mass market "shares" provides no useful

[221] *See* CFA Pet. at 9 & Cooper Decl. at 24-25; Petition to Deny, Center for Digital Democracy ("CDD Pet.") at 6.

[222] *See* Cooper & Roycroft Decl. at 14, 38-39; Cbeyond Comments at 35; Baldwin & Bosley Decl. ¶ 36-37, 47-48, 66-68. Notably, the NJRPA filed comments in the New Jersey Board of Public Utilities ("BPU") proceeding on this merger stating that it "does not oppose the Merger and urges the BPU to issue an order approving the Merger expeditiously." *In re Joint Verified Pet. of AT&T Inc., BellSouth Corp. & BellSouth Long Distance, Inc. for Approval of Merger*, BPU Docket No. TM06030262; Comments of the New Jersey Division of the Ratepayer Advocate at 2 (May 19, 2006).

information,[223] because "competition from intermodal competitors is growing quickly, and we expect it to become increasingly significant in the years to come."[224] This intense competition captured more than 8 million lines from incumbent LECs last year, and is expected to capture another 7 million this year.[225] In these circumstances, backward-looking market shares that reflect the *historical* significance of traditional mass market competitors are a meaningless proxy for current and future competitive significance. The arrival of new competitors represents a profound change in market structure, and no historical market share analysis could adequately gauge the significance of these (or traditional) competitors.[226]

Static historical market shares are especially inapposite for AT&T. Because AT&T ceased to be an active price-constraining competitor to BellSouth years ago, AT&T's "present market share [is] an inaccurate reflection of its future competitive strength" and should not be relied upon.[227] The Commission reached precisely that conclusion in the *SBC/AT&T Merger Order*.[228]

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[223] *See SBC/AT&T Merger Order* ¶ 103 ("Although we agree with commenters that the Applicants' post-merger market shares for the relevant products are high, we nonetheless find . . . that these numbers significantly overstate the likely competitive impact of the merger").

[224] *SBC/AT&T Merger Order* ¶ 101.

[225] *Quarterly VoIP Monitor: VoIP Gathering Momentum, Expecting 20M Cable VoIP Subs by 2010*, Bernstein Research, (Jan. 17, 2006), at 5, 10. The New Jersey Ratepayer Advocate complains that some of these line losses are second lines lost to BellSouth's own DSL service, but it does not dispute that most of BellSouth's line losses are to competitors or that line losses to broadband are a significant competitive constraint on traditional wireline services, regardless of which broadband provider wins particular customers in the robust competition for those customers. *See* Baldwin & Bosley Decl. at 47-48, 66-68.

[226] *See, e.g., In re Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶¶ 67-72 (Oct. 23, 1995) (rejecting claim that AT&T should be treated as a dominant carrier in light of its "high" market share, because other new facilities-based carriers with excess capacity had the incentive and ability to serve AT&T customers in the event of price increase).

[227] *FTC* v. *Nat'l Tea Co.*, 603 F.2d 694, 700 (8th Cir. 1979); *see also Ball Mem'l Hosp., Inc.* v. *Mut. Hos. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986) ("Market share is just a way of estimating market power, which is the ultimate consideration. . . . Market share reflects current

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b. Wireless Pricing

Merger opponents argue that Applicants will have weaker incentives to price and market their Cingular wireless services aggressively because these wireless services compete with their wireline services.[229] But they ignore the key facts that (a) Applicants already own Cingular,[230] and (2) numerous other wireless carriers – Verizon Wireless, Sprint Nextel, T-Mobile, and others like MetroPCS that specifically market their services as a wireline replacement – continue to compete vigorously for local customers in AT&T's and BellSouth's regions. If the post-merger AT&T were to price Cingular's services unaggressively, these other wireless carriers (and other intermodal competitors, such as cable companies) would win those customers' business.[231]

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sales, but today's sales do not always indicate power over sales and price tomorrow"); *United States v. Syufy Enter.*, 903 F.2d 659, 665-66 (9th Cir. 1990) ("In evaluating monopoly power, it is not market share that counts, but the ability to maintain market share.").

[228] *SBC/AT&T Merger Order* ¶ 103 ("Regardless of what role AT&T may have played in the past, we conclude that AT&T's actions to cease marketing and gradually withdraw from the mass market mean it is no longer a significant provider (or potential provider) of local service, long distance service, or bundled local and long distance service to mass market consumers").

[229] *See, e.g.,* Cooper & Roycroft Decl. ¶¶ 20-24; CDD Pet. at 4-5; Cbeyond Comments at 47-48, 76-78; MSVS Comments at 7-9.

[230] In this regard, the *Antitrust Guidelines for Collaborations Among Competitors* do not show that the unification of Cingular's ownership would have a merger-specific competitive effect, as MSVS asserts. MSVS Comments at 7-9. The only way in which AT&T competes today in the wireless market is by reselling wireless services in the BellSouth region under the AT&T brand name. This limited resale is not competitively significant in light of the numerous, facilities-based providers of wireless services throughout the BellSouth region. For this reason, the Cingular joint venture is exactly the type of "collaboration" that antitrust regulators would view as having "competitive effects identical to those that would arise if the participants merged." FTC and U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 5 (Apr. 2000). As such, AT&T's acquisition of BellSouth's ownership interest in Cingular does not impact the competitive *status quo*. These facts are also the complete answer to CFA's HHI calculations that purport to show that mass market competition would be improved if the Commission required AT&T to divest Cingular. *See* Cooper & Roycroft Decl. at 21-24. There is simply no justification for any such divestiture requirement; AT&T and BellSouth already own Cingular, and the merger does not change this status quo. Indeed, CFA is really attacking the Commission's long-settled decision to permit ILEC affiliates to hold CMRS licenses. *See* 47 C.F.R. § 20.20 (formerly § 22.903).

[231] *See, e.g., Cingular/AT&T Wireless Merger Order* ¶¶ 248-49 & nn.590-91 (rejecting similar claim); *Sprint/Nextel Merger Order* ¶¶ 108-113 (risk of unilateral price increases by merged firm

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AT&T would be left with the worst of all worlds, for it would retain these customers as neither wireline nor wireless customers. Accordingly, AT&T will have no incentive to scale back the existing aggressiveness of its wireless pricing once the merger is approved.

Nor is AT&T uniquely positioned in the market for converged services. Stand-alone wireless providers – like T-Mobile – are furthest along in rolling out dual-mode Wi-Fi/CMRS telephones in the US.[232] Sprint Nextel and a consortium of cable companies have formed a $200 million joint venture that specifically targets converged services,[233] and Sprint Nextel claims that it is, in any event, "best positioned to offer truly integrated services as a result of its converged, wholly-owned wireless and wireline national platforms."[234] Verizon has unveiled "a robust line of … integrated wireless and wireline network access offerings" that are "designed to enable workforce mobility and maintain uninterrupted business operations."[235] Other national

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low because other wireless carriers can easily absorb additional demand); *Cingular/AT&T Wireless Merger Order* ¶ 136 (same).

[232] Amol Sharma & Li Yuan, *AT&T Deal Could Speed Move To Wireless Internet Calling*, Wall Street J., March 6, 2006 (T-Mobile already has begun to trial the devices in Seattle, with a commercial offering scheduled for later this year).

[233] Press Release, Time Warner Cable, Sprint Nextel, Comcast, Time Warner Cable, Cox Communications and Advanced/Newhouse Communications to Form Landmark Cable and Wireless Joint Venture (Nov. 2, 2005), *available at* http://www.timewarnercable.com/InvestorRelations/PressReleases/TWCPressReleaseDetail.ashx?PRID=840&MarketID=0.

[234] Sprint Nextel Presentation, *Wireline Svcs. Importance to Sprint Nextel's Converged Solutions*, at 3 (Sept. 2005), *available at* http://www4.sprint.com/servlet/whitepapers/dbdownload/090105_Wireline_Services_Booklet.pdf?table=whp_item_file&blob=item_file&keyname=item_id&keyvalue='lrj429q'; *see also id.* (Sprint Nextel is "*best positioned* to take advantage of the trend toward convergence *regardless of any future combinations of its competitors*") (emphasis added).

[235] Press Release, Verizon, Verizon Business, New Global Communications Provider, Opens for Business Worldwide; Launches Integrated Product Portfolio and Advertising Campaign (Jan. 23, 2006), *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93195.

and regional players are also positioning themselves to provide future technologies, including converged wireless/wireline services.[236]

3. Opponents' Non-Merger Specific Arguments Should Be Rejected

Merger opponents raise a series of generalized grievances about the Commission's failure to adopt policies that they believe are necessary to promote mass market competition. For example, the New Jersey Ratepayer Advocate – which urged the New Jersey Board of Public Utilities to approve this merger expeditiously[237] – contends that this Commission has undermined intramodal competition by eliminating UNE-P and complains about the increasing extent to which carriers are offering bundles of voice and data services.[238] CFA asserts that the elimination of "line sharing" has caused the U.S. to "fall[] further behind in areas of broadband penetration" and that the Commission should reverse its recent decision and mandate that BellSouth provide "naked" DSL".[239] But "[m]erger review is limited to consideration of merger-specific effects,"[240] and these arguments are "matters for which the public interest would be better served by addressing the matter in [a] broader proceeding of general applicability."[241]

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[236] *See* The Quad Play – The First Wave of the Converged Services Evolution, Incode, Feb. 2006, a*vailable at:* http://www.incodewireless.com/media/whitepapers/2006/3GSMConvergence-(Feb-2006).pdf.

[237] *In re Joint Verified Pet. of AT&T Inc., BellSouth Corp. & BellSouth Long Distance, Inc. for Approval of Merger*, BPU Docket No. TM06030262, Comments of the New Jersey Division of the Ratepayer Advocate at 2 (May 19, 2006).

[238] Baldwin & Bosley Decl. ¶¶ 41, 67-88; *see also* Cooper & Roycroft Decl. at 6-7, 13.

[239] Cooper & Roycroft Decl. at 7, 66.

[240] *AT&T/Comcast Merger Order* ¶ 11. *In re Applications of Global Crossing Ltd. & Citizens Commc'ns Co.*, Memorandum Opinion and Order, 16 FCC Rcd. 8507, 8511, ¶ 10 (CCB/IB/CSB/WTB 2001) (rejecting alleged harms as insufficiently merger-specific).

[241] *SBC/AT&T Merger Order* ¶ 175. *AT&T/Comcast Merger Order* ¶ 31; *In re Applications of S. New England Telecomms. Corp. & SBC Commc'ns Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21292, 21306, ¶ 29 (1998).

These attempts to roll back the regulatory clock are entirely misguided. These opponents contend that the Commission's overarching policy goal should be to promote resale competition. The Commission, however, has recognized the need to balance resale with the promotion of *facilities-based* competition and the deployment of broadband networks. Indeed, Section 706 of the 1996 Act[242] expressly requires this focus. And, as the Commission has held, forcing incumbent carriers to share their networks can both deter the deployment of broadband facilities by both incumbents and new entrants. The Commission's intermodal competition and broadband initiatives have been wildly successful. These accomplishments should be applauded, not seized upon as a basis for rejecting a merger that will further accelerate intermodal competition and broadband deployment.

Finally, numerous commenters ask for a host of wholly inappropriate merger conditions. For example, commenters variously propose such conditions as a five-year freeze on the availability of unbundled network elements,[243] unbundled access to fiber loops,[244] access to line sharing as an unbundled network element pursuant to Section 251(c)(3),[245] unbundled access to "Section 271 network elements" under the Section 252 process,[246] mandated rates for UNE-P,[247] recalculation of the thresholds for impairment for transmission UNEs,[248] a requirement to offer broadband services at "POTS prices" for three years,[249] all the way to a complete "fresh look" at

[242] *See* Telecommunications Act of 1996, § 706, Pub. L. No. 104-104, 110 Stat. 56, 153.

[243] Cbeyond Comments at 99.

[244] Access Point Pet. at 73.

[245] Cbeyond Comments at 104.

[246] Access Point Pet. at 71-72.

[247] New Jersey Ratepayer Advocate Comments at 22; Comments of Fones4All Corp. ("Fones4All Comments") at 18-19.

[248] Cbeyond Comments at 102-03.

[249] New Jersey Ratepayer Advocate Comments at 22.

all of the Commission's local competition decisions.[250] The Commission rejected a host of similarly improper proposals to relitigate or reopen settled rules and policies in the SBC/AT&T merger, and it should do so again here for the same well considered reasons.

D. The Merger Will Not "Foreclose" Competitive Long Distance or Special Access Providers

Merger opponents advance two "foreclosure" theories: (1) that BellSouth is a large purchaser of wholesale long distance services and the merger will harm BellSouth's existing long distance suppliers when the post-merger firm shifts BellSouth's wholesale long distance traffic to AT&T's network,[251] and (2) that AT&T is the "leading" purchaser of special access services in the BellSouth region and that the merger will harm CLECs by eliminating their "ability to sell services to AT&T."[252] Neither claim withstands scrutiny.

In the *SBC/AT&T Merger Order* the Commission rejected claims that the merging parties' vertical integration would impair wholesale long distance competition,[253] and it should do so here. "Vertical integration normally represents, a benign, efficiency-producing method of organizing production."[254] At the same time, such beneficial "cooperation" – whether by merger or contract – can always be characterized as "'foreclos[ing]' or 'exclud[ing]' alternative sellers from some portion of the market."[255]

In order to ensure that the incentives for parties to engage in such ordinary and presumptively beneficial arrangements are not chilled, courts and regulators have established two

[250] CFA Pet. at 9.

[251] Access Point Pet. at 34-36.

[252] Sprint Nextel Comments at 12.

[253] *SBC/AT&T Merger Order* ¶ 151.

[254] *See, e.g., In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 202 (1980).

[255] *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.).

strict requirements in evaluating whether alleged "foreclosure" is truly anticompetitive. First, the party alleging customer foreclosure must show that "a significant fraction of buyers . . . are frozen out of a market."[256] When "sellers can redirect their . . . sales to others," there is not even the potential for cognizable harm.[257] Second, that party must show that the foreclosure has an actual anticompetitive effect in the market.[258] Where "foreclosed" firms remain viable competitors or the market otherwise will remain competitive, the challenged customer "foreclosure" cannot be said to harm social welfare.[259]

Here, merger opponents do not remotely shoulder their burden. First and foremost, they offer no evidence that the market for wholesale transport, which is widely acclaimed for its competitiveness, will be rendered any less so. That point is dispositive of any concern.

Nor for that matter can they credibly allege harm to individual competitors. BellSouth's purchases are a trivial fraction of the total U.S. long distance wholesale revenues, which exceed $18 billion annually.[260] Further, BellSouth will continue to honor existing contractual obligations and "affected carriers will have an opportunity to seek other customers" during the pendency of those contracts.[261]

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[256] *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring); *see also Tampa Electric Company v. Nashville Coal Company*, 365 U.S. 320, 333 (1961).

[257] *Jefferson Parish*, 466 U.S. at 45.

[258] *Advanced Health-Care Services, Inc. v. Radford Community Hosp.*, 910 F.2d 139, 151 (4th Cir. 1990); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 478 (7th Cir. 1988); *see also SBC/AT&T Merger Order* ¶ 151 (noting that "foreclosure" must impact "the market as a whole" to be significant).

[259] *See generally* Steven C. Sunshine, Deputy Assistant Attorney General, U.S. Dep't of Justice Antitrust Division, Vertical Merger Enforcement Policy, 1995 WL 1774373, at *5 (Apr. 5, 1995).

[260] *See U.S. Telecom: Wholesale Segment Too Large to Sweep Under Rug*, Bernstein Research, at 3-4 (Jan. 6, 2005).

[261] *SBC/AT&T Merger Order* ¶ 151.

The vast majority of BellSouth's wholesale purchases (other than from AT&T) are from Sprint Nextel, Verizon and Qwest – large, vertically integrated carriers that could not be competitively weakened by the loss of BellSouth's limited and broadly disseminated business. BellSouth's remaining purchases are spread over a number of carriers, with only two very large carriers (each with quarterly revenue in excess of $1 billion) receiving more than $10 million annually from BellSouth. There is simply no issue here.

Sprint Nextel's suggestion that the loss of special access sales to AT&T in the BellSouth region might foreclose CLEC special access providers fails for the same reason. Sprint Nextel provides no basis for any conclusion that CLECs' loss of special access sales to AT&T could have any conceivable anticompetitive effect (or, indeed, any material impact even on individual CLECs). Indeed, none of the CLECs from which AT&T purchases special access services in the BellSouth region (including AT&T's largest CLEC supplier by far, TWTC) even raises the issue, much less contends that it would be crippled by the loss of special access sales to AT&T. Further, following the merger, the combined company will obviously have every incentive to continue to purchase special access from competitive carriers outside of AT&T's region to the extent those carriers continue to offer favorable rates and high quality services.

E. The Merger Will Not Lessen Competition for Broadband Services

1. The Merger Will Not Lessen Competition for Broadband Services That Use Wireless or Other Technologies

Several merger opponents assert that the merger will increase concentration of ownership of spectrum suitable for wireless consumer broadband services and lessen actual or potential competition in broadband services markets. But these merger opponents generally make only

perfunctory and conclusory assertions to this effect.[262] The only attempt to support these claims is made by Clearwire, which offers service in the 2.5 GHz band of spectrum and which argues that the Commission should order divestiture of BellSouth's 2.5 GHz holdings to permit Clearwire to increase its already extensive holdings.[263]

Clearwire's contentions plainly have nothing to do with this merger or the public interest. The merger will not increase the concentration of ownership in spectrum suitable for broadband in any area, and the merged companies will own only a small percentage of the spectrum suitable for wireless broadband service. Whatever the effects of the merged company's retention of this spectrum on Clearwire's *private* interests and business plans, the combination of AT&T's and BellSouth's holdings can have no adverse effect on competition in wireless broadband services, much less in the broader market for consumer broadband services or on the *public* interest. AT&T's control of BellSouth's 2.5 GHz holdings will neither prevent promising forms of wireless broadband services nor give AT&T "incentives" to "warehouse" spectrum. Clearwire's current claims were rejected by the Commission in the *Sprint/Nextel Merger Order* and the orders authorizing ILECs and CMRS providers to hold spectrum in the 2.5 and 2.3 GHz bands, and they should be rejected here.

[262] *See* Access Point Pet. at 73; Cbeyond Comments at 109-10; CDD Pet. at 6; CFA Pet. at 9; Cooper & Roycroft Decl. at 24-25, 67; Rubin Comments at 16-18.

[263] Petition to Deny or, in the Alternative Condition Consent of Clearwire Corp. ("Clearwire Pet.") at 11-17; Clearwire Pet., Declaration of Perry S. Satterlee ("Satterlee Decl.") ¶¶ 9-12

a. AT&T's Acquisition of Control of BellSouth's 2.5 GHz Spectrum Raises No Competitive Concerns

Clearwire first contends that the merger will cause "AT&T [to] hold enough [2.5 GHz] spectrum to impede promising platforms in that band from providing nationwide broadband services."[264] This argument is flawed at every level.

First, even if the 2.5 GHz spectrum represented the only means of offering wireless broadband services – as it patently does not – the merger will not increase concentration of ownership of this spectrum. BellSouth holds 2.5 GHz spectrum in some parts of the southeast, and AT&T holds *no* 2.5 GHz spectrum anywhere. The merger thus will not increase concentration in any area or otherwise constrict the availability of 2.5 GHz spectrum to Clearwire and other competitors – since just as much 2.5 GHz spectrum will be available to others after the merger as was available before the merger.[265] To the extent that Clearwire lacks a national footprint, the AT&T/BellSouth merger neither causes nor exacerbates this.

Second, even if Clearwire's complaints about BellSouth's existing 2.5 GHz holdings were properly raised in this merger proceeding, Clearwire is repeating claims that the Commission rejected in the *Sprint/Nextel Merger Order* and that are entirely meritless. The Sprint-Nextel merger was a merger of "the two largest current holders of rights to spectrum in the 2.5 GHz band,"[266] and it substantially increased concentration of ownership of 2.5 GHz licenses in some 20 markets, giving Sprint-Nextel over 90% of the 2.5 GHz channels in several

[264] Clearwire Pet. at iii.

[265] Similarly, while both AT&T and BellSouth hold 2.3 GHz licenses, these licenses do not overlap each other. Indeed, the only overlap of any sorts is in the rural and thinly populated southeastern corner of Orange County, Indiana, where AT&T holds a 5 MHz WCS license and BellSouth holds BRS/EBS spectrum. This overlap plainly is of no competitive significance.

[266] *Sprint/Nextel Merger Order* ¶ 147.

markets.[267] The Commission there specifically rejected the claim that Clearwire now makes, namely, that "the 2.5 GHz band is intrinsically superior to other spectrum for the provision of wireless services."[268] Instead, the Commission found that "other . . . spectrum should become accessible to competitors," and "if the 2.5 GHz band is used for the provision of mobile data service, it will be one of many existing and potential inputs into the mobile data services market."[269] And, with specific reference to the 2.5 GHz band, the Commission stated that "it is premature to conclude which spectrum bands will support the services desired in this rapidly evolving market."[270] Indeed, Clearwire itself recognizes this latter fact, for it is considering using spectrum besides 2.5 GHz to provide wireless broadband service.[271]

For the same reason, even if, contrary to fact, the AT&T/BellSouth merger increased concentration of 2.5 GHz spectrum holdings, it could have no conceivable adverse effect on actual and potential competition in wireless broadband services. As the Carlton & Sider Reply Declaration makes clear, the combined company will hold a very small percentage – between 2.4% and 16.1%, depending on the assumptions one makes – of the spectrum available for consumer wireless services, whether CMRS, wireless broadband or both.[272]

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[267] According to exhibits filed with its merger applications, Sprint Nextel holds more than 90% of the BRS/EBS MHz POPs in 16 basic trading areas ("BTAs"), including Detroit and Baltimore. It also holds 99% of the BRS/EBS MHz POPs in two Colorado BTAs.

[268] *Sprint/Nextel Merger Order* ¶ 157.

[269] *Id.*

[270] *Sprint/Nextel Merger Order* ¶ 156. National CMRS carriers, including Verizon Wireless and Sprint Nextel using EV-DO technology, and Cingular using UMTS technology, are already providing mobile wireless broadband services and this growing segment is intensely competitive.

[271] Clearwire Corp., Form S-1 SEC Registration Statement, at 4 (May 11, 2006), *available at* http://www.sec.gov/Archives/edgar/data/1285551/000095012306006136/y20080sv1.htm ("Clearwire S-1").

[272] The percentages vary depending on the assumptions that underlie the calculations, including whether to include or exclude CMRS, unlicensed spectrum and spectrum that is scheduled or expected to be auctioned.

In addition, as the Commission has found,[273] there are substantial amounts of currently licensed spectrum in other frequency bands that can support the types of services that Clearwire offers. This spectrum includes 18 MHz of Lower 700 MHz spectrum, 6 MHz of Upper 700 MHz spectrum, 5 MHz of 1.6 GHz WCS spectrum, and 30 MHz of 2.3 GHz WCS spectrum, plus the 194-198 MHz of 2.5 GHz BRS/EBS spectrum. In addition, 83.5 MHz of unlicensed 2.4 GHz ISM spectrum and 555 MHz of unlicensed 5 GHz U-NII spectrum are also currently available for use.

Beyond that, additional spectrum suitable for wireless broadband service will be available in the near term. As John Kneuer, Acting Administrator of the National Telecommunications and Information Administration, recently stated, government efforts to make more spectrum available for commercial purposes will mean "lots of capacity" and a market that will soon be "awash in competition."[274] The Commission will auction 90 MHz of 1.7-2.1 GHz AWS spectrum in August 2006, 30 MHz of Upper 700 MHz spectrum in early 2008, and 30 MHz of Lower 700 MHz spectrum in 2008 or 2009. An additional 40 MHz of AWS spectrum also is planned for auction. The Commission is also finalizing rules for the unlicensed use of 50 MHz at 3.65-3.7 GHz, and the Commission is working actively to improve the usefulness of existing spectrum for broadband services. For example, the Commission is expediting the development of testing criteria for devices in the 5 GHz band.[275]

The wide range of spectrum choices available to wireless broadband providers is confirmed by the wide range of carriers' wireless plans. QUALCOMM's subsidiary, MediaFLO

[273] *Sprint/Nextel Merger Order* ¶ 156.

[274] Lynn Stanton, *Verizon's Tauke Warns of Vagueness of Net Neutrality Language,* TR Daily, May 9, 2006.

[275] Howard Buskirk, *FCC Pushing for Fast Action on 5 GHz Testing Procedures,* Comm. Daily, May 5, 2006.

USA, Inc., plans to use its Lower 700 MHz spectrum to operate a nationwide mediacast network to deliver high-quality video and audio programming to wireless subscribers.[276] Aloha Partners, which also holds Lower 700 MHz spectrum, has joined with satellite operator SES Americom to test-market mobile TV through a new subsidiary, Hwire, using the digital video broadcasting-handheld ("DVB-H") platform.[277] Polar Communications, a rural telco, is using its Lower 700 MHz spectrum to provide mass market wireless broadband services in North Dakota, as is IdeaOne, a CLEC in North Dakota.[278] Agri-valley is doing the same thing in Michigan.[279] Crown Castle's subsidiary, Modeo, is using its 1.6 GHz WCS spectrum to offer a DVB-H service that will have a high-quality network featuring 10+ video channels and 24+ audio channels.[280] And thousands of Wireless Internet Service Providers ("WISPs") use unlicensed 2.4 GHz and 5.8 GHz spectrum to provide wireless Internet access.[281]

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[276] Dr. Paul E. Jacobs, QUALCOMM Annual Stockholder Meeting Presentation (Mar. 7, 2006) http://files.shareholder.com/downloads/QCOM/32794915x0x33470/9c0c2390-c334-4993-b2f3-6ced7e48519e/pj_stockholder.pdf; Jo Best, *Verizon Wireless Signs Up for Media FLO*, silicon.com, Dec. 1, 2005, http://networks.silicon.com/mobile/0,39024665,39154746,00.htm.

[277] Howard Buskirk, *Aloha will Explore using 700 MHz Spectrum for TV on Cellphones*, Comm. Daily, Apr. 25, 2006.

[278] Press release, Polar Comm'cns, Vyyo Launches 700 MHz Solution for US and International Markets (May 6, 2004), *available at* http://www.polarcomm.com/pdf/0506/04.pdf; Press Release, Vyyo Inc, IdeaOne Group Deploys Vyyo Solution for Delivery of Broadband to Rural Costumers (July 26, 2005), *available at* http://phx.corporate-ir.net/preview/phoenix.zhtml?c=120942&p=irol-newsArticle_print&ID=734856&highlight=.

[279] Press Release, Vyyo Inc., Agri-Valley Services Deploys Vyyo; 700 MHz (VHF) Solution in Michigan (June 22, 2004), *available at* http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/6-22-2004/0002197542&EDATE=.

[280] Introduction to Crown Castle, *available at* http://www.crowncastle.com/investor/presentations/CCI_Profile.pdf; Crown Castle Int'l Mobile Media Presentation (Dec. 2005), http://www.crowncastle.com/investor/presentations/investorsDay2005/MichaelSchueppert.pdf.

[281] *See* License Exempt Wireless Internet Service Provider (WISP) Hurricane Katrina Disaster Relief Assistance, *available at* http://www.broadbandwirelessreports.com/pressreleases/files/FCC%20Briefing%2009152005.pdf.

Finally, while the Commission's job is to protect the public interest – not the private interests of individual competitors – Clearwire's argument is flawed even on its own terms. Clearwire stops well short of asserting, much less demonstrating, that it could not provide broadband services using 2.5 GHz (or other) spectrum that is not held by BellSouth. Indeed, in Atlanta, which is the city in BellSouth's ILEC service territory where Clearwire says that BellSouth has the most 2.5 GHz spectrum, Clearwire already has at least 24 MHz of 2.5 GHz spectrum.[282] And in other cities where Clearwire claims that BellSouth's 2.5 GHz spectrum holdings threaten competition,[283] Clearwire not only holds substantial spectrum but is currently providing service.[284]

In any event, the suggestion that Clearwire could not be an effective "national" competitor with such limited gaps in its footprint borders on the frivolous. All wireless carriers fill in their footprints over time and rarely achieve 100% coverage. There are many successful regional carriers that do not even seek nationwide coverage.[285] And the reality is that Clearwire already has achieved a very broad footprint. Even though Clearwire was founded less than three years ago,[286] it is now the second largest holder of 2.5 GHz spectrum in the United States behind only Sprint Nextel (and well ahead of BellSouth),[287] with Clearwire's licenses covering

[282] A Clearwire subsidiary, Fixed Wireless Holdings, LLC, is the licensee for WHT664, which is the Channel Group F license in Atlanta.

[283] Clearwire Pet. Ex. 1.02 (claiming impact on competition in Jacksonville and Daytona Beach).

[284] *See* Clearwire Services Areas Coverage Map, http://www.clearwire.com/store/service_areas.php.

[285] For example, Cricket does not have a national footprint. *See* Cricket Coverage Map, https://www.mycricket.com/coverage/.

[286] Clearwire S-1 at 1.

[287] *Id.* ("In the United States we use spectrum in the 2.495 to 2.690 Gigahertz, or GHz, band, and we believe that we have the second largest spectrum position in this band in the United States").

157 million people.[288] Indeed, Clearwire says that its "[s]trong [s]pectrum [p]osition" is one of its "[c]ompetitive [s]trengths."[289] These broad spectrum holdings have already allowed Clearwire to offer services in markets with nearly 5 million people and win the business of nearly 100,000 customers.[290]

In short, this merger does not affect the availability of spectrum that can be used to provide broadband wireless services. The merger thus has no possible adverse effect on competition in wireless broadband services, much less on competition in the larger consumer broadband market where emerging wireless broadband services will merely supplement the array of existing options provided by cable incumbents, ILECs, cellular and PCS carriers, satellite services, and electric utilities and other providers. The Commission should reject Clearwire's attempts to manipulate the merger process to serve its own private business interests.

b. The Merger Will Not Give AT&T the Incentive or Ability To "Warehouse" 2.5 GHz Spectrum

Clearwire also seeks divestiture of this spectrum on the theory that the merged company "will have the incentive to warehouse or otherwise use spectrum at 2.5 GHz to avoid losing business in the services that would ride on competing independent broadband platforms."[291] This is nonsense, for the merger will have no effect on the "incentive" of the merging companies, which is to use this valuable spectrum, for example, to offer fixed wireless broadband services to

[288] Clearwire continues to acquire additional 2.5 GHz spectrum – this spring, for example, Clearwire agreed to acquire Winbeam, which holds 2.5 GHz spectrum in Maryland, Pennsylvania, New York and Virginia. Susan Rush, *Clearwire Expands Footprint*, Wireless Week, Apr. 21, 2006, http://www.wirelessweek.com/article/CA6326992.html. Clearwire also is swapping spectrum with Sprint Nextel, trading spectrum in nine middle market cities for spectrum in 61 mostly rural areas. *Id.*

[289] Clearwire S-1 at 3.

[290] Clearwire Pet. at 4.

[291] *Id.* at iii, 17.

rural and other customers that cannot be reached by DSL, as well as to offer customers the ability to obtain broadband access outside their offices and homes in places where wireline service is not feasible.

To support its claim that the merger will create incentives to warehouse spectrum, Clearwire asserts that the combination of the non-overlapping 2.3 GHz spectrum that AT&T and BellSouth own will give the merged company the ability to use that spectrum to offer "WiMax-class service" nationally and that this will somehow creates incentives for the merged company to "warehouse" 2.5 GHz spectrum in order to block competitors from providing services that compete with AT&T's 2.3 GHz services.[292] There are numerous problems with this claim. Many of AT&T's and BellSouth's existing 2.3 MHz licenses are in the C and D blocks, which, due to unresolved regulatory issues, are subject to interference from Digital Audio Radio Service terrestrial repeaters (*i.e.* the ground-based antennas that retransmit signals from Sirius and XM Radio satellites). Such interference is especially intense in downtown areas where there are numerous such repeaters to address poor direct satellite reception caused by tall buildings. Moreover, unlike 2.5 GHz (and even 3.6 GHz), no standards "profile" for WiMax equipment has even been tendered for 2.3 GHz. Since standardization, and the resultant low consumer equipment prices, have been a key to the success of WiFi, the head start held by 2.5 GHz WiMax operators in the standards and equipment development process is a substantial competitive benefit. Further, the narrow amounts of bandwidth associated with many of the combined company's 2.3 GHz spectrum licenses would constrain its ability to support a robust and commercially viable mobile or fixed broadband data service under current conditions.

[292] *Id.* at 2-3, 8-9, 14-15.

In any event, Clearwire's argument simply repeats claims that the Commission has already considered and rejected in industry-wide rulemakings addressing the appropriate use of 2.3 GHz and 2.5 GHz spectrum. Specifically, in those proceedings the Commission considered a broad range of arguments concerning the advantages and disadvantages of allowing ILECs and CMRS providers to acquire such spectrum, and concluded that permitting ILECs and CMRS carriers to hold 2.3 GHz and 2.5 GHz spectrum would not threaten intermodal competition.[293] The Commission there recognized that ILECs that also provide CMRS services have multiple possible uses of this spectrum to benefit consumers. As the Commission held in the *Sprint/Nextel Merger Order*, a merger proceeding is no place to revisit determinations made in that context.[294]

Beyond that, Clearwire's unsupported assertions ignore the reality that AT&T and BellSouth are not warehousing spectrum today. Both AT&T and BellSouth have been using wireless broadband spectrum in innovative ways to serve customers. For example, notwithstanding the substantial regulatory uncertainties concerning these spectrum bands,[295]

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[293] *See, e.g., In re Amendment of the Commission's Rules To Establish Part 27, the Wireless Communications Service ("WCS")*, Report and Order, 12 FCC Rcd. 10785 (Feb. 19, 1997) (after a rulemaking in which in 55 parties filed comments and 38 filed reply comments, the Commission concluded that there should be no restrictions on WCS license holding besides foreign ownership); *In re Amendment of Parts 1, 21, 23, 74 and 101 of the Commission's Rules To Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 14165, ¶¶ 172-73 (July 29, 2004) ("*Broadband Access Facilitation Order*") (after a rulemaking in which 61 parties filed comments, 65 filed reply comments, and 116 filed ex parte comments, the Commission concluded that there should be no restrictions on BRS license holders apart from cable companies providing multichannel video services).

[294] *See Sprint/Nextel Merger Order* ¶ 162 ("in the BRS/EBS proceeding, the Commission specifically raised the issue of whether restrictions were necessary for the 2.5 GHz band and determined, after a notice and comment period, that such limits were not in the public interest").

[295] The 2.5 MHz band has been in a state of regulatory flux for years, as its use migrated from in-school instructional uses and wireless cable to broadband service, both commercial and educational. *See Broadband Access Facilitation Order* ¶¶ 9-20. As the Commission has

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AT&T is developing and refining WiMax and other fixed wireless technologies as potential solutions for delivering broadband services to its hard-to-reach, in-region customers.[296] As AT&T's Chairman and CEO recently said, "A telecommunications market where just 'most' have access to broadband and other new technologies isn't good enough in today's world."[297] To that end, AT&T has been using wireless spectrum to bring broadband services to remote rural and other areas to complete the DSL footprint. Thus, AT&T has launched wireless broadband service in Girdwood, Aniak, and Northway, Alaska, and in Frisco, McKinney, Prosper, Centennial, and Little Elm, Texas, and will soon be doing so in Red Oak and Midlothian, Texas, and Pahrump, Nevada. AT&T also has been testing fixed wireless technology in several locations.[298]

BellSouth has also been active, commercially launching wireless broadband systems using its 2.3 GHz and 2.5 GHz spectrum in six primarily rural or disaster-stricken areas: Palatka, Florida; DeLand, Florida; Athens, Georgia; Gulfport, Mississippi; Biloxi, Mississippi; and New

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recognized, the band plan for the 2.5 GHz band is currently in the middle of a multi-year transition to a new band plan that will not end before October 2009 at the earliest. *Sprint/Nextel Merger Order* n.329. *See also Broadband Access Facilitation Order* ¶ 103. As noted, the 2.3 GHz band has been negatively affected by a lack of permanent rules for DARS terrestrial repeaters, which can potentially interfere with WCS and the lack of equipment. *In re Request of AT&T, Inc., BellSouth Corp., Comcast Corp., NextWave Broadband Inc., NTELOS, Inc., Sprint Nextel Corp., Verizon Labs Inc., and WaveTel NC License Corp. for Limited Extension of Deadline for Establishing Compliance with Section 27.14 Substantial Service Requirement*, WT Docket 06-102 (Mar. 22, 2006).

[296] Letter from Joan Marsh, AT&T, to Marlene H. Dortch, FCC, CC Docket No. 06-74 (May 9, 2006).

[297] Speech of Edward Whitacre, Chairman and CEO, AT&T Inc., to the Detroit Economic Club, (May 8, 2006).

[298] *See* Press Release, AT&T Inc., AT&T Initiatives Expand Availability of Advanced Communications Technologies (May 8, 2006), *available at:* http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22272.

Orleans, Louisiana.[299] BellSouth has announced plans to expand its offering of this service to additional rural communities in Mississippi, Kentucky, Tennessee, and Georgia.[300]

Applicants' increasing use of this spectrum should not be surprising, because Clearwire's warehousing argument makes no business sense. The provision of broadband services is intensely competitive. As shown above, there are many different technologies and wireless spectrum options available. Numerous unaffiliated providers will use their own spectrum (or other technologies) to compete fiercely with the merged firm, regardless of whether the merged firm attempts to make productive use of the spectrum or not. Hence, any failure to use the spectrum would simply leave the merged firm that much more susceptible to competitive losses, even as it irrationally wasted a potentially valuable asset.[301] In sum, there is no basis for the wireless divestitures that Clearwire and others seek.

2. The Merger Will Not Reduce Internet Backbone Competition

AT&T has a Tier 1 Internet backbone; BellSouth does not. The proposed merger thus will neither reduce the number of Tier 1 Internet backbone providers ("IBPs") nor alter the relative balance among those providers such that anticompetitive "de-peering" would be possible. For these reasons, the Commission's findings of no anticompetitive effects for Internet backbone and related services in the *SBC/AT&T Merger Order* are fully applicable here as well.

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[299] *See* Press Release, BellSouth Corp., BellSouth Launches Wireless Broadband Service in DeLand, Fla. (Jan. 19 2006), *available at* http://bellsouth.mediaroom.com/index.php?s=press_releases&item=2797&printable (relating to 2.3 GHz spectrum).

[300] *Id*. In addition, BellSouth has commitments to use its EBS licenses to transmit educational content for educational institutions such as Emory University, Atlanta Interfaith Broadcasting, and the Atlanta Public Schools to sites in the Atlanta area. If BellSouth were required to divest the BRS/EBS licenses, these educational programming services could face substantial disruption.

[301] Carlton & Sider Reply Decl. ¶¶ 79-83.

Of the three commenters that even discuss Internet backbone issues, only one, TWTC, attempts any Tier 1 backbone competition argument.[302] TWTC makes three arguments, none of which withstands scrutiny: (1) that AT&T's backbone share may exceed the 37% figure that DOJ regarded as close to a potential tipping point in *WorldCom/Intermedia*; (2) that AT&T "failed" to include business customers in calculating its post-merger share of broadband "eyeballs," and (3) that the impact of conversion of circuit-switched voice traffic to VoIP could be significant.[303] As shown below, even assuming *arguendo* that a 37% share would raise "tipping" concerns (and it would not), the post-merger AT&T does not approach that level by *any* of the metrics of eyeballs, traffic, or revenue, properly measured, and voice conversion from TDM to IP does nothing to change that. As the Commission found less than one year ago, the market for Tier 1 Internet backbone services is "both competitive and dynamic."[304] The combination of AT&T and BellSouth will not change that.

a. AT&T/BellSouth Cannot Engage in Anticompetitive De-Peering

It is important to keep in mind the economic foundation upon which prior Internet backbone merger competition concerns were based – whether the merger creates an Internet backbone that is so much larger than its rivals that a strategy of de-peering is profitable. As explained in greater detail in the Reply Declaration of Dr. Marius Schwartz ("Schwartz Reply Declaration"), a credible threat to de-peer requires that the de-peering backbone be able to create

[302] *Compare* TWTC Pet. at 25-32 *with* Access Point Pet. at 29-34, CFA Pet. at 5-8; Cooper & Roycroft Decl. at 57-62. Access Point's complaint should be dismissed out of hand, as it does not suggest any harm to competition among Tier 1 providers, only that it will have to continue to pay for peering/transit while post-merger BellSouth will not. CFA's Internet discussion describes backbone market structure, but casts its arguments as net neutrality issues, which we address in Section III.E.3 below.

[303] TWTC Pet. at 25-32.

[304] *SBC/AT&T Merger Order* ¶ 124.

a "black hole" in the Internet cloud by denying a rival access to a unique base of customers who can only be reached through the de-peering backbone, and cannot easily switch backbone providers. The theory of global de-peering requires as a necessary, but not sufficient, condition that the de-peering Internet backbone have a share of these unique customers in excess of 50%.[305] By any measure, AT&T and BellSouth fall well short of that threshold.

(i) Broadband Subscriber Data

The closest proxy to an installed base of unique customers is AT&T's and BellSouth's DSL broadband customers ("eyeballs").[306] As measured by this standard, the impact of this merger is insignificant: BellSouth accounts for only about 7% of these eyeballs, and the combined firm would still be under 23%. Over 75% of all eyeballs will remain with other large broadband ISPs, and more than half will remain with the largest cable broadband ISPs.[307] As the FCC found in the *SBC/AT&T Merger Order*, these cable ISPs can easily shift their eyeballs among backbones should any IBP attempt to engage in anticompetitive behavior.[308]

[305] Reply Declaration of Dr. Marius Schwartz, at ¶¶ 6-8 ("Schwartz Reply Declaration"). Note that the 37% figure cited by TWTC from *Intermedia* was for WorldCom's share of traffic in a universe of 15 backbones surveyed by DOJ. *See* TWTC Pet. at 28 (*citing* Competitive Impact Statement, *United States v. WorldCom, Inc.*, Civ. A. No. 1:00CV02789 (D.D.C. Dec. 21, 2000) at 9-10). AT&T's lower post-merger share of traffic is in a limited eight-firm Tier 1 universe, and would, of course, be lower still in a 15-firm universe comparable to what DOJ utilized in *Intermedia*.

[306] Schwartz Reply Decl. ¶ 11.

[307] *Id.* ¶ 12; Public Interest Statement at 103.

[308] *SBC/AT&T Merger Order* ¶ 127. In addition, the relative shares of broadband providers are subject to continuing pressure. Competition between telephone and cable companies for broadband customers is intense, and new and existing companies are also expanding into the provision of broadband services, primarily through wireless technologies. These companies will further decrease the proportion of "eyeballs" served by the telcos and cable companies. *See* FCC, *High-Speed Services for Internet Access: Status as of June 30, 2005* (Apr. 2006) ("*FCC Broadband Report*") at Table 15 (showing that over 88% of U.S. zip codes are served by two or more broadband providers, and that almost 60% are served by four or more providers).

TWTC does not dispute these numbers, but asserts a need for data on the merging parties' share of medium and large business lines that they will "control" after the transaction.[309] This information is not relevant to the economic analysis for two reasons: (a) such customers, especially the larger ones, are likely to be "multi-homed" on multiple backbones, and thus not be unique customers of AT&T or BellSouth, and (b) "control" over such customers is illusory given that dedicated Internet access is highly competitive, and switching costs are low.[310] In any event, the relative extent of Applicants' share of *business* Internet connectivity *is* subsumed in the analysis of the traffic data, as reflected in the Schwartz Reply Declaration.[311] There is no need for further data, as the record evidence clearly supports the finding that there is no competitive issue.[312]

(ii) Traffic and Revenue Data

Since no opponent suggests that AT&T's post-merger share of broadband eyeballs is anywhere near sufficient to warrant further scrutiny, they are left to assert that other metrics – traffic and revenue – should be used.[313] But the merged company's share using these less reliable metrics is still far too low to raise any plausible concern, and opponents can claim otherwise only by vastly overstating Applicants' shares.

Traffic is an imprecise measure of customers uniquely served by an IBP for several reasons. First, high traffic customers (DIA and ISP) often are served by multiple IBPs, and thus are not uniquely accessible through a single IBP. Second, the shift of even a small number of

[309] TWTC Pet. at 31.

[310] *SBC/AT&T Merger Order* ¶¶ 73, 127, 128.

[311] Schwartz Reply Decl. ¶¶ 14-16 and Table 1.

[312] *SBC/AT&T Merger Order* ¶ 137 (combined SBC/AT&T and Verizon/MCI share of eyeballs of under 30% not a competitive concern).

[313] TWTC Pet. at 29, 31-32; Cooper & Roycroft Decl. at 58-59.

large customers to a competing IBP can radically alter traffic shares.[314] As the Commission noted in the *SBC/AT&T Merger Order*, there are no significant barriers to cable companies and other ISPs shifting millions of customers' Internet traffic to other backbones, which can result in a sea change in the IBPs' relative shares of traffic carried.[315]

But even using traffic data as a snapshot of the relative size of a backbone, the combined share here is well below the levels required for any plausible concern about global de-peering. According to RHK Research data, as of the fourth quarter of 2004, legacy AT&T carried approximately 12.6%, and legacy SBC carried approximately 5.8%, of North American Internet traffic.[316] Utilizing additional data from the first part of 2006, the parties have calculated that BellSouth's regional backbone carried less than 2% of North American Internet traffic. Given the extremely small increment to AT&T's traffic represented by the addition of BellSouth's regional traffic, and the unconcentrated nature of this market, there is simply no basis to conclude that the merger would "tip" the market to one in which AT&T/BellSouth could threaten global de-peering. Even limiting the traffic universe to just Tier 1 IBPs, the resulting share for AT&T after the merger of less than 30% (which includes both residential and business "eyeballs") would still be very far below both the relevant tipping point of a 50% share and even below TWTC's 37% figure.[317]

Nor do the revenue data provide any refuge, as this argument[318] relies upon flawed data to reach an erroneous conclusion. While the Commission in the *SBC/AT&T Merger Order* cited

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[314] Schwartz Reply Decl. ¶ 14.

[315] *SBC/AT&T Merger Order* ¶¶ 127, 135, n.405.

[316] Schwartz Reply Decl. ¶ 15 and Table 1.

[317] Schwartz Reply Decl. ¶ 16 and Table 1.

[318] TWTC Pet. at 29, n.45 citing *SBC/AT&T Merger Order* ¶ 135 (describing the 40% as a "moderate share").

revenue numbers from third party sources submitted by the parties, it did so without endorsing revenue as the correct, or even the best, measure of an IBP's market position.[319] As Dr. Schwartz explains in detail, from the information available in this record, it is clear that the third party revenue data, and, in particular, the data on which TWTC and the Cooper & Roycroft Declaration rely, greatly overstate the revenues of the merging parties.[320] When Applicants' actual revenue numbers are used, their post-merger, Tier 1 revenue share is about 29%, which is more consistent with both their share of traffic and eyeballs, and far below the relevant threshold of concern.[321]

Even accurately measured revenues, however, are a poor indicator of relative IBP market shares because of the manner in which Internet access is priced.[322] Large ISPs (those with the greatest number of end users or traffic) often receive substantial discounts in their purchases of Internet backbone services relative to the prices paid by smaller ISPs and individual consumers. Therefore, revenue shares underemphasize the relative size and importance of an IBP with a high proportion of large ISP customers, and overemphasize an IBP with a higher proportion of smaller ISPs and individual consumers, due to the higher per-unit prices paid by these end

[319] *SBC/AT&T Merger Order* ¶ 123, n.363. In fact, the Commission expressly found that "no complete and reliable data sources are available to measure the relative strength of Internet backbone providers." *Id*. at ¶ 122.

[320] Schwartz Reply Decl. ¶¶ 19-22. There are likely a number of reasons for these inaccuracies in the revenue data presented. First, AT&T and BellSouth do not publish this revenue information, nor is it otherwise made publicly available. In addition, because AT&T and BellSouth both commonly sell Internet backbone services in connection with other bundled non-Internet backbone services, it would be virtually impossible for any third party to independently calculate these revenues.

[321] *Id.* at ¶ 23 and Table 2.

[322] *Id.* ¶¶ 17-18.

users.[323] Absent the ability to control for the variations in the characteristics of the customers served by each Tier 1 Internet backbone provider, the IDC revenue information relied upon by merger opponents is not a reliable indicator of the competitive strength of those companies.

In the *SBC/AT&T Merger Order*, the Commission concluded its analysis of global de-peering by stating:

> [W]e agree with the Applicants that the proposed merger is unlikely to create a single dominant Tier 1 Internet backbone provider with a market share that is overwhelmingly disproportionate to its rivals, which was the key concern in prior backbone mergers. . . . . Peering and de-peering decisions are driven by a backbone's incentives to maximize network efficiency and lower interconnection costs, and we do not see how the proposed merger would materially alter this calculus.[324]

For all of the foregoing reasons, the Commission's prior conclusions apply with equal force here.

b. A Combined AT&T/BellSouth Lacks Sufficient Installed Base To Engage in Targeted De-Peering

Opponents also argue that they (or their Tier 1 backbone providers) will be selectively de-peered by the merged firm, because AT&T/BellSouth will gain a sufficient increase in market share from this merger to alter the competitive analysis just completed by the Commission in *SBC/AT&T*.[325] These arguments are not credible on either the economic theory of competitive harm, or on the facts before the Commission.

As the Commission found, "peering and de-peering decisions are driven by a backbone's incentives to maximize network efficiency and lower interconnection costs," not by the relative

[323] *Id.* In the IDC revenue data, for example, Level 3 is listed as having only $283 million in upstream transit and DIA revenue, a mere 25% of the revenues listed by IDC for legacy AT&T, yet at the same time its share of Internet traffic exceeded legacy AT&T's share. *Id.* ¶ 19 and Tables 1 and 2.

[324] *SBC/AT&T Merger Order* ¶¶ 124, 129.

[325] *E.g.* TWTC Pet. at 29-30.

amount of traffic carried by the networks.[326] In fact, AT&T historically peered with IBPs that were one tenth its size (as measured by their estimated total Internet traffic).[327] Here, as in the SBC/AT&T merger, the parties' combined market share will remain moderate, and there will remain a sufficient number of large rival Tier 1 IBPs, so there is no basis for concern that this merger will result in any change in the existing competitive dynamic.

Further, as the Commission noted, the ability of customers to change IBPs provides a powerful check against any potential strategy of targeted degradation and de-peering, since the combined company would suffer a loss of competitiveness against all of the other IBPs that continue to peer with both it and the targeted carrier.[328] Moreover, the targeted carrier would likely become a customer of one of the other Tier 1 IBPs, thereby strengthening that carrier relative to AT&T/BellSouth.[329] For these reasons, the merger will not create any incentive for AT&T after the merger to engage in targeted degradation or de-peering.

c. Conversion of Voice Traffic Does Not Alter The Analysis

TWTC suggests that conversion of voice traffic to VoIP could somehow alter the Commission's prior analysis that the backbone market is "both competitive and dynamic."[330] The facts do not support any such concern for several reasons: (1) voice traffic as IP is not bandwidth intensive, so converting circuit-switched voice to IP does not materially increase total

[326] *SBC/AT&T Merger Order* ¶ 129.

[327] *See* Schwartz Reply Decl. ¶ 29.

[328] *SBC/AT&T Merger Order* ¶¶ 129, 136 n.408. If an IBP were to engage in a strategy of targeted de-peering, and thereby degrade the performance of its own network relative to that of other non-targeted IBPs, there is no evidence that its subscribers would remain loyal, rather than defect to one of the many alternatives that would continue to offer full connectivity. *Id.* ¶ 129. The market for Internet access services is intensely competitive, and there are an increasing number of competing broadband alternatives. *See* Public Interest Statement at 108-09; Schwartz Reply Decl. ¶¶ 53-57.

[329] *See SBC/AT&T Merger Order* ¶¶ 127, 129.

[330] *Id.* ¶ 124. *See* TWTC Pet. at 31.

backbone traffic; (2) the selection of the backbone to be utilized for VoIP traffic is made by the broadband provider, and as the parties have shown, post-merger they will be the broadband provider to less than 23% of broadband customers, leaving more than 75% of all potential voice conversion traffic as potential traffic on other backbones, and (3) for the foreseeable future, VoIP traffic will be terminated via the PSTN, which will therefore remain a competitive bypass alternative, and a constraint on backbone providers' competitive behavior. Nothing about the conversion of voice to IP implicates the *relative* share of Tier 1 Internet Backbone traffic that the post-merger AT&T will carry.

3. The Commission Should Not Impose Any So-Called "Net Neutrality" Conditions on this Merger

The Commission should rebuff the demands of merger opponents to impose so-called "net neutrality" conditions on the merger. Opponents offer nothing more than conclusory assertions – without any economic or other analytical explanation – as to how this transaction could lead to anticompetitive Internet behavior.[331] Their demands are thus unrelated to merger-specific effects and have no place in a merger proceeding.[332] Moreover, there is nothing

[331] *See* Comments of Access Integrated Networks; Access Point Pet.; TWTC Pet.; TWTC Pet., Declaration of Graham Taylor ("Taylor Decl."); MSVS Comments; Comments of Georgia Public Service Commission; New Jersey Ratepayer Advocate Comments; Baldwin & Bosley Decl.; CDD Pet.; Petition to Deny of Consumer Federation of America, *et al*.; Cooper & Roycroft Decl.; Petition to Deny of the Concerned Mayors Alliance (June 5, 2006) ("CMA Pet.").

[332] *See SBC/AT&T Merger Order* ¶ 55; *see also AT&T/Comcast Merger Order* ¶ 31 (2002); *In re Applications of S. New England Telecomms. Corp. & SBC Commc'ns Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21292, 21306, ¶ 29 (1998). It is obvious to even the most casual observer that "net neutrality" issues are part of an on-going policy debate, quite apart from this proceeding. For example, these issues have been the subject of numerous congressional hearings, in which a wide array of industry representatives and other parties have participated, and they are the subject of pending legislation. They are a perfect illustration of why the Commission has held that industry-wide issues should be addressed in industry-wide proceedings, both to ensure the broadest participation and to ensure that any change from the status quo is evenly applied. *See SBC/AT&T Merger Order* ¶ 55; *In re Applications of S. New England Telecomms. Corp. & SBC Commc'ns Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21292, 21306, ¶ 29 (1998).

"neutral" about imposing conditions only on AT&T[333] and not on the cable companies and other broadband providers. Impairing AT&T's ability to compete in this way would conflict with the Commission's *Wireline Broadband Order,* which leveled the regulatory playing field between DSL and cable modem services for the competitive benefit of consumers.[334]

So-called "net neutrality" rules also would be bad public policy. A quote offered by one of merger opponents is telling: "There is no consensus on precisely what 'Network Neutrality' means – and thus no consensus on what rules are required to achieve it."[335] Merger opponents nevertheless would have the Commission abandon its long-standing "hands off" policy and regulate the Internet based on principles that they cannot articulate. As explained in the Schwartz Reply Declaration, rather than moving down the path of regulating the Internet in this proceeding, the Commission should leave the further evolution of Internet business models in the first instance to the competitive marketplace.[336]

a. The Merger Will Have No Effect Upon the Merged Companies' Incentives or Abilities to Engage in Anticompetitive Behavior

There is no merger-specific effect that could justify imposing so-called "neutral" regulatory requirements upon the merged company. Merger opponents' attempts to find a merger-specific connection amount to only conclusory assertions that are easily dispensed with:

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[333] AT&T also notes that, in connection with the SBC/AT&T merger, it has accepted, for a period of two years, to "conduct business in a manner that comports with the principles set forth in the FCC's Policy Statement, issued September 23, 2005 (FCC 05-151)." *SBC/AT&T Merger Order,* Appendix F.

[334] *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (Sept. 23, 2005) ("*Wireline Broadband Access Framework Report*"), *appeal pending sub nom. Time Warner Telecom v. FCC,* Civ. A. No. 05-4769 (D.C. Cir.).

[335] *See* Baldwin & Bosley Decl. ¶ 220 (*quoting* George S. Ford *et al*., Phoenix Center for Advanced Legal & Economic Public Policy Studies, *Net Neutrality and Industry Structure* at 2, (Apr. 2006) ("*Phoenix Center Paper*")).

[336] Schwartz Reply Decl. ¶¶ 30-32, 61.

- Alleged harms from vertical integration of broadband access and Internet content/ applications lack factual support.[337] AT&T is not a major creator or supplier of video or broadband content, and merging with BellSouth will not change that fact (in contrast to the combination of AOL's portal and Time Warner's video content and cable distribution system).[338]

- The assertion based on Cisco marketing materials that equipment is available to manage and prioritize Internet traffic[339] has nothing to do with this transaction. Such equipment was available before (since 1999 according to the cited papers), and this merger will not make it any more so.

- Vague assertions about the "growing size" of AT&T's broadband customer base[340] add nothing to the analysis, since no one disputes the Applicants' showing that together their share of residential broadband customers will be less than 23%.[341] Any concern about leverage over content providers is foreclosed by the Commission's prior finding in *Comcast/AT&T Broadband* that controlling 29% of MVPD subscribers would not "impair the quality or quantity of programming available to consumers."[342]

Put simply, no opponent has put forth a credible argument that this merger will change Applicants' ability or incentives to block anyone's access to the Internet, or to degrade the quality of their Internet service.[343] Nor could opponents, because this merger will not create or

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[337] *See generally* CDD Pet.; Cooper & Roycroft Decl. at 46-57.

[338] *See also* Schwartz Reply Decl. ¶ 34.

[339] *See* Cooper & Roycroft Decl. at 49-50.

[340] *Id*. at 46.

[341] *See* Public Interest Statement at 103. Even this share, however, overstates the combined company's relative competitive significance, for example because Internet content and applications tend to be "global" in scope (or, at a minimum, global as to English-speaking countries).

[342] *See Comcast/AT&T Merger Order* ¶ 30. Since that time, the FCC's determination has been borne out. None of the comments opposing the acquisition of Adelphia by Comcast and Time Warner has suggested that Comcast's acquisition of AT&T Broadband resulted in Comcast being able to unduly depress video content charges, or adversely affect competition in the development and distribution of video content. *See In re Applications of Adelphia Communications & Time Warner, Inc. & Comcast Corp.*, 20 FCC Rcd 20073 (MB Dec. 20, 2005). Moreover, as compared to the competition to cable offered at the time by satellite providers, cable today represents a considerably stronger competitive presence in broadband. *See, e.g., FCC Broadband Report* at Table 7 and Chart 11.

[343] Merger opponents repeat AT&T Chairman and CEO Edward Whitacre's November 2005 statement about AT&T's desire to seek a return on the capital invested in building its network for the proposition that AT&T will somehow discriminate against Internet content. *See, e.g.*, Cooper

Footnote continued on next page

enhance "market power" in either the Internet backbone or Internet access segments. Indeed, as there is absolutely no merger-specific basis for the consideration of "net neutrality" issues in this proceeding, longstanding FCC precedent dictates that determination should end the inquiry on this issue.[344]

b. Net Neutrality Regulation on an Industry-Wide Basis Is Also Undesirable

Beyond the very sound principle that merger review should be limited to issues specific to that merger, there are compelling policy reasons not to consider net neutrality regulatory conditions here. Even if considered on an industry-wide basis, caution is particularly applicable here where the risks of mis-regulation of a previously unregulated and highly successful Internet are high.

Net neutrality proponents describe an Internet world in which everything that has worked well to date can be attributed to the "neutrality" of the Internet, and therefore any shift in neutrality must be a bad thing.[345] But they fail to note that the Internet has succeeded because

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& Roycroft Decl. at 5. Aside from the obvious point that Mr. Whitacre's statement makes no claim whatsoever about any intent to discriminate, merger critics conveniently ignore AT&T's unequivocal position on this issue: "Let me be clear: AT&T will not block anyone's access to the public Internet, nor will we degrade anyone's quality of service. Period. End of Story." Edward Whitacre, Chairman and CEO, AT&T, Remarks at the Inaugural Conference of TelecomNext (Mar. 21, 2006), *available at* http://www.ustelecom.org/TelecomNEXT/speeches/whitacre.pdf.

[344] As the Commission repeatedly has recognized, "[a]n application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry." *In re General Motors Corp. and Hughes Electronics Corp. and News Corp. Ltd. For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473, 534, ¶ 131 (Jan. 14, 2004) ("*GM/Hughes Order*"). On the contrary, "merger review is limited to consideration of merger-specific effects." *Comcast/AT&T Merger Order* ¶ 11.

[345] *See* Cooper & Roycroft Decl. at 47.

the government properly has concluded not to regulate, but to let the market work.[346] Nor do they acknowledge the obvious fact that today's Internet is vastly different than it was just a few years ago, and it continues to evolve at a rapid pace. New applications are placing greater demands on the network. For example streaming video and gaming are both bandwidth-intensive and require high quality of service, while VoIP is sensitive to packet loss and latency.[347] In addition, there is an ongoing explosion in Internet traffic – for example, Internet traffic through just one exchange is predicted to double from March 2006 to December 2006, and double again by October 2007.[348]

The impact of these developments is obvious: more investments to expand capacity are required. But, as an MIT Working Group explained, the incentives to make such investments are easily undermined:

> bandwidth intensive behaviors . . . impose additional costs on network operators. The broadband value chain is headed for a train wreck. Any business that expects to reach its customers or employees through ever-better mass-market broadband Internet access, whether wired or wireless, is in for a rude awakening. Unless the broadband incentive problem is recognized and dealt with now....[349]

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[346] *See* 47 U.S.C. § 230(b)(2) (2000) (declaring as the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

[347] *See* Taylor Decl. ¶ 28.

[348] *See* DAIWA Institute of Research, Ltd; EuroTelco Snapshot (Apr. 4, 2006), http://www.ams-ix.net/news/archive/Snapshot_bandwidth_data.pdf. The same report shows half-year growth rates for traffic between North America and Asia of 69.4%, and between North America and Europe of 32.6%. *Id.* at 2. *See also* Christopher T. Heun, "The Tale of the Tube," InternetWeek (Mar. 17, 2006), *available at* http://www.internetweek.cmp.com/183700712 (noting BellSouth's estimates that the average user downloads about 2 gigabits of data every month, but if a subscriber were to watch five standard definition movies per month, 9 gigabits of data would be involved, while all television viewing in standard definition and high definition would require 224 gigabits and 1,120 gigabits of data per month, respectively). *See* Schwartz Reply Decl. ¶ 42, n.29.

[349] *See* Broadband Working Group of the MIT Communications Futures Program, *The Broadband Incentive Problem*, Cambridge University Communications Research Network (Sept. 2005), *available at* http://cfp.mit.edu/groups/broadband/docs/2005/Incentive_Whitepaper_09-28-05.pdf. Note that the Working Group includes not only academics but also representatives of British Telecom, Cisco, Comcast, DT/T-Mobile, FT, Intel, Motorola, Nokia and Nortel.

Business models, including price and service options, need to evolve as the Internet evolves in order to ensure that network operators maintain incentives to invest in additional capacity.[350]

Regulatory conditions restricting Internet service or pricing options would reduce incentives to continue to invest in network capacity and performance. In fact, as Dr. Schwartz explains, the prospective application of so-called "net neutrality" regulation would likely have the *anti-consumer* effect of preempting new service and pricing options.[351] Imposing restrictions on evolving business models is hardly likely to lead to more investment and new entry in broadband.[352] Moreover, restricting broadband providers' ability to differentiate their service offerings from one another will likewise retard investment and entry.[353]

Opponents seek to prejudice the debate by incorrectly characterizing the prospects of upstream charges as "paying twice" for the same service – delivery of content.[354] While

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[350] *See id*. at 11 ("[A] critical problem exists which, unless solved, will ultimately stunt the growth of the industries that constitute the broadband value chain…. Good solutions to this problem need to align the incentives of network operators and upstream stakeholders…. Solutions that achieve this alignment will produce the revenues necessary to support ongoing operator investments in more capable networks, enabling innovation and growth to continue in all parts of the broadband value chain.").

[351] *See* Schwartz Reply Decl. ¶¶ 44-50, 61.

[352] *See* Letter from Albert Cinelli, President, QComm Corp., *In the Matter of Consumer Protection In the Broadband Era*, WC Docket No. 05-271 (Mar. 16, 2006) (stating that "[t]o the extent Net Neutrality becomes law … [QComm] will have no choice but to immediately stop the build out of our rural FTTP networks."). The potential for well-meaning regulation to have unintended consequences is well illustrated by the disparate former treatment of DSL and cable modem Internet services. While the government mandated that telephone companies' DSL services were subject to extensive access rules, cable modems remained unregulated. "Unregulated cable modems sprinted to a commanding lead among broadband subscribers, dominating regulated DSL networks nearly two-to-one, 1999 through year-end 2002. When DSL network access obligations were reduced in early 2003, however, the trend quickly switched. By 2004, new DSL subscribers pulled even with new cable modem customers. By 2005, DSL subscriber additions surged ahead. . . . The empirical evidence demonstrates that regulating open access failed to improve broadband networks." Thomas Hazlett, *Neutering the Net*, Fin. Times, Mar. 20, 2006.

[353] *See Phoenix Center Paper*; *see also* Schwartz Reply Decl. ¶¶ 58-60.

[354] *See* Baldwin & Bosley Decl. ¶ 227.

consumers and content/application providers may pay for their connectivity to the Internet, the debate is about whether it is efficient for one side of the market to pay only close to the incremental costs of service in light of the need to cover the large fixed costs of enhanced consumer broadband networks, and the high incremental costs of extending such networks to individual consumers.[355] Net neutrality proponents seek to push those costs solely onto consumers.[356] Yet it is basic economics that raising access prices will slow the adoption of broadband by consumers, and thus reduce the potential network audience available to the Internet content and access providers.[357]

At bottom, the net neutrality regulatory camp rests its claims on an asserted lack of broadband competition. But the claim that AT&T will have over half the nation's wireline telephone lines is wholly irrelevant in a world where cable modem service continues to be the predominant form of consumer broadband.[358] Similarly, the assertion that monopoly-style price regulation is necessary because a "cozy duopoly" of telco and cable[359] is only "one step away from monopoly," defies logic.[360] Broadband access is characterized by rapid growth, lower prices, sharp changes in relative market shares, and the emergence of new technologies, all characteristics of vigorous competition, not monopoly.[361] AT&T's and BellSouth's gains in DSL against cable broadband providers reflect just how vigorous this competition has been and

[355] Schwartz Reply Decl. ¶¶ 48-49.

[356] *See* Baldwin & Bosley Decl. ¶ 227.

[357] Schwartz Reply Decl. ¶ 50.

[358] *See* Baldwin & Bosley Decl. ¶ 217; *see also FCC Broadband Report* at 3 (noting that cable modem service represents approximately 61% of the 42.9 million high-speed lines in service).

[359] *See* Cooper & Roycroft Decl. at 7.

[360] *See* Baldwin & Bosley Decl. ¶ 146.

[361] *See* Schwartz Reply Decl. ¶¶ 53-57.

continues to be,[362] and the Commission should not now place its regulatory thumb on the scales to influence this robustly competitive marketplace. "The broadband marketplace before us today is an emerging and rapidly changing marketplace that is markedly different from the narrowband marketplace that the Commission considered in adopting the *Computer Inquiry* rules."[363]

As the history of the Internet conclusively demonstrates, competition and innovation are best served by letting the marketplace decide what products, services, and prices will be offered, rather than constraining market forces by government regulation. Any departure from this principle could profoundly affect the future of the Internet. It should be considered only in proceedings of industry-wide applicability, and then only if there is clear evidence that there is a real competitive problem that the marketplace is unable to resolve. That is decidedly not the case here.

IV. THE COMBINATION OF APPLICANTS' LEC OPERATIONS WILL HAVE NO ADVERSE EFFECT ON THE PUBLIC INTEREST

Some merger opponents contend that the "most serious" public interest issues involve the merger's combination of Applicants' separate and non-overlapping incumbent LEC operations.[364] In particular, they assert that this combination will facilitate discrimination and deprive regulators of a valuable benchmark. These claims ignore the very predicates of the Commission decisions upon which they rely. Those decisions dealt with facts that the Commission expressly found would persist for only a few years[365] in markets "undergoing a

[362] *See FCC Broadband Report* at Table 9.

[363] *Wireline Broadband Report* ¶ 47.

[364] *See* Access Point Pet. at 20-24; Cbeyond Comments at 78-96; Baldwin & Bosley Decl. ¶¶ 199-212; Sprint Nextel Comments at 6-9; TWTC Pet. at 32-71.

[365] *SBC/Ameritech Merger Order* ¶ 161; *Bell Atlantic/GTE Merger Order* ¶ 154.

transition to competitive market conditions."[366] Conditions that the Commission imposed were to remain in effect for only *three years*,[367] and they expired years ago.

In all events, the 1990s-vintage concerns that underlay the conditions no longer apply. The requirements of Sections 251 and 271 were fully implemented years ago, and intramodal and intermodal competition has flourished in the ensuing years. Moreover, AT&T, Verizon and Qwest are now major purchasers of ILEC services outside their regions and, thus, have powerful incentives to resist practices that would interfere with their own ability to purchase access.

A. Applicants' Increased Local Footprint Does Not Threaten Discrimination

The market conditions underlying the Commission's concern in the 1990s that RBOC mergers could increase the merged company's incentive to discriminate vanished long ago.[368] The concerns rested on findings that incumbent LECs have "monopoly control over key inputs that rivals need in order to offer retail services,"[369] particularly "bottleneck" loop facilities.[370] The Commission also found that existing regulatory obligations were insufficient to prevent such discrimination because regulatory authorities had not finished implementing the market opening obligations of the 1996 Act.[371] Neither concern exists today.

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[366] *SBC/Ameritech Merger Order* ¶ 63.

[367] *Id*., App. C ¶ 74; *Bell Atlantic/GTE Merger Order*, App. D ¶ 64.

[368] As Applicants note elsewhere, even on the facts under which it was developed, this theory rested on untested and unexplored assumptions, and the Commission's findings in the earlier orders were refuted in subsequent empirical studies. Public Interest Statement at 115-16.

[369] *SBC/Ameritech Merger Order* ¶ 188; *see also id.* ¶ 190 ("Incumbent LECs' ability to discriminate against retail rivals stems from their monopoly control over key inputs that rivals need in order to offer retail services."); *id.* ¶ 202 ("competitors often are totally dependent on incumbent LECs for last mile wireline access to end users").

[370] *See id.* ¶ 197 (DSL providers are "dependent" upon ILEC loops and collocation to access those loops); *id.* ¶ 203 (ILECs have a "near monopoly in access to local customers").

[371] *See id.* ¶¶ 197, 242.

RBOCs no longer have monopoly control over the critical inputs that competing carriers need. The 1996 Act has now been "fully implemented,"[372] and Applicants' local markets are "irreversibly open" to competition. Regulators and the industry have a decade of experience with the new regulatory scheme – including the near universal adoption by state commissions of detailed "performance metrics" to ensure nondiscriminatory provisioning. Applicants also now face competition not only from carriers leasing UNEs, but also from facilities-based carriers that own their own "last-mile" facilities and "over the top" VoIP providers that do not need to collocate in ILEC end offices or need access to ILEC operations support systems.[373] This vibrant competition, the Commission has found, is "the one sure remedy for the ILEC's threat of discrimination."[374]

Merger opponents simply ignore these developments. For example, Cbeyond and Access Point assert at length that ILECs face no more UNE-based competition in 2006 than they did in 1999.[375] This claim would be irrelevant even if it were true. The emergence of intermodal competition from cable, wireless, VoIP and other sources has put unprecedented pressure on prices, spawned a wide variety of new services, features and options, and achieved far greater scope and intensity than the "arbitrage" competition that existed in 1999.

TWTC acknowledges that mass market customers benefit from intermodal competition,[376] but insists that ILECs still have monopoly power over special access and other

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[372] *In re Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415 (Dec. 2, 2005) ¶¶ 52-53 ("*Qwest Omaha Forbearance Order*").

[373] *See SBC/Ameritech Merger Order* ¶ 239.

[374] *Id.* ¶ 230.

[375] Cbeyond Comments at 16-23; Access Point Pet. at 24-28.

[376] TWTC Pet. at 34-35.

local inputs required to provide service to business customers and that the merger will increase incentives to abuse that power to discriminate against rivals.[377] This contention should be rejected.

First, in the prior ILEC mergers, the Commission was most "acute[ly]" concerned about their effect on "competitive providers of local exchange services to mass market customers,"[378] but had no issue with special access services, presumably because there had long been both competition and Commission oversight of such services. TWTC now explicitly challenges the predicates of the Commission's existing regulation of special access services[379] and is rehashing the arguments it and other CLECs are currently advancing in the Commission's ongoing review of special access pricing and provisioning.[380] Under the Commission's precedents, these claims must be raised in those ongoing proceedings, not in this merger.[381]

Second, in any event, there is no basis for TWTC's assertions that ILECs control bottleneck access facilities and have unconstrained market power – predicates for even theoretical concern about the size of any ILEC's footprint. To the contrary, the provision of high-capacity local facilities is intensely competitive, and regulations already address any residual power that ILECs are alleged to have over certain DS-level facilities.

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[377] *Id*. at 34; *see also* Access Point Pet. at 41-47. Indeed, Access Point even goes so far as to claim that cable, VoIP, wireless providers, systems integrators and equipment vendors do not offer meaningful levels of service to enterprise customers.

[378] *SBC/Ameritech Merger Order* ¶ 188.

[379] TWTC Pet. at 34-35.

[380] *See id*. at 33-42.

[381] *See, e.g., SBC/AT&T Merger Order* ¶ 55 ("[t]o the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors . . . such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing").

Both the Commission's precedents and market evidence confirm these points. In the *SBC/AT&T Merger Order*, the Commission held that incumbent LECs face "robust" competition for enterprise services,[382] that "foreign-based companies, competitive LECs, cable companies, systems integrators, equipment vendors and value-added resellers" were all competing for enterprise customers, and that cable and VoIP providers, in particular, were dramatically expanding.[383] The Commission also has found that CLECs pervasively deploy competitive fiber loops at OCn-level capacity.[384] These facilities can be used to offer not just OCn-level services to high-demand customer locations, but also, through channelization, DSn-level services.[385] As described above, carriers are also increasingly using fixed wireless to provide dedicated transmission services to buildings that cannot be served economically by local fiber.[386] And, as detailed above and in the declaration of Drs. Carlton and Sider,[387] CLECs have blanketed BellSouth's major metro markets with thousands of miles of local fiber, connected thousands of individual buildings to these local fiber networks, and established fiber-based collocation in

[382] *SBC/AT&T Merger Order* ¶¶ 57, 73 n.223. *See also Verizon/MCI Merger Order* ¶ 74.

[383] *SBC/AT&T Merger Order* ¶ 73. This competition is intensifying. Many CLECs have announced major expansions. *See* Public Interest Statement at 59. Although merger opponents continue to insist (without citation) that cable companies are not leveraging their state-of-the-art networks to provide dedicated broadband transmission services to businesses, *cf.* Access Point Pet. at 41-42, the facts are clearly to the contrary, *SBC/AT&T Merger Order* ¶ 64; *see also, e.g.*, Carlton & Sider Decl. ¶ 27; Public Interest Statement at 81. Analysts estimate that cable companies have sold about $2 billion in services to business customers. Public Interest Statement at 81 (citing authorities). *See* Section III.B.1, above.

[384] *TR Remand Order* ¶ 183.

[385] *Id.* ¶ 154.

[386] Merger opponents predictably point to the Commission's characterization of fixed wireless several years ago as a "nascent technology." Access Point Pet. at 44. But, as the vibrant and expanding fixed wireless operations of XO and others establish, initial difficulties in deploying this technology have been overcome and fixed wireless is now quite commonly used by traditional fiber-based CLECs to reach low and medium demand buildings.

[387] Carlton & Sider Decl. ¶¶ 103-12.

scores of BellSouth wire centers that can used to reach other commercial buildings in BellSouth's region.

Even if ILECs retained some residual market power over certain DSn-level facilities, the "full implementation" of Sections 251 and 271 means that CLECs can obtain loop and transport UNEs at TELRIC-based rates in areas where the Commission has found that self-deployment of such facilities by the CLECs is uneconomic.[388] Further, the Section 251 and 271 proceedings have subjected access to these UNEs to comprehensive "performance standards" and self-executing remedy plans.[389] As explained in the accompanying Reply Declaration of William L. Dysart, Ronald A. Watkins and Brett Kissel and the Reply Declaration of Ronald Pate and Kevin Graulich, these plans establish standards for BellSouth's and AT&T's performance in the pre-ordering, ordering, provisioning, billing, and maintenance and repair of network elements and interconnection, measure their performance in meeting such standards, and contain automatic remedies for failures to meet these standards.[390]

[388] Remarkably, TWTC contends that there has not been "full implementation" of the 1996 Act because the Commission "decided not to apply the requirements of Section 251 and the Section 271 checklist to [] packetized local transmission services." TWTC Pet. at 37-38. The Commission based these decisions on specific findings that there are no significant barriers to deploying such "layer 4" equipment and services – as the very decisions cited by TWTC make clear. *See id.* n.60 (citing decisions).

[389] TWTC and Access Point generically contend that the state performance plans are "obsolete" and impose "[in]adequate" remedies. TWTC Pet. at 40; Access Point Pet. at 27-28. The accompanying declarations demonstrate that there is no support for these *ipse dixit* assertions and that, in fact, the state plans impose substantial remedies and can be – and have been – modified to account for relevant changes in the industry. *See* Dysart, Watkins & Kissel Decl. ¶¶ 16-17, 52-53; Pate & Graulich Decl. ¶¶ 8-22. Indeed, many CLECs *supported* BellSouth's recently revised regional "transaction-based" performance plans.

[390] Dysart, Watkins & Kissel Decl. ¶¶ 13-17, 51; Pate & Graulich Decl. ¶ 8-22.

Further, Applicants have steadily improved the quality of their UNE provisioning.[391] Today, Applicants routinely satisfy or exceed between 85% and 90% (or more) of the demanding performance standards that have been adopted to monitor network element provisioning. These levels are above even the high levels of performance that supported BellSouth's and AT&T's Section 271 filings. Even if opponents were correct that the merger might marginally change Applicants' incentives, any attempt to reverse this trend would be easily detected and would subject Applicants to significant, self-executing remedies, including the payment of liquidated damages.

Of course, CLECs also have the choice of obtaining last-mile access to customers by purchasing special access services. The provisioning of these services is accomplished through processes that are now quite mature.[392] Applicants have designed high-quality automated special access provisioning systems that treat all requests – whether from an affiliate or a non-affiliate – the same. Applicants also have instituted rigorous training for their personnel to ensure strict adherence to existing safeguards and procedures. And Applicants' tariffs contain express performance guarantees (supported by substantial penalties for non-performance) for DSn-level services.[393] These steps ensure that the merged company will continue to provide special access service in a non-discriminatory manner.

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[391] Dysart, Watkins & Kissel Decl. ¶ 57-63 & Attachment 8; Pate & Graulich Decl. ¶¶ 4, 32-35.

[392] Dysart, Watkins & Kissel Decl. ¶ 74; Pate & Graulich Decl. ¶¶ 23-27.

[393] For example, AT&T's "MVP" tariff provides service guarantees for DS1- and DS0-level services with substantial penalties for poor performance. Similarly, BellSouth's contract tariffs offer customers performance guarantees for the installation and reliability of BellSouth DS-1 and DS-3 services. In addition, AT&T and BellSouth each provide for credits in their special access tariffs for service interruptions.

Notably, the many Commission performance audits that have been conducted since the prior BOC mergers were approved show that Applicants' special access performance has been exemplary.[394] The most recent audit reports for AT&T and BellSouth confirm that each carrier provisions special access on a nondiscriminatory basis.[395] Not a single party filed comments on the 2003-2005 audits, and no regulatory commission, state or federal, has taken any adverse action or even made any follow-up inquiries or data requests) in response to the 2003-2005 audit reports.

Third, several merger opponents' claims rest on factual assertions that are incorrect. Foremost, the centerpiece of TWTC's claim that the merger would increase incentives for discrimination is its allegation that BellSouth is providing TWTC with wholesale access to the "Ethernet loops" that TWTC needs to provide retail Ethernet services, but that AT&T has refused to do so (purportedly because of the incentives that were created by the existing large footprint that AT&T has). Every aspect of this claim – which is a transparent attempt to use this merger proceeding to gain leverage in the ongoing commercial negotiations between AT&T and TWTC to structure a complex contract tariff for the purchase by TWTC of a wide range of services from AT&T – is wrong.

Contrary to its assertions, TWTC does not need to "obtain access to Ethernet transmission facilities from [AT&T or BellSouth]" to compete successfully in the marketplace.[396] Ethernet services are provided over ordinary dedicated transmission facilities

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[394] Dysart, Watkins & Kissel Decl. ¶¶ 41, 67-73; Pate & Graulich Decl. ¶¶ 32-35.

[395] *See* Section 272 Biennial Report for AT&T Inc. EB Docket No. 03-199, at 42-43 (Dec. 15, 2005), *available at:* http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518190405; Section 272 Biennial Report for BellSouth Telecomm., Inc., EB Docket No. 03-197, at 81 (Oct. 31, 2005), *available at:* http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518175905.

[396] Taylor Decl. ¶ 26.

(which are connected to Ethernet electronics), and TWTC today offers a suite of retail and wholesale Ethernet services without the finished AT&T wholesale Ethernet service TWTC claims is an essential input.[397]

Contrary to TWTC's claims, it competes quite successfully by providing its own Ethernet electronics (rather than by outsourcing that function to AT&T or one of the many other suppliers of "finished" wholesale Ethernet services). In a recent press release, TWTC touted its 31% increase in data and Internet services revenues, "due to success with Ethernet and IP-based product sales."[398] The day after TWTC filed comments in this proceeding claiming that it "cannot possibly compete by relying on Ethernet under the prices terms and conditions offered by AT&T,"[399] TWTC issued a press release announcing its arrangement to deploy next-generation Ethernet customer premises equipment, which "enables [TWTC] to cost-effectively deliver our industry-leading Ethernet portfolio to customers anywhere" using ordinary TDM loops.[400] Indeed, TWTC describes itself as the "*industry lead[er]*" with "a comprehensive portfolio of Ethernet services."[401]

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[397] *See* Declaration of Parley C. Casto ("Casto Decl.") ¶ 19. *See* Taylor Decl. ¶ 43 (in addition to using its own loop facilities, "TWTC has relied [] on . . . DS1 and DS3 AT&T ILEC loops with TWTC-provided Ethernet equipment to compete in the provision of Ethernet in the AT&T ILEC territory")

[398] Press Release, Time Warner Telecom, Time Warner Telecom Reports Solid First Quarter 2006 Results, at 1 (May 6, 2006), *available at* http://www.twtelecom.com/Documents/Announcements/News/2006/TWTC_Q1_2006_Earnings_Release.pdf.

[399] TWTC Pet. at 47.

[400] Press Release, Time Warner Telecom, Time Warner Telecom and Overture Networks Provide Ethernet Anywhere (June 6, 2006) available at http://www.twtelecom.com/Documents/Announcements/News/2006/Overture.pdf.

[401] *Id.* at 2. TWTC recently signed a contract tariff with AT&T that provides TWTC with steep discounts for TDM special access facilities when TWTC chooses to purchase those services from AT&T. In TWTC's words, this arrangement with AT&T further "strengthens Time Warner Telecom's ability to compete effectively for the nationwide business market." Press Release, Time Warner Telecom, AT&T, SBC, Time Warner Telecom, AT&T, SBC Extend Long-Term

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TWTC nonetheless complains that the self-provisioning approach that made it the "industry leader" is "not a viable long term strategy," because it causes TWTC to "incur extra costs," and that TWTC can succeed in the future only by reselling AT&T's Ethernet services.[402] In fact, these "extra costs" exist whether TWTC self-provides Ethernet connectivity or obtains it from a wholesale supplier; they are the costs of the "layer 2" Ethernet electronics – TWTC must either provide that equipment itself or its wholesale Ethernet provider must do so, in which case the costs of the equipment will be reflected in the wholesale Ethernet service price.[403]

This evidence that Ethernet providers can efficiently offer service via self-provisioning is a sufficient basis for rejecting TWTC's claims. But TWTC does not mention, let alone dispute, the existence of alternative Ethernet access service providers, including the many carriers offering this access on a wholesale basis, such as Level 3, XO, Global Capacity Group and USCarrier Telecom.[404]

TWTC's suggestion that AT&T has refused to provide reasonable wholesale access to "Ethernet loops"[405] is not correct. Like BellSouth, AT&T has a generally available wholesale Ethernet access tariff, called OPT-E-MAN.[406] In markets where AT&T has deployed the necessary Ethernet electronics, OPT-E-MAN provides Ethernet connectivity to any location served by AT&T fiber with a single point of interconnection that aggregates the traffic of all of a

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Service Agreement, (June 1, 2005) *available at* http://www.sbc.com/genpress.room?pid=4800&cdun=news&newsarticleid=21695&phase=check.

[402] Taylor Decl. ¶¶ 26, 43.

[403] Casto Decl. ¶ 21.

[404] *See, e.g.*, Casto Decl. ¶ 14.

[405] TWTC Pet. at 46-47.

[406] Casto Decl. ¶ 16.

wholesale carrier's Ethernet customers.[407] Although AT&T hopes to expand this service and attract customers like TWTC, AT&T currently sells very little of this relatively new OPT-E-MAN services on a wholesale basis to retail Ethernet providers. Yet, retail competition is thriving, belying TWTC's claims that OPT-E-MAN is an essential input to retailers. In fact, AT&T is attempting to place this new product into the market, and competitive forces will compel AT&T to offer competitive and reasonable terms.

In this regard, as explained in greater detail in the accompanying Reply Declaration of Parley Casto, AT&T is deep into negotiations with TWTC to develop a contract tariff for Ethernet access services designed specifically for TWTC's needs.[408] To be sure, TWTC is seeking even lower prices than AT&T has proposed and features that AT&T's service does not currently support. But these are exactly the type of issues that should be – and, based on the recent successful negotiations between AT&T and TWTC, can be – resolved at the bargaining table, not in a merger proceeding. In light of the vibrant competition that exists for Ethernet services, the number and quality of suppliers, and TWTC's unquestioned ability touted in TWTC's own press release to bypass AT&T's Ethernet network entirely and "cost-effectively deliver our industry-leading Ethernet portfolio to customers anywhere," the Commission can be quite confident that the merger will not result in discrimination against TWTC.

TWTC's arguments are also contradicted by the claims of other merger opponents. TWTC's central theory – that the incentives for ILECs to discriminate in providing dedicated local facilities increase directly with the size of their footprints – is flatly inconsistent with the claims of Cbeyond that AT&T (with its larger current footprint) has provisioning practices that

[407] *Compare id. with* Taylor Decl. ¶ 27.

[408] Casto Decl. ¶¶ 23-40.

are more favorable to CLECs than does BellSouth (with its smaller current footprint) and that BellSouth has service terms that are more favorable to CLECs than AT&T's.[409] Cbeyond's arguments demonstrate that there is no correlation between the size of the footprint and the willingness of carriers to adopt practices that CLECs prefer.

Cbeyond nevertheless contends that the merger is contrary to the public interest because the merged firm will adopt the "less competitive and less favorable practices" of each of the merger partners.[410] Cbeyond's logic is flawed. If market and regulatory conditions permitted, AT&T could adopt the purportedly "less competitive and less favorable practices" of BellSouth – and vise versa – in the absence of a merger. To the extent the practices of AT&T and BellSouth *in fact* differ,[411] they reflect different responses to marketplace conditions, and are not a basis for disapproving the merger.

B. The Proposed Merger Raises No "Benchmarking" Concerns

Some opponents claim that the merger would reduce the ability of the Commission to detect discrimination by comparing the practices of multiple independent LECs.[412] These parties rely upon the Commission's findings in 1999 and 2000 that there was then an "acute present need for benchmarking" because (1) the merging ILECs then possessed local bottlenecks that could be used to discriminate against rivals[413] and (2) the existence of multiple ILEC

[409] Cbeyond Comments at 84-85; Falvey Decl. ¶¶ 6-15; Younger Decl. ¶¶ 5-8.

[410] Cbeyond Comments at 85.

[411] As explained below, Cbeyond's assertions that AT&T has adopted certain anticompetitive practices are false.

[412] Access Point Pet. at 13-20; Cbeyond Comments at 78-88; EarthLink Pet. at 32-36; Sprint Nextel Comments at 8; TWTC Pet. at 49-72.

[413] *SBC/Ameritech Merger Order* ¶ 161.

benchmarks would "facilitate implementation of the market-opening measures of the 1996 Act."[414]

These claims ignore both the Commission's corollary finding that its concern would be short-lived and the fact that the purported control of bottleneck facilities has long since disappeared. The Commission "agree[d]" that the marketplace is highly dynamic and could reasonably be expected to "evolve" in ways that would eliminate the need for multiple "benchmarks."[415] The Commission observed that after "the course of the transition to full competition in local markets,"[416] existing local bottleneck monopolies would be broken. At that point, market forces – not regulation – would provide the "sure remedy for the ILEC's threat of discrimination."[417]

Merger opponents also ignore Applicants' detailed showing that the transition to full competition predicted by the Commission has in fact occurred. First, as noted above, facilities-based CLECs, cable and wireless companies, and others have deployed alternative wireline and wireless connections to customer premises throughout Applicants' incumbent territories. This competition not only eliminates any substantial risk of discrimination, but also provides affirmative market incentives for Applicants to reach reasonable wholesale arrangements (to

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[414] *Id.*

[415] *Id.* ¶ 154.

[416] *Id.* ¶ 161.

[417] *Id.* ¶ 230. TWTC claims that the Commission held in the *Bell Atlantic/GTE Merger Order* that any reduction in the number of ILEC benchmarks from 4 to 3 would be conclusively deemed to disserve the public interest. TWTC Pet. at 50. The Commission made no such finding. Although the Commission observed that any further reduction in the number of ILEC benchmarks at that time would raise significant concerns, *see Bell Atlantic/GTE Merger Order* ¶ 170, the Commission also stated that such diversity needed to be preserved only "during the transition to competition," *id.* ¶ 172. Even merger opponents do not deny that where there is vigorous competition, the need for ILEC benchmarks is substantially reduced, if not eliminated.

avoid losing the business altogether to intermodal competitors).[418] As noted,[419] Applicants now provide commercially negotiated wholesale "UNE-P replacement" to scores of carriers that use these arrangements to serve millions of lines. Likewise, both AT&T and BellSouth offer heavily discounted special access tariffs with performance guarantees.[420]

In addition, the market opening requirements of the 1996 Act that the Commission previously regarded as too immature in 1999 and 2000 to supplant the need for benchmarking against multiple independent RBOCs have now been "fully implemented."[421] Thus, the provisioning disputes over the services that the Commission regarded in 1999-2000 as candidates for RBOC-to-RBOC benchmarking comparisons (*e.g.*, loop testing and provisioning, number portability, cageless collocation, technically feasible points of interconnection)[422] have all but disappeared. Both ILEC unbundling and obligations concerning the OSS and other systems that must be used to provision UNEs are well-defined from both a technical and regulatory perspective.

Further, as noted above, AT&T and BellSouth are now uniformly subject to comprehensive performance plans, with literally thousands of metrics to identify whether UNEs are being provisioned in a non-discriminatory manner,[423] and the plans provide for self-executing

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[418] *Wireline Broadband Report* ¶ 75.

[419] *See* Public Interest Statement at 124.

[420] Dysart, Watkins & Kissel Decl. ¶¶ 21-30; Pate & Graulich Decl. ¶¶ 23-27. For these reasons, the merger will not require the Commission to engage in "highly intrusive regulatory practices" as a substitute for "the ability to benchmark among major independent incumbent LECs." *SBC/Ameritech Merger Order* ¶ 113. Given the presence of robust intermodal competition, the Commission can rely on market forces to prevent discrimination. This approach, not "comparative practices analysis," is clearly much more consistent with the "deregulatory goals of the 1996 Act." *Id.*

[421] *Qwest Omaha Forbearance Order* ¶¶ 52-53.

[422] *SBC/Ameritech Merger Order* ¶¶ 131-33, 141-43.

[423] Dysart, Watkins & Kissel Decl. ¶¶ 13-16; Pate & Graulich Decl. ¶¶ 7-22.

remedies should AT&T and BellSouth fall short.[424] Litigation over the terms, conditions and pricing of UNEs has become much less common, and the terms of interconnection arrangements today are largely provided through voluntary negotiations.[425]

Merger opponents do not seriously contest these points. Instead, they point to a handful of post-1999 instances in which benchmarking allegedly has "detected" purportedly anticompetitive conduct by ILECs.[426] These disputes, however, have long been settled. For example, three of the cases TWTC cites are clearly irrelevant because they pertain to an RBOC's satisfaction of the Section 271 checklist, which the Commission found satisfied in all states years ago.[427] Similarly, several pertain to "line splitting" and NGDLC unbundling[428] – issues that were settled by the Commission's unbundling orders[429] – and the ISP-bound traffic pricing issues that were hotly contested half a decade ago but were later resolved by the Commission.[430]

Nor do the decisions touted by merger opponents show that regulators have relied on RBOC-to-RBOC benchmarking to resolve what few disputes still surface.[431] Notably, merger opponents cite only one case where BellSouth was even *proposed* as a benchmark for SBC (an

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[424] Dysart, Watkins & Kissel Decl. ¶¶ 16-18; Pate & Graulich Decl. ¶¶ 15-17.

[425] Public Interest Statement at 122.

[426] TWTC Pet. at 53-58.

[427] *Id*. at 55-56 & nn.89-91.

[428] *Id*. at 54-55 & nn.84-86.

[429] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17168, ¶¶ 251-52, 285-97 (Aug. 21, 2003) ("*Triennial Review Order*").

[430] In several instances, the decisions that TWTC claims were adopted "since" the *SBC/Ameritech Merger Order* actually *preceded* that order and are clearly irrelevant. *See* TWTC Pet. at 58 & nn.99-101 (purporting to cite decisions that show that regulators use benchmarking to identify "worst-practices").

[431] TWTC Pet. at 52.

Indiana PUC arbitration), and there the state commission based its decision on other grounds, not benchmarking.[432] Similarly, the Arizona commission decision cited by TWTC concerning Qwest's delivery of interconnection trunking did *not* adopt Level 3's proposed benchmarking standard,[433] but merely required Qwest to provide a date certain for each order in accordance with the guidelines in Qwest's own Interconnect and Resale Source Guide.[434] Nor is TWTC correct in its claim that the Colorado commission determined that Qwest should be "required to submit to certain billing practices" because AT&T had received better terms with SBC.[435] And, although the Commission in the *Virginia TELRIC Arbitration Order* examined BellSouth's approach to "structure sharing," the Commission's rejection of Verizon's position ultimately rested on Verizon's *own* cost evidence.[436]

Moreover, the examples of "average" practice benchmarking offered by TWTC refute any notion that the only relevant benchmarks are RBOCs. TWTC cites several instances in which state commissions or the Commission used a "proxy group" to determine the cost of

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[432] *Id*. at 53 & n.81. The language cited by TWTC quotes Level 3's argument – summarized in the "position of the parties" section of the decision, not the Indiana commission's actual holding and analysis. TWTC Pet. at 53 n.81 (quoting *In re Level 3 Commc'ns, LLC's Pet. for Arbitration*, 2004 Ind. PUC LEXIS, 465, at *67 (Ind. Utility Reg. Comm'n Dec. 22, 2004). Although the Indiana commission ruled in Level 3's favor, it did not rely on "benchmarking" – indeed, the Indiana commission never mentions Level 3's benchmarking argument in its analysis. *Id.* at *98.

[433] TWTC Pet. at 54 & n.82.

[434] *In re Pet. of Level 3 Commc'ns LLC for Arbitration*, 2000 Ariz. PUC LEXIS 4, at *23-24 (Az. Corp. Comm'n Apr. 10, 2000).

[435] TWTC Pet. at 54 & n.83. In fact, the Colorado commission did not "require" Qwest to submit to any billing practices at all. To the contrary, it merely held that the parties should *negotiate* a separate billing arrangement. *In re Pet. of Qwest for Arbitration* 2003 Colo. PUC LEXIS 1149, at *149 (Colo. Public Utilities Comm'n Oct. 14, 2003). ("We are persuaded by AT&T that billing for alternatively billed calls is better dealt with through a separate agreement").

[436] *In re Pet. of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act*, Memorandum Opinion and Order, 18 FCC Rcd. 17722, ¶ 291 (Aug. 29, 2003) ("*Virginia Arbitration Order*").

capital in TELRIC proceedings.[437] But the proxy groups offered by CLECs in these proceedings included not just the RBOCs, but also ILECs such as ALLTEL and CenturyTel.[438] Indeed, in the *Virginia Arbitration TELRIC Order*, the Commission adopted a cost of capital based in large part on a proxy group of the S&P 500.[439] And the Commission abandoned several years ago the "industry average" formerly used to determine the productivity adjustment for price cap regulation.[440]

TWTC recognizes that the relevant issue is whether there is a need for benchmarking "going forward," not the past role of benchmarking during the early implementation of the 1996 Act.[441] TWTC nevertheless offers three reasons for reviving this historical artifact. First, TWTC says that benchmarking is necessary to prevent "possible backsliding by the RBOCs."[442] But the best evidence of any "backsliding" by an RBOC is a comparison between its current conduct and

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[437] TWTC Pet. at 57-58.

[438] *See, e.g.*, *Virginia Arbitration Order* ¶ 69; *In re Application of Cincinnati Bell Telephone*, 1999 Ohio PUC LEXIS 620, at *26 (Oh. Public Utilities Comm'n Nov. 4, 1999). TWTC contends that even Qwest cannot be considered a benchmark because of its relatively smaller size. *Compare* TWTC Pet. at 62 (arguing Qwest cannot be used as a benchmark) *with* TWTC Pet. at 57-58 (claiming that state commissions and this Commission properly used Qwest as a "benchmark" in setting special access price caps and UNE rates). But the only analysis offered by TWTC in support of this claim is that Qwest has not announced plans to offer wireline video services or its own wireless services. TWTC Pet. at 62. The extent to which Qwest provides such services is irrelevant to the appropriateness of Qwest as a "benchmark" for regulated local facilities. There is no need to "benchmark" AT&T's wireless or wireline video service offerings against Qwest's because there could be no conceivable claim that regulation is necessary to compel access to those facilities. And while Qwest's financial difficulties and securities issues may have made it an inappropriate "benchmark" for determining cost of capital in TELRIC proceedings initiated several years ago, *cf.* TWTC Pet. at 62-63, those conditions no longer persist today.

[439] *Virginia Arbitration Order* ¶¶ 88, 90.

[440] *Compare* TWTC Pet. at 57 with 47 C.F.R. § 61.45(b)(1)(iii)-(iv).

[441] TWTC Pet. at 59.

[442] *Id*. at 59; *see also* Access Point Pet. at 27.

its prior actual conduct, not a horizontal comparison between the BOC's conduct and that of other carriers.

Second, TWTC contends that benchmarking is still vital to appropriate regulation of ILEC special access.[443] TWTC does not cite a single recent instance in which the conduct of a second ILEC has been relied upon as a benchmark in a proceeding concerning either the lawfulness or the adequacy of an ILEC's provisioning of special access, and Applicants are aware of none.

Rather, as the comments in the current special access performance standards proceeding confirm,[444] the relevant comparisons are between the ILEC's performance in providing service to itself and its performance in providing service to others – *i.e.*, parity standards. As CLEC commenters have explained, "[o]nce provisioning parity is established, ILECs and CLECs can compete on grounds that they *both* can control, including price, quality of service, customer support, and additional features."[445] Indeed, there is broad consensus that the central safeguard should be a parity standard,[446] with both CLECs and ILECs proposing detailed plans that incorporate a parity standard.[447]

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[443] TWTC Pet. at 59-60.

[444] *In re Performance Measurements and Standards for Interstate Special Access*, CC Docket No. 01-321.

[445] Comments of Focal Commc'ns Corp., *et al.*, *In re Performance Measurements and Standards for Interstate Special Access*, CC Docket No. 01-321 (Jan. 22, 2001) ("Focal Commc'ns Comments") at 14 (emphasis in original).

[446] *See, e.g.*, Focal Commc'ns Comments at 13-14 ("[F]ederal rules can, and must, assure that ILEC provisioning of special access . . . to CLECs is on parity with its provisioning of special access . . . to itself, its affiliates, or its retail customers. . . . The objective level of quality or cost of service from the ILECs is less important to the Joint Commenters than the fact that CLECs obtain bottleneck facilities from the ILEC on a performance level *equivalent* to the service it provides to itself.") (emphasis in original); Comments of TWTC and XO Communications, Inc., at 24 (Jan. 22, 2002) ("The point of performance rules is to facilitate the detection of discrimination in favor of the ILEC's end users and affiliates as well as discrimination among competitors. Accordingly, any meaningful performance requirements must include a basis for

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Merger opponents' only rejoinder is that parity rules may be insufficient because an ILEC might provide itself poor service or not provide a comparable "retail" service.[448] This claim makes no sense in today's radically changed markets. Unlike SBC and Ameritech in 1999, AT&T today provides retail services to enterprise customers. Further, AT&T has an established reputation for providing the highest quality enterprise services, and relies on that reputation in marketing its services. It is simply not credible to suggest that AT&T would find it "profitable" to provide its own retail enterprise affiliates with poor quality special access service.

Nor is "benchmarking" required for effective special access rate regulation. ILEC-to-ILEC "benchmarking" today has no role in the current price cap regime for regulating special access rates. Likewise, for special access services that have pricing flexibility, "benchmarking" is not a focus in the Commission's ongoing proceeding to address regulation of special access pricing.[449] No party in that proceeding is proposing that comparisons between or among ILEC

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comparing the level of service quality provided to specific competitors with the service quality provided to (1) the ILEC's end users and affiliates, and (2) all competitors."); Comments of Sprint Corporation *In re Performance Measurements and Standards for Interstate Special Access*, (Jan. 22, 2002) at 3 ("the Commission should interpret the Section 202 prohibition on discrimination as requiring parity – equality in the provision of special access service to an affiliate or subsidiary, a non-affiliated carrier, or to an end user").

[447] *See* Letter from The Joint Competitive Industry Group to Chairman Michael K. Powell (Jan. 22, 2002), Attachment A, *Joint Competitive Industry Group Proposal-ILEC Performance Measurements & Standards in the Ordering, Provisioning, and Maintenance & Repair of Special Access Service*, at 3 (Jan. 18, 2002) (establishing objective performance standards and also requiring comparison reports for CLEC/IXC Carrier Aggregate and ILEC Affiliates Aggregate); Letter from BellSouth, Qwest, SBC and Verizon to Mr. Jeff Carlisle, Chief, Wireline Competition Bureau (Dec. 20, 2004), attaching *Service Quality Measurement Plan (SQM) – Joint BOC Section 272(e)(1) Performance Metrics Proposal*, at 7 ("For purposes of this plan, the RBOC's performance in providing service to its non-affiliate carrier customers shall be substantially similar to that which it provides to its affiliates. Performance shall be measured by comparing, for each of these measures, the service received by the Non-Affiliate Aggregate (IXC/CLEC) with the service received by the RBOC Affiliates Aggregate").

[448] TWTC Pet. at 67.

[449] *In re Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25.

special access rates should be used either to determine whether current special access rates are excessive or to set rates prospectively. Nor would such comparisons be meaningful because special access rates depend on a host of company-specific factors, such as geographic density, network architecture, cost of capital, mileage of the average circuit, term/volume commitment, and performance guarantees. Therefore, substantial variation among ILEC special access rates is to be expected.

Third, TWTC claims that benchmarking is necessary to protect competition for emerging advanced services.[450] But as the Commission concluded in the *SBC/AT&T Merger Order* and *Verizon-MCI Merger Order*, following a long line of prior decisions, a wide and heterogeneous array of competitors "ensure that there is sufficient competition" for Frame Relay, ATM, and Gigabit Ethernet and similar based transmission services.[451] The Commission also observed that "a growing number of enterprise customers" have begun switching to new entrant providers. "These new competitors are putting significant competitive pressure on traditional service providers."[452]

Finally, merger opponents note that in the prior ILEC merger orders, the Commission expressed concern that a merger of ILECs would "increase the likelihood of coordination . . . to

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[450] TWTC Pet. at 60.

[451] *SBC/AT&T Merger Order* ¶ 73; *see also id.* ("we find that myriad providers are prepared to make competitive offers" to enterprise customers); *Verizon/MCI Merger Order* ¶ 74 (same); *Bell Atlantic/GTE Merger Order* ¶ 121 ("a large number of other firms" with "similar capabilities" provide both local and long distance services to business customers, and "more firms are entering the larger business market"); *id.* ¶¶ 120, 126 ("incumbent LECs face increasing competition from numerous new facilities-based carriers in serving the larger business market"; "there are a number of significant competitors equally competitive with Bell Atlantic and GTE in these larger business markets"); *SBC/Ameritech Merger Order* ¶¶ 89-90 (noting actual and potential competition for larger businesses); *In re Teleport Commc'ns Group Inc., Transferor, and AT&T Corp., Transferee*, Memorandum Opinion and Order, 13 FCC Rcd. 15236, ¶¶ 28, 37, 40 (July 23, 1998) (same).

[452] *Verizon/MCI Merger Order* ¶ 75 n.229; *see also* Public Interest Statement at 71-82 (discussing many competitors that offer these advanced services).

settle on a lower benchmark or . . . conceal[] information concerning operating practices and dealing with competitors."[453] But the Commission's more recent deregulatory decisions and the intense intermodal competition fostered by those policies have spurred enormous investment in innovation. ILECs have overwhelming incentives today to meet their customers' needs as effectively as possible and to innovate whenever possible – or risk losing those customers to other providers.

Likewise inapplicable today is any concern about "increasing the incentive and opportunity for collusion and concealment of information among the few remaining major incumbent LECs."[454] AT&T and Verizon are fierce competitors, particularly in the markets for enterprise level customers, with each other and with "myriad" other suppliers. AT&T has deployed local network facilities in Verizon's and Qwest's territories and purchases several *billion* dollars in access services from these carriers; Verizon and Qwest have a similar presence in Applicants' territories. Indeed, Qwest is expanding its CLEC presence with the recent acquisition of OnFiber.[455] The merger will diminish neither this competition nor Applicants' incentive to ensure that they will be able to access customer locations in Verizon's and Qwest's territories on reasonable terms and conditions.[456]

Despite these facts, and the near-complete absence of out-of-region operations by BellSouth, TWTC claims that the merger will substantially increase the likelihood of regulatory

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[453] TWTC Pet. at 66 (quoting *SBC/Ameritech Merger Order* ¶ 121); *see also* Access Point Pet. at 17-18; EarthLink Pet. at 21-27.

[454] *SBC/Ameritech Merger Order* ¶ 184.

[455] *See* Press Release, Qwest, Qwest To Acquire OnFiber Communications, Inc. (May 15, 2006), *available at* http://www.qwest.com/about/media/pressroom/1,1281,1869_current,00.html.

[456] Carlton & Sider Reply Decl. ¶ 108-09.

collusion because BellSouth is a "maverick" among special access service providers.[457] TWTC offers two pieces of evidence to support this counter-intuitive proposition. First, TWTC says BellSouth alone among the RBOCs urged the adoption of "performance metrics" in 2002.[458] But, as TWTC subsequently admits, all of the RBOCs, including BellSouth, subsequently sponsored a joint proposal that supplanted the initial BellSouth filing.[459]

TWTC also claims that BellSouth provides TWTC with better special access performance metrics than AT&T.[460] Yet, the very AT&T tariff that TWTC now attacks is a contract tariff negotiated barely a year ago to respond to demands from TWTC for special access terms and conditions different than those available in SBC's other offerings.[461] TWTC, when executing the contract tariff, informed the public that the deal "strengthens Time Warner Telecom's ability to compete effectively for the nationwide business market."[462]

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[457] TWTC Pet. at 68. *Compare* Cbeyond at 84-85 (contending that BellSouth's special access practices are inferior to AT&T practices).

[458] TWTC Pet. at 68.

[459] TWTC Pet. at 68-70. Contrary to TWTC's claim, the joint RBOC filing did not "water down" the BellSouth proposal but strengthened it in several respects.

[460] TWTC Pet. at 70-71.

[461] Casto Decl. ¶ 41.

[462] Press Release, Time Warner Telecom Inc., AT&T, SBC Commc'ns, Time Warner Telecom, AT&T, SBC Extend Long-Term Service Agreement (June 1, 2005) *available at* http://www.sbc.com/gen/press.room?pid=4800&cdun=news&newsarticleid=21695& phase=check. TWTC's comparisons of the AT&T and BellSouth tariffs are misleading and inappropriate in other respects. For example, although the AT&T tariff has fewer performance metrics than the BellSouth tariff (albeit more than TWTC states), AT&T's metrics contain "ratchet" terms that require enhanced performance over the life of the contract. Casto Decl. ¶ 44. Likewise, one of the key provisions of the AT&T tariff that TWTC attacks – the use of penalties to improve performance – was included specifically to satisfy TWTC's demands during the contract negotiations. Casto Decl. ¶ 43. And AT&T's tariff provides other discounts to TWTC beyond what BellSouth offers. Casto Decl. ¶ 44. Cbeyond broadly claims that AT&T has a practice of discriminating against CLECs and would extend those practices to BellSouth post-merger. These allegations – which have nothing to do with this merger – are refuted in detail in Appendix A.

V. AT&T IS FULLY QUALIFIED TO CONTROL BELLSOUTH'S AUTHORIZATIONS, BELLSOUTH IS FULLY QUALIFIED TO HOLD THEM, AND OTHER OBJECTIONS TO APPLICANTS' PRACTICES ARE UNFOUNDED

The Commission has concluded repeatedly that AT&T is fully qualified to control Commission authorizations. Nothing has changed to disturb this conclusion.[463] Similarly, there is no question as to BellSouth's character or qualifications to hold Commission authorizations.[464] Although certain merger opponents have cited various incidents involving AT&T and BellSouth, their claims do not withstand scrutiny. Indeed, with respect to BellSouth, the FCC's policy "when evaluating transfer of control applications under section 310(d) . . . [is] not [to] re-evaluate the qualifications of the transferor" particularly in instances in which "no issues have been raised that would require us to re-evaluate the basic qualifications of the transferor."[465] Opponents' other objections to various practices of Applicants that allegedly are abusive or improper are without merit.[466] Applicants' responses to these claims are summarized below, with additional detail provided in Appendix A hereto.

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[463] Public Interest Statement at 2.

[464] *Id.*

[465] *In re Applications of XO Communications, Inc.*, Memorandum Opinion, Order, and Authorization, 17 FCC Rcd. 19212, ¶ 13 (IB/WTB/WCB Oct. 3, 2002).

[466] Jonathan Rubin's opposition to Applicants' request for a waiver of Section 1.913(b) of the Commission's rules, 47 C.F.R. §1.913(b) – to sanction their manual filing of a single Wireless Radio Services Application (File No. 0002560497) – Rubin Comments at 7-8, reveals his misunderstanding of the facts. Contrary to his claim, only one out of the 101 Wireless Radio Services applications filed in connection with this merger was filed manually and is the subject of the waiver request. And, contrary to his assertion, the public was not deprived of *any* access to *any* information about the sole manually filed application.

Moreover, Mr. Rubin's suggestion that Applicants failed to justify their manual filing of this one application shows no appreciation for the limitations inherent in the Commission's Universal Licensing System ("ULS"). It is not uncommon for ULS to be unable – as it was here – to accept electronic filings when a license is subject to multiple transactions simultaneously or in close proximity. In such circumstances, the communications bar and the Commission staff have developed a standard practice of filing and processing manual applications when ULS is unable to accept an electronic filing. *See, e.g.*, File Nos. 50002CWTC05 (transfer of control accompanied by waiver request; attached to File No. 0001969071), 50004CWTC05 (transfer of

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A. AT&T Is Fully Qualified to Control BellSouth's Authorizations, and BellSouth Is Fully Qualified to Hold Them

Virtually all of the challenges to Applicants' character rest on charges that have been addressed by the Commission in other proceedings and rejected. EarthLink, in particular, trots out a series of old allegations of supposed misconduct by AT&T (and its predecessor, SBC). The remaining allegations raised by EarthLink and other opponents are no more availing. Some involve consent decrees, which the Commission "does not consider . . . for purposes of assessing an applicant's character qualifications."[467] Others stem from business disputes and similar matters, which, under well-established precedent, the Commission should ignore because the allegations are not merger-specific[468] or "are better addressed in other Commission proceedings, or other legal fora,"[469] if at all. Applicants respond in detail in Appendix A to each of these challenges – as well as to the New Jersey Ratepayer Advocate's misleading and irrelevant attacks on service quality and Cbeyond's unfounded allegations that the merger will result in the "standardization" of "unfair" or "anticompetitive" practices.

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control accompanied by waiver request; attached to File No. 0001966108), 50004CWAA04 (assignment accompanied by a waiver request; attached to File No. 0001487713). Applicants followed standard Commission practices, their waiver request is fully justified, and it should be granted.

[467] *Cingular/AT&T Wireless Merger Order* ¶ 53.

[468] *See AT&T/Comcast Merger Order* ¶ 165 (rejecting alleged harm as not merger-specific); *In re Joint Applications of Global Crossing Ltd. & Citizens Commc'ns Co.*, Memorandum Opinion and Order, 16 FCC Rcd. 8507, 8511, ¶ 10 (CCB/IB/CSB/WTB Apr. 16, 2001) (rejecting alleged harms as insufficiently merger-specific).

[469] *In re Applications of Craig O. McCaw & AT&T Co.*, Memorandum Opinion and Order, 9 FCC Rcd. 5836, 5904, ¶ 123 (Sept. 19, 1994) ("*McCaw/AT&T Merger Order*"); *see also SBC/AT&T Merger Order* ¶ 175 & n.493; *Cingular/AT&T Wireless Merger Order* ¶¶ 49-51, 56 n.222; *GM/Hughes Order* ¶¶ 304-09, 313-14 (2004); *SBC/Ameritech Merger Order* ¶¶ 518, ¶¶ 557-59.

B. The Commission Should Disregard Opponents' Irrelevant and Unsubstantiated Claims Involving Redlining and Franchising

The Commission also should summarily reject the attempt of the Concerned Mayors Alliance ("CMA") to insert franchising and redlining issues, which are totally unrelated to this merger, into this proceeding.[470] These issues are generic industry-wide issues, and the merger does not affect their resolution one way or the other; thus, they are wholly irrelevant to whether the Applications should be approved.[471] Moreover, many of those issues are addressed in existing federal and state laws and are the subject of pending legislation, administrative proceedings, including proceedings pending at the FCC, and court cases.[472] This merger proceeding is not the appropriate forum in which to address them.

[470] *See* CMA Pet. at 13-20, 26-27.

[471] In previous merger proceedings, the Commission has wisely declined to address such unrelated issues. *See SBC/AT&T Merger Order* ¶ 55; *see Comcast/AT&T Merger Order* ¶ 31 (2002); *In re Applications of S. New England Telecomms. Corp. and SBC Commc'ns Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21292, 21297, ¶ 29 (Oct. 23, 1998).

[472] Franchising, redlining and related buildout issues are being debated in a number of proceedings and fora. The Commission is considering these issues in two proceedings. *See In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984, as Amended*, Notice of Proposed Rulemaking, 20 FCC Rcd. 18581, ¶ 23 (Nov. 23, 2005) ("*621 NPRM*") (rulemaking addresses the local imposition of buildout requirements on new entrants); *In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004) (Commission considering the regulatory structure applicable to IP-enabled services). Congress is also debating MVPD legislation that contains antidiscrimination language. *See* Communications Opportunity, Promotion and Enhancement (COPE) Act of 2006, H.R. 5252, 109th Cong. (2006) (passed by the House on June 8, 2006); American Broadband for Communities Act, S. 2332, 109th Cong. (2006); Franchise Reform Act of 2006, S. 2989, 109th Cong. (2006); Communications, Consumer Choice, and Broadband Deployment Act of 2006, S. 2686, 109th Cong. (2006). A number of states have recently passed statewide video franchising legislation (*e.g.*, Texas, Virginia, Indiana, Kansas, New Jersey and South Carolina), and similar legislation is pending in others (*e.g.*, California, Michigan and North Carolina). At the state administrative level, the Connecticut Department of Public Utility Control recently decided that AT&T's IP video service is not subject to state cable franchising requirements. *See Investigation of the Terms and Conditions Under Which Video Products May Be Offered by Connecticut's Incumbent Local Exchange Cos.*, Decision, Docket No. 05-06-12, (Conn. Dep't of Pub. Util. Control June 7, 2006).

So too, the Commission should reject CMA's argument that "redlining" conditions are required because "redlining" contravenes the public interest and applicable law.[473] The claims that AT&T will engage in redlining are pure speculation. There is no evidence to suggest that AT&T has previously engaged in, or ever will engage in, discriminatory conduct based on income or other impermissible factors.[474] To the contrary, more than 5.5 million lower-income households in 41 Project Lightspeed markets will be capable of receiving U-verse[SM] within the first three years of deployment.[475] Indeed, as AT&T has pointed out in pleadings filed in the 621 NPRM proceeding, it would be economically irrational for AT&T to follow a discriminatory course in the video market, given current market conditions.[476]

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[473] CMA posits that the Commission has some sort of obligation in this proceeding to prevent redlining because such a practice is unlawful under the Communications Act. We assume CMA's primary concern is directed at cable and broadband services since all the so-called "evidence" it cites, involves such services. *See* CMA Pet. at 15-18. However, CMA relies on provisions relating to common carriers and telecommunications services, which do not apply to either Title VI cable services, cable modem service or wireline broadband Internet access services. CMA Pet. at 17. Moreover, the one antidiscrimination provision that applies to cable service has no applicability here because, among other things, AT&T's IPTV service is not a Title VI cable service; the cited provision imposes no statutory obligation on the Commission to prevent redlining; and there is no evidence of a redlining problem.

[474] CMA's bald assertions about AT&T are particularly egregious. CMA complains of misdeeds that involve AT&T Broadband. However, the party in this proceeding is the former SBC Communications Inc., which acquired AT&T Corp. in 2005. AT&T Broadband was a separate entity that legacy AT&T sold to Comcast long before legacy AT&T was acquired by SBC to create the AT&T applicant here. New AT&T has never owned or had any interest in AT&T Broadband. CMA also cites to seven-year-old press accounts involving MediaOne, which AT&T Broadband acquired before it was sold to Comcast.

[475] *See* Press Release, AT&T Inc., AT&T Initiatives Expand Availability of Advanced Communications Technologies (May 8, 2006), *available at* http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22272. AT&T has further demonstrated its commitment to expanding the availability of advanced services to people of all backgrounds through "AT&T AccessAll," a $100 million program recently announced by AT&T and the AT&T Foundation that is designed to provide in-home Internet and technology access to low income families and underserved communities across the country. *See* Press Release, AT&T Inc., AT&T Announces $100 Million 'AT&T Accessall' Signature Program – Nation's Largest to Provide In-Home-Technology Access to Underserved Populations (June 14, 2006), a*vailable at* http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22339.

[476] AT&T is under competitive pressure to offer video programming services as quickly and broadly as economically feasible, in order to retain customers being aggressively courted by

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Moreover, AT&T's history of broadband deployment shows that it has aggressively made DSL service available widely throughout its local service territory to the extent technically feasible, regardless of the income levels of the residents. AT&T has upgraded its networks and now offers DSL service to nearly 80% of households in its service areas.[477] Given this record, there is no basis for the Commission even to assume that AT&T will unlawfully discriminate in its deployment of IPTV services. If and when evidence of discriminatory behavior in the roll out of video services develops, appropriate relief may be sought at that time under applicable law.[478]

C. The ACLU's Concerns About Alleged Call Record Disclosures to the Government in Connection with Anti-Terrorist Intelligence Activities Cannot Be Considered in This Proceeding

The ACLU asserts that the Commission cannot approve the merger unless it first investigates *USA Today*'s allegations that AT&T, Verizon, and BellSouth violated provisions of the Communications Act in allegedly providing assistance to the National Security Agency ("NSA") in connection with anti-terrorist intelligence activities instituted following the terrorist attacks of September 11, 2001. The ACLU contends that this investigation is necessary to determine if AT&T's has the requisite "character" to control BellSouth's licenses. The argument

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cable operators offering a bundle of voice, video and Internet services. *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984, as Amended*, MB Docket No. 05-311, Reply Comments of AT&T, Inc. at 39-40 and n. 62 (Mar. 28, 2006); *id.*, Comments of AT&T, Inc. at 54-55 (Feb. 13, 2006). Moreover, AT&T's comments explain that research indicates that subscription rates correlate little with income. As a new entrant facing entrenched cable incumbents and DBS providers with an established customer base, AT&T has strong incentives to market its IP video service as broadly as economically feasible to establish a foothold in the market.

[477] *See* Paul Taylor, *AT&T Plans Expansion of Broadband Reach*, Fin. Times, May 9, 2006 (quoting AT&T Chairman and CEO Edward Whitacre in a May 8, 2006, speech to the Detroit Economic Club).

[478] Similarly, opponents' claims about cross-subsidization are baseless and not merger specific. *See, e.g.*, Baldwin & Bosley Decl. ¶ 50; Fones4All Comments at 13. Moreover, to the extent there are cross-subsidy concerns about rate regulated services, there are federal and state rules and procedures in place to address those issues.

is meritless. First, the Commission has already determined that it is "unable to investigate" these allegations in *any* proceeding because information about the NSA's activities is classified and because the National Security Act deprives the Commission of authority to compel production of classified information.[479] While the ACLU asks the Commission to "reconsider" this decision, the ACLU does not challenge the Commission's interpretation of the National Security Act, which is plainly correct. Second, even if the Commission could investigate these issues, a merger review would not be the proper forum, for the alleged misconduct is wholly unrelated to the merger and was allegedly engaged in by multiple carriers in the industry.[480] Indeed, the ACLU and others are challenging this same alleged conduct in over 20 separate putative class action lawsuits that are now pending in federal district courts, which will determine whether the "military and states secrets privilege" of the United States bars litigation of these claims and, if not, whether any violations have occurred. Indeed, even assuming that the Commission can lawfully pursue such an investigation under the national security laws applicable to the alleged activities of the NSA, the Commission's own policy on character issues[481] dictates that it should stay its hand until these judicial proceedings are resolved.

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[479] *See* Letter from Kevin J. Martin, FCC, to the Edward J. Markey, U.S. House of Representatives, at 1 (May 22, 2006) (citing Pub. L. No. 86-36, § 6(a), 73 Stat. 63, 64, codified at 50 U.S.C. § 402 note).

[480] *SBC/AT&T Merger Order* ¶ 175 & n.493; *accord Cingular/AT&T Wireless Merger Order* ¶¶ 49-51, 56 n.222; *GM/Hughes Order* ¶¶ 304-09, 313-14 (2004); *SBC/Ameritech Merger Order*, ¶¶ 518, ¶¶ 557-59; *In re Application of Worldcom, Inc. & MCI Commc'ns Corp. for Transfer of Control of MCI Commc'ns Corp. to Worldcom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 18025, ¶ 215 (Sept. 14, 1998); *McCaw/AT&T Merger Order* ¶ 123.

[481] *In re Policy Regarding Character Qualifications in Broad. Licensing*, Report, Order and Policy Statement, 102 F.C.C. 2d 1179, 1204-06 ¶ 48 (Jan. 14, 1986) (stating that the Commission only considers finally adjudicated misconduct), *modified*, Policy Statement and Order, 5 FCC Rcd. 3252, 3252-53, ¶ 7 (May 11, 1990), *recons. granted in part*, Memorandum Opinion and Order, 6 FCC Rcd. 3448 (May 24, 1991), *modified in part*, Memorandum Opinion and Order, 7 FCC Rcd. 6564 (Oct. 9, 1992).

VI. CONCLUSION

For the foregoing reasons, the Commission should dismiss or deny the filings made in opposition to the merger of AT&T and BellSouth. Applicants have demonstrated that the proposed merger serves the public interest, convenience, and necessity. Accordingly, the Commission should expeditiously grant, without conditions, the applications to transfer control of BellSouth's FCC authorizations to AT&T.

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