Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

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

REPLY COMMENTS
of
CONSUMER FEDERATION OF AMERICA,
CONSUMERS UNION,
FREE PRESS,
and
U.S. PUBLIC INTEREST RESEARCH GROUP

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Summary

Unless the Commission denies the merger application of AT&T and BellSouth, or imposes stringent and enforceable conditions on its approval, the path before us can only lead to the re-monopolization of the U.S. telecommunications industry and to a substantial risk to the unregulated Internet's important role as the locus of vibrant competition in the content, applications and services markets.

Comments and Petitions filed in this proceeding by CFA *et al.* and other parties provide ample evidence that this latest merger does not serve the public interest. Rather, the combination of AT&T and BellSouth will result in significant harm to current and future competition.

The Commission cannot ignore the impact of this merger on competition in BellSouth's service area. AT&T continues to be a major provider of both mass-market services and special access services. Absent Commission action, this competition will be erased. If this merger goes forward, these AT&T customers and assets must be spun off to an independent entity. Similarly, the Commission cannot stand by and allow anticompetitive actions pursued by BellSouth, which still bundles its DSL and voice services, to continue. If the "future" which the Commission sees is "intermodal" competition, BellSouth's anticompetitive actions undermine this emerging alternative.

The applicants, already joint venture partners in Cingular, one of the largest national wireless service providers, also control vast but almost completely untapped spectrum resources in the 2.3 to 2.5 GHz range. These spectrum resources could be put to productive use by one or more independent firms to provide broadband services in competition with AT&T and BellSouth. The applicants' apparent warehousing of spectrum

resources is yet another anti-competitive practice which must be stopped whether or not this merger is allowed to proceed. Suitable spectrum is too scarce to allow joint applicants to undermine the potential for last-mile broadband competition.

Given the current differences associated with AT&T and BellSouth's dealings with CLECs, the Commission should insist on the best practices across the two companies being implemented system-wide. Furthermore, UNE rates should be frozen and end-users should be given a fresh look following the merger, should the Commission allow it.

The Commission will be remiss in its duties if it fails to take these remedial steps with regard to competition should this merger be allowed to go forward. As explained in CFA *et al.'s* Petition to Deny, and in these Reply Comments, the Commission could resolve some of these problems by requiring the divestiture of all of AT&T's operations in BellSouth's service area. However, should the Commission not follow this recommendation, a thorough examination of AT&T's operations in BellSouth's service area should be conducted, and divestiture conditions similar to those pursued in the SBC-AT&T merger should be implemented.

Finally, as the Commission considers this merger, it must carefully weigh the impact of the merger on the Internet. The U.S. holds a unique position as the birthplace of the Internet, and the Commission's previous pro-competition policies played no small part in the growth of the Internet. AT&T will become the largest provider of broadband services following this merger. This role, combined with its substantial Internet backbone facilities, gives rise to new risks to the Internet by providing AT&T with increased leverage over both end-user customers and the providers of Internet content, services, and applications. The Commission must impose conditions requiring network neutrality, as well

as safeguards to protect peering arrangements, if it decides to allow this merger to proceed. The Internet is at risk, and the Commission should not allow the vibrant competition which has been the defining feature of the provision of Internet content, services, and applications to date to succumb to the same dismal fate that has befallen local and long distance competition on the Commission's watch.

I. Introduction

As in the perennial dilemma faced by Charlie Brown, the Commission is being asked again to "kick the football" of merger approval. In this case AT&T and BellSouth, playing the role of the smirking Lucy, are again promising the glory of competition and public benefits, if only the Commission believes the fairytale contained in this merger's Public Interest Showing. The comments and petitions filed in response to joint applicants' request should quell any hope on the part of the Commission that this time is going to be any different. No, as was the case with each of the mergers the Commission has approved in the past, the Commission can rest assured that the "football" of competition and the public interest will be jerked away, and the Commission will be flat on its back, staring at a sky filling with the gathering clouds of monopoly, discrimination, and the next step in industry consolidation.

The overwhelming majority of comments oppose the merger. While CFA, *et al.* did not review each of the more than 11,000 short comments filed in this proceeding, it appears that very few of these commenters support the merger. Each of the substantial comments or petitions filed opposes the merger, with two exceptions. The Communications Workers of America offer guarded support for the merger, but question the alleged benefits of improved disaster response claimed by joint applicants in light of joint applicants' pledge to their shareholders to cut over 10,000 jobs following the merger.[1] The other substantial comment that supports the merger stands out for its source and its irony. The Alliance for Public Technology (APT) sees nothing but good coming from the merger. The irony of their comments, in addition to the fact that they are apparently

1. Comments of the Communications Workers of America, pp. 1-2.

blind to any issues associated with Network Neutrality, which could be considered *the* public technology issue associated with this merger, is the fact that the basis for APT's support are the *commitments* made by the joint applicants.[2] APT ignores the track record of these companies when it comes to meeting commitments. Placing any faith in AT&T's promises is a fool's game.

The Commission, by reviewing the Petitions and Comments, can find ample evidence of the string of broken promises associated with the mergers it has approved, especially those associated with the new AT&T and its predecessor, SBC. Cbeyond *et al.* tell the story of SBC's promises from just a year ago.

> When SBC acquired AT&T a year ago, it made plain its intentions to compete for all levels of business customers outside the SBC region against other incumbent LECs, such as BellSouth. SBC emphasized to the Commission in its opposition to the various petitions to deny its merger that "(t)he very purpose of this transaction would be thwarted if the combined company were to limit its focus to SBC's region. And while SBC explained that it was acquiring AT&T "to become a major provider of communications services to national and global business enterprise customers with sophisticated needs," it also emphasized that
>
> > (w)ere it SBC's intent to forbear from competing for customers beyond (the SBC region), it would not be seeking to acquire AT&T, whose primary assets are its national and international customer base and the network assets needed to serve them–including in Verizon's regions. Large and small customers alike located outside SBC's region constitute profitable customer segments, and SBC will aggressively pursue them. Indeed, customers expect the merger to have precisely this result.
>
> . . . In short, only a year ago, AT&T and SBC had plans to compete out of region for large and small businesses and used this as partial justification for the largest merger this Commission has ever seen. Now, in proposing another monumental merger, this time principally RBOC-to-RBOC, they

2. Specifically, the Alliance for Public Technology cites to AT&T's commitments to: (1) roll out IP video services; (2) roll out broadband technology; (3) expanding multichannel video competition; (4) to spend more on "innovation" and network infrastructure; and (5) to maintain Cingular as a leader among wireless providers.

> want the Commission to forget the recent past and assume that BellSouth and AT&T are competitive ships passing in the night.[3]

COMPTEL reminds the Commission of the out-of-region commitments associated with previous mergers:

> In both the SBC/Ameritech and Bell Atlantic/GTE mergers, the Bell Companies argued that the transactions were in the public interest because they would serve as a catalyst for out-of-region competition. However, as the applicants themselves recognized in their Public Interest Statement, significant out-of-region competition has not yet occurred.[4]

CFA *et al.* summarize the hollow promise associated with SBC's "national-local" strategy, which first appeared as a condition of the SBC/Ameritech merger:

> In its approval of the SBC-Ameritech merger, the Commission required that the combined company begin to provide business and residential local exchange service in areas outside of its service territory:
>
> > As a condition of this merger, within 30 months of the merger closing date the combined firm will enter at least 30 major markets outside SBC's and Ameritech's incumbent service area as a facilities-based provider of local telecommunications services to business and residential customers. This will ensure that residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC. This condition effectively requires SBC and Ameritech to redeem their promise that their merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier. We also anticipate that this condition will stimulate competitive entry into the SBC/Ameritech region by the affected incumbent LECs.
>
> As the Commission is well aware, and as the joint applicants freely admit, SBC did not engage in any meaningful attempt to compete outside of its region.[5]

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3. Comments of Cbeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc. XO Communications, Inc., and Xspedius Communication, pp. 54-55.
4. COMPTEL Comments, p. 14, footnote, citing to the AT&T/BellSouth Public Interest Showing at 86, 106 is omitted.
5. CFA et al. Petition to Deny, Affidavit of Mark Cooper and Trevor Roycroft, pp. 35-36.

The most recent and for consumers, the most galling, example of AT&T's habitual practice of failing to fulfill its merger commitments is its offering (or perhaps more accurately, *non*-offering) of "naked DSL" at a price that offers consumers significant savings over the bundled price of DSL and basic phone service. As reported in the *San Francisco Chronicle*, AT&T just last week began taking telephone orders for standalone DSL at a rate of $44.99 per month, only a dollar less than the least expensive regular bundle of DSL and phone service. Neither the availability of stand-alone DSL nor the rate for the service has yet been publicized by AT&T, although a company spokesman said that AT&T plans to offer standalone DSL on its web site soon. *See* "AT&T offers broadband by itself; Unpublicized DSL service won't save subscribers much" Saturday, June 17, 2006 online at the following URL last visited 6/20/06: http://sfgate.com/cgibin/article.cgi?f=/c/a/2006/06/17/BUGA2JFMBL1.DTL&hw=Ryan+Kim&sn=006&sc=897

The Commission should, by now, be able to break the "AT&T Code" when it comes to AT&T's discussion of competition and public benefits associated with merger. "Increased Competition" and "Public Benefits" mean nothing more than growing monopoly power and harm to the public interest.

II. Argument

A. The Commission Must Evaluate the Impact of this Merger on Interrelated Markets

As it reviews the record in this proceeding, the Commission must take a broad view of the competitive and policy issues associated with the merger. The multiple markets that will be affected, should this merger be permitted, are interrelated to varying degrees and "spillover" effects across these markets will result from the consolidation of

AT&T's and BellSouth's operations.

The Commission has previously recognized that there may be spillovers on a regional basis. For example, in the SBC/Ameritech merger Order, the Commission noted: "In many cases, discriminatory conduct by an incumbent LEC in its region affects a competitor in areas both inside and outside the incumbent's region."[6]

Likewise, the Commission has recognized the importance of spillovers associated with network effects, which can cause markets to "tip" in the favor of a particular firm:

> We conclude the market in text-based instant messaging is characterized by strong "network effects," *i.e.*, a service's value increases substantially with the addition of new users with whom other users can communicate, and that AOL, by any measure described in the record, is the dominant IM provider in America. . . .AOL's market dominance in text-based messaging, coupled with the network effects and its resistance to interoperability, establishes a very high barrier to entry for competitors that contravenes the public interest in open and interoperable communications systems, the development of the Internet, consumer choice, competition and innovation.[7]

The Commission went on to note that "recent (economic) literature suggests that near monopoly outcomes in markets exhibiting strong network effects are "tipped markets."[8]

It is beyond doubt that geographic and network-effect related spillovers are potential outcomes of this merger. For example, this merger will increase AT&T's share of broadband subscribers to about 23% of the overall broadband market, making AT&T the largest broadband provider in the nation.[9] The spillovers from the rising concentration extend well beyond the last-mile broadband market. The combination of the substantial market share in last-mile broadband markets and AT&T's substantial Internet backbone holdings provide a synergistic anti-competitive impact, with AT&T gaining increased

6. SBC/Ameritech Merger Order, ¶192.
7. AOL/Time Warner Merger Order, ¶129.
8. *Id.*, footnote 368.
9. CFA *et al*. Petition to Deny, Declaration of Mark Cooper and Trevor Roycroft, p. 44.

leverage in the Internet backbone market as its size and number of subscribers will make it unlike most other backbone providers, and may enable AT&T to enforce transit-pricing arrangements rather than peering arrangements. Likewise, the network effects in last-mile broadband that AT&T will gain may encourage this market to "tip" in AT&T's favor within its region, given that it will have the ability to offer proprietary and exclusive services, such as interactive gaming, to its large broadband customer base.

Similarly, the record clearly demonstrates that this merger will have a profoundly negative impact on special access markets. The increased ability of the combined AT&T/BellSouth to exercise pricing power and to discriminate in special access markets will have a spillover impact on market performance in wireless markets, long distance markets, and the Internet. To the extent that intermodal alternatives rely on the performance of special access markets, the combined company can use its increased market power to undermine this competition, while favoring its own intermodal affiliates.

The Commission, while evaluating the diverse pieces of this merger puzzle, should not lose sight of the interconnected nature of the various pieces. The Commission must be careful not to overlook the negative synergy that this merger creates for competition in a variety of interrelated markets.

B. The Record Shows that the Commission Should Deny this Merger

As will be discussed further below, the record that the Commission has before it contains an overwhelming volume of data, supported by legal and economic arguments demonstrating why this merger should not be approved. Balanced against this compelling information, the Commission has before it the application and supporting materials provided by the joint applicants. As discussed by CFA *et al.* in its Petition to Deny and

supporting declaration, the data and arguments supplied by the joint applicants fall far short of those needed to justify this merger. The flaws in AT&T/BellSouth's application are many. As will be discussed further below, the comments only reinforce the criticism leveled by CFA *et al.* The Commission would serve the public interest well if it would simply deny AT&T and BellSouth's application outright.

The record also demonstrates that, should the Commission decide to allow this merger to proceed, significant, enforceable conditions must be imposed. If the Commission approves the merger unconditionally, it will do so in the face of overwhelming record evidence that the public interest will be harmed. As will be discussed below, many commenters, in addition to CFA *et al.*, favor the imposition of substantial conditions, should the merger be permitted by the Commission. Based on information in the record of this proceeding, the Commission should also begin re-regulating the telecommunications industry, whether or not this particular merger is approved. The record clearly demonstrates that competition is not providing the needed check on the incumbents' existing level of market power.

1. Legal Insufficiency of the Public Interest Showing

CFA *et al.* have told the Commission that the joint applicants' filing is spare on details and high on rhetoric. Joint applicants gloss over important issues. For example, the joint applicants' lead declarants regarding special access markets indicate that they have only conducted a "preliminary" analysis of the market.[10] Similar criticism was leveled by Access Point *et al.*:

10. CFA et al. Petition to Deny, Affidavit of Mark Cooper and Trevor Roycroft, p. 40.

> While the Applicants fill numerous pages describing the alleged benefits of integration of the AT&T and BellSouth networks, notably missing is any description of how this would be accomplished. In particular, the Applicants have not provided any details as to how or if differences in operational procedures between the AT&T operating companies and BellSouth will be reconciled. They do not indicate whether AT&T will be adopting some BellSouth policies with regard to any specific issues or vice-versa.[11]

Likewise, EarthLink points to one of the many inconsistencies and contradictions readily apparent in the application materials:

> In May 2005, while the SBC/AT&T merger was under review by the Commission, SBC and AT&T issued a joint press release in which they hailed an agreement with Covad as an important step in expanding out-of-region competition post-merger:
>
> > Covad will extend broadband access to merged companies, to enable expansion of VoIP services out-of-region, promote vigorous competition in telecommunications industry
> >
> > > San Antonio, May 5, 2005 – SBC Communications Inc. (NYSE: SBC) and AT&T Corp. (NYSE: T) together have reached a services agreement under which Covad Communications Group Inc. (OTCBB: COVD) would extend broadband access to the merged companies, which would help the combined entity expand Internet protocol (IP) services, including voice-over-Internet-protocol (VoIP), out-of-region to consumers and businesses. The deal, effective upon completion of the SBC and AT&T merger, demonstrates the parties' commitment to promoting vigorous competition in the telecommunications industry among product and service providers.
> > >
> > > "Consumers will continue to benefit from competition in the provision of telecommunications services, making them the real winners here," said Mark Keiffer, senior vice president-business marketing for SBC. "And agreements such as these will be especially important in enabling SBC, post-merger, to become a more effective out-of-region competitor. We look forward to working with Covad not only in offering services to consumers and businesses outside of our territory, but in building on the excellent relationship that exists between AT&T and Covad today to work to bring additional services to the market, post-

11. Petition to Deny of Access Point, et al., p. 4, footnotes omitted.

merger."

> Given AT&T's explicit statement of intent to compete out-of-region with respect to VoIP and other broadband services, the Applicants here must provide specifics about the number of customers they actually serve out-of-region and about their out-of-region plans pre- and post- merger (with respect to SBC/AT&T and AT&T/BellSouth), including all intra- and inter-company communications on that subject. Instead of providing that information, however, the Applicants brush off the Covad deal by stating that AT&T only provides "DSL services to a limited number of out-of-region customers through a resale agreement with Covad. . . ." Absent specific information about the actual competition that the Applicants acknowledge exists, but about which they have provided no facts, the application must be denied.[12]

The joint applicants have failed to provide basic information to the Commission, and much of the information they have provided is either contradictory or else inconsistent with the joint applicants' previous submissions to the Commission. If the Commission does not have before it an accurate representation of the current status of the applicants' respective operations, then the impact of their merger on competition cannot be established. As a result, the Commission would serve the public interest by rejecting the merger proposal.

Furthermore, while we will turn to the special access market in detail below, statements made by the joint applicants regarding AT&T's presence in the special access market in BellSouth's territory are of dubious validity. As noted by Cbeyond *et al.*:

> Although, in the Application, AT&T tries to downplay its presence by claiming that it has fiber in only 11 metropolitan areas in BellSouth's territory, information submitted last year (by) BellSouth in the Commission's Special Access proceeding, WC Docket No. 05-25, tells a different tale. There, BellSouth reported that AT&T had lit buildings in each of the top 20 MSAs in the BellSouth region. . . .
>
> Outside these top 20 markets, AT&T also had the most pervasive facilities-based presence in terms of lit buildings in BellSouth territory. BellSouth's data showed that AT&T had not only the most lit buildings among competitive LECs region wide (145 to 85 for its next closest competitor),

12. Petition to Deny of EarthLink, Inc., pp. 7-8.

> but that AT&T was the clear competitive leader in six states, second in another, and fourth in another (where it had more than 75% the number of lit buildings as the leader). Thus, AT&T's efforts to suggest that it has only a minor facilities-based presence in BellSouth's territory is sharply contradicted by the data its merger partner assembled less than a year ago.[13]

To reiterate, the joint applicants have failed to carry their burden on critical matters related to vital issues, including the most basic information on AT&T's operations in BellSouth territory. The Commission needs more information than the joint applicants have provided if it is to determine the impact of this merger on competition, and ultimately the public interest. Given the paucity of information furnished by the joint applicants, and the numerous contradictions and inconsistencies therein, the Commission simply cannot determine whether the public interest will be served by this merger. In view of the joint applicants' failure to provide sufficient evidence to sustain their ultimate burden of proof, the Commission should deny the application.

2. Network Neutrality

As discussed in CFA *et al.'s* Petition and supporting affidavit, network neutrality is a major concern surrounding this merger.[14] The expanded footprint and resulting market position of AT&T, which will become the nation's largest provider of broadband access facilities following the merger, raise concerns regarding the ability of the combined company to leverage the network effects that it will gain as a result of the merger to higher levels of the Internet.[15] The economic logic associated with this concern is noth-

13. Comments of Cbeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc. XO Communications, Inc. And Xspedius Communication, pp. 63-64.
14. CFA *et al.* Petition to Deny, Affidavit of Mark Cooper and Trevor Roycroft, pp. 44-57.
15. CFA *et al.* Petition to Deny, Affidavit of Mark Cooper and Trevor Roycroft, pp. 4-5.

ing new. In their Comments, Access Point *et al.* highlight Commission's previous observations regarding the power of network effects associated with an ILEC with has a growing footprint. The generally negative impact of AT&T's growing footprint applies equally well to the issue of network neutrality as affected by AT&T's growing broadband footprint, as Access Point *et al.* remind the Commission:

> The Commission correctly recognized in the SBC-Ameritech Order that the larger the combined entity, the more incentive it would have to discriminate because of gains from external effects. Put another way, since discrimination in one region has spill-over effects in other regions, an ILEC with operations in both regions will reap benefits in both regions, and thus will have greater incentive to discriminate. "Economies of scale and scope and network effects," the Commission reasoned, "imply that when incumbent LECs weaken a competitive service in one region, this weakens it in other regions as well. . . . [T]he merger's big footprint will create more incentives for the merged entity to discriminate against competitors whose networks become more attractive with more "on-net" customers." "As a result," the Commission concluded, "the level of discrimination engaged in by the combined entity in each region within the combined territory would be greater than the sum of the level of discrimination engaged in by the two individual companies in their own, separate regions, absent the merger."[16]

Other commenters express similar concerns that discrimination and anticompetitive practices, which are among the likely results of this merger, will impair network neutrality.

The Center for Digital Democracy notes:

> As between Mr. Whitacre's repeated promises to use AT&T's market power to extract revenue from Internet users, and the bland self-serving assertions to the contrary buried in the parties' "Public Interest Showing," the Commission should take Mr. Whitacre's own words at face value in this respect. The fact is that the scale of the merged enterprise, controlling the preponderance of landlines in 22 states, affords massive market power to a company with powerful motives and an expressed desire to leverage that power against Internet content providers, VOIP competitors and others.[17]

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16. Access Point *et al*., p. 21, footnotes omitted. Quoting SBC/Ameritech Merger Order at ¶94 and ¶87.
17. Center for Digital Democracy, Petition to Deny, pp. 3-4, footnotes omitted.

The Georgia Public Service Commission states:

> Network neutrality is essential to promote competition and protect customer choice. The maintenance of net neutrality is a concept that should be made a condition of any approval of the application for transfer of control.[18]

The New Jersey Division of Ratepayer Advocate notes:

> The Commission should prevent this scenario wherein a few powerful telephone companies control the nation's access to information. Furthermore, carriers should not be allowed to give preferential treatment to their own affiliates and/or discriminate against unaffiliated carriers. We oppose a "tiered" Internet where large carriers could act as gatekeepers to the flow of information. Under such a scenario, the economy and society risk being captive to the whims of the telco-cable duopoly, which has a compelling incentive to control consumers' access to information and entertainment, and to extract monopoly profits from such access. Discrimination would create inefficient barriers, unduly limit consumers' choices, and likely raise consumers' prices.[19]

The Concerned Mayor's Alliance notes that network neutrality promotes competition[20] and goes on to point out that

> [T]he Commission cannot overlook the glaring fact that this merger will result in major market dominance in the Internet industry for AT&T. Both companies have shown a willingness to use exclusionary, anticompetitive conduct as a business strategy. Now AT&T will move even closer to possession of monopoly power in the U.S. cable and Internet market.[21]

Other commenters, such as Access Point *et al.* and Integrated Access Networks, support network neutrality provisions.[22]

As will be discussed below, the impact of this merger in traditional telecommunications markets is decidedly negative. The negative impact on network neutrality will be in addition to the damage already done to competition in traditional telecommunications

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18. Comments of the Georgia Public Service Commission, p. 2.
19. Comments on Behalf of the New Jersey Division of the Ratepayer Advocate, p. 20 (citing the Baldwin/Bosley Declaration at ¶219).
20. Petition to Deny of The Concerned Mayors Alliance, p. 25.
21. Petition to Deny of The Concerned Mayors Alliance, p. 26.
22. Access Point *et al.*, p 70; Integrated Access Networks, Comments, p. 4.

markets. Competition in telecommunications has never lived up to the expectations of the Telecommunications Act of 1996. The Telecommunications Act of 1996 envisioned a policy that would bring the benefits of telecommunications competition to all Americans, but competition in traditional telecommunications either failed to materialize or has largely ceased to exist. On the other hand, considerable benefits were realized due to the growth of the Internet, which flourished in the post-1996 period precisely because of the regulatory restraints placed on the firms possessing market power in last-mile access markets.

Should it allow this merger to go forward, the Commission should not concede the monopolization of the Internet. The competition resulting from the neutral and open access Internet is a testament to the ability of wise policy measures to cultivate competition. However, the policy reversals of 2005, which empowered the owners of last-mile broadband facilities to exercise their monopoly power against the competitive forces operative in the Internet, have laid the groundwork for dismantling the pro-competitive traditions which have been responsible for the Internet's success. The record is clear on this point. The Commission, should it allow this merger to go forward, must impose enforceable network neutrality conditions.

3. Naked DSL

CFA *et al.* have proposed, as an enforceable merger condition, that the joint applicants be required to offer stand-alone DSL service, without the bundling of *any* voice services (circuit switched or VoIP) throughout its service area.[23] Other commenters also

23. CFA et al. Petition to Deny, Affidavit of Mark Cooper and Trevor Roycroft, p. 66.

view stand-alone DSL as a necessary merger condition. The Georgia Public Service Commission notes:

> GPSC also requests that Applicants be required to offer stand-alone DSL service in BellSouth's service territory as a condition of any approval of the application for transfer of control. Currently, BellSouth does not offer its DSL service on a stand-alone basis. In fact, in order to receive BellSouth's DSL service, a customer must receive BellSouth's voice service as well. The anticompetitive impact of this policy is exacerbated in an environment where major competitors merge and customers have fewer competitive options.[24]

Mobile Satellite Ventures states:

> In light of the ability and incentive of the merged company to discriminate against competing VoIP providers, the Commission should impose certain conditions on the merging parties if it decides to approve the merger. The Commission should require the merged company to provide unbundled or "naked" DSL. In other words, consumers should be able to obtain DSL service from the merged company without being coerced into purchasing bundled voice services.[25]

Likewise, the New Jersey Division of Ratepayer Advocate supports stand-alone DSL as an enforceable merger requirement,[26] as does Access Integrated Networks, Inc.[27]

As the Commission is well aware, intramodal CLEC competition is in decline. To the extent that mass-market competition remains a possibility, intermodal alternatives appear to be the only hope at this point. As was discussed by CFA, *et al.,* intermodal competition already has many hurdles to overcome.[28] For some of these hurdles the Commission can do nothing. However, other hurdles, such as the anti-competitive bundling of DSL service and the incumbent's voice services, can be subject to the Commis-

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24. Comments of the Georgia Public Service Commission, p. 2.
25. Comments of Mobile Satellite Ventures Subsidiary LLC, p. 15.
26. Comments on Behalf of the New Jersey Division of the Ratepayer Advocate, Baldwin/Bosley Declaration at ¶260.
27. Comments of Access Integrated Networks, Inc., p. 4.
28. Petition to Deny of CFA, et al., Declaration of Mark Cooper and Trevor Roycroft, pp. 14-20.

sion's authority, and the hurdle remedied. The Commission, should it allow this merger to proceed, must include stand-alone DSL, without the provision of any voice services, as an enforceable merger condition. As explained previously in these Reply Comments, *supra* at p. 4, AT&T's compliance with the "naked DSL" condition in the SBC/AT&T proceeding leaves much to be desired. If the Commission does approve the AT&T/BellSouth merger, it should require AT&T to commit to publicizing the availability of standalone DSL as well as pricing that service at a substantial discount from the bundled price of DSL and telephone service.

4. Internet Backbone Markets

In its Petition and supporting declaration, CFA *et al.* have told the Commission that this merger introduces new concerns for the Internet backbone market, especially due to the unique position that AT&T will hold following the merger as the largest broadband access provider in the nation.[29] Other commenters also point to risks to the backbone market arising from the merger. Access Point *et al.* note with regard to Internet backbone markets that the merger will have profound effects.

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

SBC itself has stated:

> The size of a backbone is critical because a backbone's value to its users lies in its ability to provide a connectivity to the entire Internet... [W]here

29. CFA et al. Petition to Deny, Affidavit of Mark Cooper and Trevor Roycroft, pp. 57-62.

> one backbone achieves a substantial size advantage over its rivals, it necessarily "reduces the value of, and therefore the demand for, the rivals' products." At some point, "the market may 'tip,' with customers abandoning the rivals altogether because their networks are too small to be viable."

AT&T Corp. has likewise stated that:

> IBPs [Internet Backbone Providers] with unbalanced traffic, then, are expected to become customers rather than be peers. They can do so by entering into a "transit arrangement" pursuant to which, for a fee, an Internet Backbone Provider [] agrees to transport the traffic to terminating points on its network or on the networks of traffic to terminating points on its network or on the networks of other IBPs with whom it has a private peering relationship. Alternatively, a large IBP might agree to a "paid-for" private peering relationship allowing traffic to be terminated on its peering relationship allowing traffic to be terminated on its network, but the IBP paying for such an interconnection cannot represent to its customer that it has a private peering relationship. This significantly hampers its ability to compete with those that do have settlements-free private peering relationships.

Accordingly, if it approves the merger, the Commission should implement substantial new safeguards designed to protect against unreasonable discrimination in the provision of IP interconnection.[30]

Time Warner provides an insightful discussion of the negative impact on backbone markets that this merger will have:

> One of the Applicants' claimed efficiencies from the transaction is the ability to move all of BellSouth's Internet traffic on to AT&T's backbone. Once the BellSouth Internet traffic is completely migrated to AT&T's Internet backbone, AT&T's need to peer with other backbone providers will diminish and its bargaining power with respect to other backbone providers will again increase further. In addition, if any significant portion of AT&T/BellSouth's voice traffic is converted to VoIP traffic, its share of the Internet market could potentially increase dramatically as that

30. Access Point *et al.*, pp. 33-34, footnotes omitted. Quoting Opposition of SBC Communications Inc. to Application of Sprint Corporation and MCI WorldCom Inc., CC Docket No. 99-333 at 41 (Feb. 18, 2000), and Petition of AT&T Corp. to Deny Application of Sprint Corporation and MCI WorldCom Inc., CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T at 9 (Feb 18, 2000).

> VoIP traffic is retained on-net. As a result, the merged AT&T/BellSouth could be positioned to deal with every other backbone provider, including current Tier 1 peers, as transit customers.[31]

OPASTCO points out that the merger has a potentially negative impact on the operations of rural LECs through decreasing competition in the Internet backbone market:

> AT&T must maintain settlement-free peering arrangements with at least as many providers of Internet backbone services as it did prior to the merger. [This condition is necessary to prevent upward pressure on the prices that rural ILECs pay for access to the Internet backbone and, in turn, must charge their customers for Internet access. Once BellSouth's Internet traffic is migrated to AT&T's backbone, AT&T's need to maintain peering arrangements will diminish and its bargaining power over smaller backbone providers will increase. It is possible that AT&T will seek to peer only with backbone providers of comparable size (ex. Verizon), and those very large providers will charge smaller backbone providers to deliver their traffic. The elimination of peering arrangements among backbone providers would lead them to raise the rates they charge for access to their networks.][32]

The Commission cannot sit by and hope that the Internet backbone market will survive this merger unscathed. There is clear evidence that the growing size of AT&T in the backbone market, combined with the leadership role the company will take in the last-mile broadband market, will result in a unique position for AT&T in the backbone market. The leverage that AT&T gains due to its size and ability to self-generate massive amounts of backbone traffic, as well as supply the transit path for all off-network traffic that will terminate with AT&T's broadband customer base, places competition in the backbone market at risk. This merger may well "tip" the backbone market from competitive to "dominant firm." The negative impact on the backbone market is another reason why the Commission should reject this merger. If the Commission decides to go forward with the merger, it must place enforceable conditions on the combined company's actions in Internet backbone markets.

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31. Petition to Deny of Time Warner Telecom, p. 31.
32. OPASTCO Ex Parte, June 16, 2006, p. 3.

5. The Combined Companies' Wireless Holdings

a. Cingular

i. Unified Ownership and Management Is Not Merger Dependent

In their Public Interest Showing, AT&T and BellSouth devote considerable attention to the alleged benefits of bringing Cingular, which currently owned and operated as a joint venture, under the sole ownership and control of AT&T. The applicants assert that the unification of ownership and operation of Cingular resulting from the merger will facilitate the offering of converged wireless/wireline services by permitting the adoption of a single, unified IP Multimedia Subsystem (IMS) architecture and a single customer repository.[33] But, as commenter Rubin notes, the applicants have not shown that any efficiencies that would result from converting Cingular from a joint venture to a company with unified ownership and management are merger-dependent:

> The Applicants…claim that the merger is necessary to unify the management of Cingular. It is not explained why one or the other of the Applicants cannot acquire the other's interest in Cingular, or why Cingular cannot be spun-off as an independent entity.[34]

ii. Delivery of Converged Services Is Not Merger-Dependent

Similarly, the claimed "efficiencies" to be derived from having only a "single, unified IMS network" have not been shown to be merger-dependent. As Rubin observes, the benefits to be derived from IMS

> depend on the emergence of a multimedia industry standard logical architecture (IMS) and not on the proposed merger transaction. IMS "interworking" between networks obviates the need to combine the three companies, since it provides the gateways between networks of all kinds.[35]

33. Public Interest Showing, p. 14.
34. Comments of Jonathan L Rubin, J.D., Ph.D., pp. 19-20.
35. Comments of Jonathan L Rubin, J.D., Ph.D., p. 19.

iii. Creation of "Single Customer Repository" with Location, Presence and Other Data Poses Substantial Consumer Privacy Concerns; Under Section 222(f), Wireless Subscriber Location Data May Not Be Accessed, Used or Disclosed without Express Prior Consent of Customers.

Applicants bemoan the current parent companies' lack of access to customer information, including "presence, location and device parameters" from Cingular's network and claim that the "single customer repository" that would be made possible through the merger would allow the combined company to deliver new applications more effectively and more efficiently.

Totally missing from the applicants' discussion of the benefits is the countervailing risk that a "single customer repository" containing "presence, location and device parameters" for all AT&T, BellSouth and Cingular customers would pose to consumers' legitimate interests in privacy and personal security. Even if such a "single customer repository" were created, current Federal law prohibits the access, use or disclosure by a carrier of a wireless subscriber's location information without the express prior authorization of the customer.[36]

Applicants have not shown that consumers' legitimate privacy interests would be protected if a "single customer repository" were created, or that any new applications for

36. Section 222 (f) of the Communications Act of 1934, as amended by the Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, enacted Oct. 26, 1999, 113 Stat. 1286 ("911 Act") at Section 5 has been interpreted by the Commission as "restrict[ing] carriers' authority to access, use or disclose wireless location information 'without the express prior authorization of the customer,' except in three specifically established emergency situations." Request by Cellular Telecommunications and Internet Association to Commence Rulemaking to Establish Fair Location Information Practices, Order, FCC 02-208 17 FCC Rcd 14832 (2002).

consumers or any new managed services for business customers made possible through the merger are merger-dependent, and could not be provided just as easily by non-affiliated carriers through IMS gateways as those applications would be provided by a post-merger AT&T/BellSouth/Cingular behemoth.

b. Other spectrum holdings of AT&T and BellSouth

Applicants seek to downplay the significance of their respective non-Cingular spectrum holdings, burying the discussion of other spectrum interests under the heading "Miscellaneous Pro Forma Issues" and stating that "[a]lthough both AT&T and Bell-South have WCS or BRS spectrum, neither uses this spectrum for mobile services."[37]

The Comments demonstrate that these "miscellaneous" license holdings are both substantial and of great competitive significance. For example, Clearwire states:

> With the acquisition of BellSouth, AT&T will not only gain unprecedented control over several major overlapping wireline and wireless means of providing broadband connectivity and services to consumers and small businesses, but will also obtain enough spectrum to impede rapidly emerging wireless broadband networks from competing nationwide against AT&T in a key band. AT&T will control:
>
> (a) the largest wireline network with a much larger footprint with the addition of BellSouth's network;
>
> (b) a nationwide PCS network providing mobile wireless broadband;
>
> (c) an almost national footprint in the WCS (2.3 GHz) band which is suitable for WiMax- enabled wireless broadband service after consolidating BellSouth's licenses with AT&T's holdings; and
>
> (d) BellSouth's licenses and leases of 2.5 GHz BRS/EBS spectrum, in locations like Atlanta, New Orleans and other key southeast markets, *which are sufficient to impede the rapid development of nationwide WiMax-enabled wireless networks in*

37. Public Interest Showing, p. 132.

competition with each of AT&T's broadband options.[38]

CFA *et al.* have identified the substantial spectrum interests the applicants hold in the WCS and BRS/EBS bands as a valuable resource, the control of which by a post-merger AT&T would diminish the possibility for competition in wireless and broadband markets alike. Other commenters agree.

*i. WCS (2.3 GHz) Spectrum***:** Clearwire provides tables and maps which show post-merger WCS spectrum holdings (2.3 GHz band) covering nearly the entire U.S.[39] Although neither AT&T nor BellSouth is yet offering mobile services in the 2.3 GHz band nine years after licensing, and both are seeking a three-year extension of time, the companies have conducted trials and evaluated consumer devices that are mobile and/or portable and useable for the provision of pre-WiMax and WiMax networks in the WCS band.[40] But even BellSouth, the purported "technology leader," apparently has no near-term plans to use the spectrum or the technology as anything other than a "gap filler" ad-junct to its wireline DSL network:

> BellSouth has been a leader in testing and improving pre-WiMAX "wireless DSL" solutions, and this knowledge and experience will carry forward to forthcoming WiMAX and related technologies that will fill in gaps in broadband coverage where wireline deployment is not cost-effective.[41]

The 2.3 GHz WCS spectrum, like CMRS (cellular and PCS) and BRS/EBS, is "flexible use" spectrum, and can be utilized to render fixed, portable or mobile services.[42] Yet,

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38. Petition to Deny or, in the Alternative to Condition Consent, Clearwire Corporation, p. ii.
39. Petition to Deny or, in the Alternative to Condition Consent, Clearwire Corporation, Exhibit 1.01.
40. Petition to Deny or, in the Alternative to Condition Consent, Clearwire Corporation, pp. 9-10.
41. Public Interest Showing, p. 51.
42. Comments of Jonathan L Rubin, J.D., Ph.D., p. 17.

nine years after licensing and despite numerous trials, neither AT&T nor BellSouth has done anything of consequence with the spectrum, unless one counts seeking yet another extension of time to complete construction (*i.e.,* to warehouse the spectrum safely beyond the reach of a potential wireless broadband competitor). It is not surprising, then, that at least one commenter, the Center for Digital Democracy, has recommended that approval of the merger be conditioned upon divestiture of all of the companies' spectrum interests.[43] In view of the additional data on 2.3 GHz (WCS) spectrum holdings and trials provided by Clearwire, and AT&T's well-documented history of failing to deliver on its pre-merger commitments to the Commission, CFA *et al.* recommend that the Commission give serious consideration to requiring the pre-closing divestiture of both companies' holdings in the WCS band.

ii. BRS/EBS (2.5 GHz) Spectrum: Several commenters, in addition to CFA *et al.*, recommend that merger approval be conditioned on the applicants' divestiture of their interests (licenses as well as leases) in the 2.5 GHz band. Clearwire provides maps and tables showing that BellSouth holds BRS/EBS licenses in areas of its service territory in which an estimated 17 million people reside.[44] BellSouth controls the vast majority of channels in Atlanta, and a majority of channels are also controlled by BellSouth in some of the largest and most commercially significant markets in the Southeast, including Jacksonville, Orlando, Lakeland, Louisville and New Orleans. The strategic position of BellSouth in the BRS/EBS band gives the incumbent LEC the ability to block any poten-

43. Center for Digital Democracy, Petition to Deny, p. 6
44. Petition to Deny or, in the Alternative to Condition Consent, Clearwire Corporation, Exhibit 1.02.

tial competitor from rapidly deploying a nationwide WiMax-capable wireless broadband network. [45]

Clearwire reminds the Commission of its commitment to intermodal competition and the important role that this spectrum resource could play in enabling such competition:

> The Commission, and every Commissioner individually, has emphasized the importance of broadband competition among multiple platform providers. While even a duopoly sometimes provides downward price pressure, much more competition is necessary to provide a vigorous competitive environment and the Commission should disapprove as contrary to the public interest those license transfers that undermine the creation of independent facilities-based competitors.[46]

c. Spectrum Divestiture: CFA *et al.* believe that the fact that the non-Cingular licenses and spectrum leases of the applicants are not discussed in any detail in the Public Interest Showing represents the parties' effort to divert the Commission's attention from the obvious: the combined company, left to its own devices, will continue to warehouse valuable spectrum to the detriment of competitors and consumers alike.

CFA *et al.* agree with Clearwire's assessment that the solution adopted by the Commission in Sprint/Nextel (allowing the parties to retain the 2.5 GHz spectrum subject to construction deadlines is not appropriate here. The Commission record is littered with a trail of broken promises by SBC/ the "new" AT&T; moreover, the degree of concentration of overlapping broadband assets (wire/fiber, cellular/PCS, WCS and BRS/EBS) is much greater here than in the earlier proceeding. As CDD has aptly stated:

> These vast swathes of spectrum are especially well suited for broadband delivery via WiMax or other similar newly evolving technologies. Allow-

45. Petition to Deny or, in the Alternative to Condition Consent, Clearwire Corporation, pp. 14-15 and Exhibit 1.02.
46. Petition to Deny or, in the Alternative to Condition Consent, Clearwire Corporation, p. 16.

> ing the AT&T/BellSouth combination will withhold this potentially competitive wireless option from the market. Once they merge, a fiber-based AT&T would have no incentive to deploy, much less innovate in, wireless broadband services. There is no dearth of deep-pocketed purchasers who would be prepared to purchase either or both Cingular and the broadband-capable spectrum that AT&T and BellSouth currently control.[47]

Accordingly, CFA *et al.* renew their request that the Commission require divestiture of some or all of the Applicants' spectrum interests prior to, and as a condition of, merger approval.

C. The Merger and Competition in Other Markets

Issues related to competition are at the heart of this merger. The record is overwhelmingly clear that this merger will do nothing to benefit competition. Even joint applicants' own economists make no claims that this merger will improve competition.[48] Likewise, the only two commenters who do not oppose the merger fail to identify a single pro-competitive aspect of the merger. Thus, the best outcome which the Commission can expect is that "no harm" will be done to the already fragile state of competition. CFA *et al.*, in the Petition to Deny and supporting declaration, have reminded the Commission of the continuing problems of the CLEC industry.[49] The other parties' comments shed additional light on the shaky state of CLEC competition and the negative impact of the merger on competition in general.

Access Point *et al.* note, with regard to the prospects of facilities-based competition: The Commission found that CLECs "face substantial operational barriers to constructing their own facilities;" that competitors still face "steep economic barriers" to the

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47. Center for Digital Democracy, Petition to Deny, p. 6, footnotes omitted.
48. Carlton and Sider Declaration, pp. 6-8, *passim*. Carlton and Sider focus on lack of "competitive harm" rather than how the merger will advance competition.
49. CFA et al. Petition to Deny, Affidavit of Mark Cooper and Trevor Roycroft, pp. 12-13.

deployment of last mile facilities; and that these barriers "typically make duplication of such facilities uneconomic." It is not surprising then that competitors have only built their own last mile facilities to a very small percentage of business customers. Facilities based CLECs still rely on ILEC-provided loop facilities at 75% of their customer locations. Even AT&T Corp., in previous proceedings before this Commission (before it merged with SBC) informed the Commission that it relied on ILEC loops to serve approximately 95% of its business customers.[50]

These operational barriers will not be diminished one iota as a result of the merger; in fact, the merger will take a major competitor out of BellSouth's service area. The reduction of competition in BellSouth's service area and the other competitive harms likely to result from this merger provide sufficient reason for the Commission to deny the merger outright.

1. CLEC Allegations of Anticompetitive Conduct by AT&T/BellSouth

Several commenters identify, as an important issue, the question of which of the companies' business practices will dominate following the merger.[51] The contrasting business practices of BellSouth and AT&T with regard to CLECs have been identified as an important matter for the Commission to consider. The Commission should not dismiss the reports of anticompetitive practices outlined in the comments and declarations of various CLECs. The joint applicants will no doubt urge the Commission to disregard these reports as self-serving attempts to gain advantage through the regulatory process. But the current state of the CLEC industry, as reflected in the recent surrender of the two

50. Access Point *et al.*, p. 39, footnotes omitted.
51. Comments of Cbeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc. XO Communications, Inc. And Xspedius Communication, Attachment 1.

largest CLECs -- the legacy AT&T and MCI -- to their RBOC rivals, is a telling backdrop for claims of anti-competitive behavior. Given a competitive landscape dominated by CLEC rubble, continuing allegations of anti-competitive conduct should be carefully weighed by the Commission in its consideration of this merger.

Particularly troubling are reports of discriminatory and exclusionary practices on the part of BellSouth and AT&T. Reports of frequent network outages caused by BellSouth[52] deserve the Commission's attention through a condition of this merger, should it be allowed, on wholesale service quality. Likewise, the discrepancies in the ordering and provisioning, service terms, and volume discount policies[53] across the merging companies should be resolved by the Commission as a merger condition, and the Commission should enforce the more favorable terms currently available from either of the companies on the combined operations of the two companies. Similarly, reports of price squeezes should be of concern to the Commission.[54] EarthLink's reports of refusal to deal and anti-competitive practices are troubling.[55] The Commission should pay close attention to the information presented through the comments of Saturn Telecommunications Services Inc.,[56] and SwiftTel Communications, Inc.[57] Likewise, the Commission should carefully consider the information provided through the Declarations of James C. Falvey and Lisa

52. Comments of SwiftTel, pp. 3-4.
53. Comments of Cbeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc. XO Communications, Inc. And Xspedius Communication, Attachment 1 and Attachment 2.
54. Comments of Access Integrated Networks, Inc., pp. 2-3.
55. Petition to Deny of EarthLink, Inc., pp. 29-30.
56. Comments of Saturn Telecommunications Services Inc.
57. Comments of SwiftTel Communications, Inc.

R. Youngers attached to the Comments of Cbeyond Communications *et al.*,[58] the Declaration of Christopher Putala, which is attached to EarthLink's Petition to deny,[59] and the brief comments filed by the Federation of Internet Solution Providers of the Americas, Inc.[60] These comments and declarations reinforce CFA *et al.'s* observations regarding the state of competition and the negative impact that the proposed merger will have on competition.

2. The Merger Will Increase Coordination Abilities and Harm Competition

Several commenters point to an increased ability of the merged firm to coordinate activities, which would squash competition. The New Jersey Division of Ratepayer Advocate states:

> The Commission's optimism regarding the competition in the market should not extend to the Bells' coordinated market dominance. The Commission should reject the proposed transaction because, by eliminating an actual and potential competitor, the Commission would facilitate the coordinated interaction among remaining suppliers.[61]

Other commenters, including EarthLink, have observed that a smaller number of providers in the nationwide market makes coordination more likely:

> [T]he post-merger AT&T and Verizon would be able much more easily to coordinate pricing strategies designed to thwart competition. Thus, AT&T and Verizon could raise prices for switched and special access services in a coordinated fashion, or simply decline to lower prices as technology and other costs decline. This is especially likely given the lack of regulatory

58. Comments of Cbeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc. XO Communications, Inc. And Xspedius Communication, Attachment 1 and Attachment 2.
59. Declaration of Christopher Putala, Petition to Deny of EarthLink, Inc.
60. Federation of Internet Solution Providers of the Americas, Inc., p. 2.
61. Comments on Behalf of the New Jersey Division of the Ratepayer Advocate, p. 16.

> oversight due to recent forbearance grants and Phase I and II special access deregulation, which have allowed substantial (and unwarranted) rate increases for many of the vital services used by competitors.[62]

On the issue of increased potential for industry coordination following the merger, COMPTEL notes:

> The proposed merger is not in the public interest because it will facilitate anticompetitive coordinated behavior between the combined company and Verizon by strengthening the incentives and the ability for the two companies to: (1) tacitly agree not to compete, or (2) coordinate on prices and terms of competition. As stated above, upon consummation of the proposed merger, the number of region-wide special access providers in the combined AT&T-BellSouth territory will drop from three to two, with Verizon serving as the only other likely competitor to the combined company.[63]

Indeed, open calls for market coordination have recently been made by none other than AT&T CEO Edward Whitacre:

> When asked whether a price war between telco video, like AT&T's Lightspeed service, and cable wasn't inevitable, Whitacre said: "If I were the cable companies I guess I wouldn't be offering discounts."[64]

Such a statement made by the CEO of the largest telecommunications firm in the nation, and one that will get larger if the FCC does not block this merger, must be viewed with the utmost concern. If AT&T and its "intermodal" cable rivals "call a truce" on pricing, then the "cozy duopoly" that CFA *et al.* describe in our Petition to Deny only gets cozier, and consumers come out on the losing end. The increased ability for market coordination, which will further harm consumers, is another reason to reject this merger outright.

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62. Petition to Deny of EarthLink, Inc., p. 24, footnotes omitted.
63. Petition to Deny of COMPTEL, pp. 13-14.
64. "Whitacre Sees No Video Price War," John Eggerton -- Broadcasting & Cable, 6/2/2006. http://www.broadcastingcable.com/article/CA6340661.html?display=Breaking+News

3. Competition, Innovation, and Benchmarking

Absent competition, the process of evaluating the performance of an industry, or individual firms within and industry, regarding price, quality, and innovation can only be achieved through firm-to-firm comparisons, assisted by the collection of data, as has historically been done by the FCC. However, even with data collection backed up by the force of law, industry performance may be difficult to evaluate if multiple points of comparison are not readily available. Commenters point to the decreased ability to benchmark firm and industry performance as a negative impact of this merger. Quoting the SBC/Ameritech Merger order, Access Point *et al.* state:

> [T]he proposed merger's elimination of Ameritech as an independent major incumbent LEC will significantly impede the ability of this Commission, state regulators and competitors to use comparative practices analyses to discover beneficial, pro-competitive approaches to open telecommunications markets to competition and to promote rapid deployment of advanced services. More specifically, the loss of Ameritech as an independent source of strategic decisions and experimentation, and the increased incentive for the merged entity to reduce autonomy at the local operating company level as a result of the merger, would severely restrict the diversity that regulators and competitors otherwise could observe and, where pro-competitive, endorse. By further reducing the number of major incumbent LECs, the merger also increases the risk that the remaining firms will collude, either explicitly or tacitly, to conceal information and thereby hinder regulators' and competitors' benchmarking efforts. We therefore conclude that the proposed merger of SBC and Ameritech would impede the ability of regulators and competitors to make effective benchmark comparisons, which would force more intrusive, more costly, and less effective regulatory measures contrary to the 1996 Act's deregulatory aims and the interests of both the regulated firms and taxpayers. The loss of this more efficient method of oversight can only serve to further entrench the large incumbent LECs' substantial market power.[65]

Mobile Satellite Ventures notes:

> Second, even if AT&T and BellSouth would not enter into each other's local markets, the presence of each ILEC in its region nevertheless plays

65. Access Point, pp. 13-14, quoting SBC/Ameritech Merger Order at 51.

> an important role in providing benchmarks for ILEC practices. For example, in deciding whether special access rates charged by AT&T within its region were just and reasonable, an appropriate benchmark would be the rates charged for similar services by BellSouth in its region. The Commission has acknowledged the importance of such benchmarking or comparative practice analyses.[66]

EarthLink states:

> The Commission has long recognized that the decrease in competition as a result of a proposed merger can make it substantially more difficult for it to use the performance of the remaining comparably-situated companies to "benchmark" industry standards to ensure the public is served by just and reasonable rates and terms and can impede the innovation incentives of the remaining providers. Especially in light of the striking consolidation of the industry since the 1996 Act, the proposed merger will reduce even further the vital market benchmarks that assist the Commission in ensuring that the public interest is served going forward and the communications-consuming public receiving the price, quality and innovation benefits of a competitive market. As noted by the Commission, "[w]hen only a few similarly-situated benchmark firms remain, the harms to benchmarking increase more than proportionately with each successive loss of a firm as an independent source of observation." Simply put, the substantial reduction in the number of comparably-sized incumbent LEC competitors that would result from the proposed merger will diminish the critical market and regulatory yardsticks to ensure incumbent LECs serve the public's interest rather than their private interests.[67]

The New Jersey Division of Ratepayer advocate points to legacy AT&T comments in the SBC/Ameritech merger proceeding as an indicator of the impact of the loss of benchmarking.

> Applicants' claim that there is "no regulatory significance" to the number of RBOCs, is thus astonishing. That claim is particularly egregious in light of the fact that the Applicants have themselves repeatedly emphasized the importance of benchmarking when it has suited their purposes. For example, Ameritech has stated that "[n]o amount of sophistry can suppress the importance of benchmarks," and that "division of the local exchange networks among seven independent companies has greatly enhanced the detectability of any monopoly abuses and the effectiveness of regulation. Likewise, SBC opined that seven benchmarks provided "an effective deterrent against even subtle attempts to abuse any advantage which might

66. Comments of Mobile Satellite Ventures Subsidiary LLC, p. 6.
67. Petition to Deny of EarthLink, Inc., pp. 32-33, footnotes omitted.

> arise from ownership of local exchange communications facilities." Now, of course, SBC seeks to reduce this number to four.[68]

Time Warner Telecom states:

> [T]he proposed merger will diminish or eliminate entirely regulators' ability to rely on benchmarking to regulate the RBOCs' conduct. As the Commission has held, "a merger that reduced the number of major incumbent LECs from four to three would so severely diminish the Commission's ability to benchmark that *it is difficult to imagine that any potential public interest benefit could outweigh such a harm."*[69]

The declining ability of this Commission to benchmark industry performance is another consequence of this merger. If the Commission decides to allow this merger to go forward, it should consider expanding the data collected from the combined company to increase the ability of the Commission to keep track of the impact of the merger.

4. Special Access Markets and Competition

The importance of special access markets, and the impact of the proposed merger on special access markets, are both driven home by the petitions and comments. Not surprisingly, most commenters address special access markets. However, it is notable that absent from this discussion are the legacy AT&T and MCI, firms which had weighed in on this issue since the divestiture, voicing sentiments which regularly pointed to continuing RBOC monopoly power in special access markets.

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68. Comments on Behalf of the New Jersey Division of Ratepayer Advocate, pp. 18-19, citing Petition of AT&T Corp. To Deny Applications, Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For consent to Transfer of Control, CC Docket No. 98-141, October, 1998, at 28-29
69. Petition to Deny of Time Warner Telecom, p. 50, emphasis in the original.

Commenters indicate that special access markets face very limited competition, with "intermodal alternatives" being nonexistent.[70] COMPTEL states that the merger will increase market power in special access markets[71] and points to the impact of the merger on special access competition in the BellSouth region:

> Despite the applicants' vague statements regarding AT&T's total special access assets, one thing is certain: the new AT&T now possesses all of the old AT&T's special access facilities. In the old AT&T's wholesale sales literature, the company stated that it had roughly 61,000 total route miles of fiber, over 16,000 miles of which were used to provide special access service. Although far from ideal, the presence of AT&T as a special access competitor likely would exert some disciplining effect on the special access rates charged by BellSouth. If the proposed merger is consummated, however, AT&T will no longer be able to exert any price discipline over BellSouth's rates. Further, as the Commission itself has recognized, the large sunk costs and economies of scale associated with the deployment of loop and transport facilities make it unlikely that any competitive carriers will enter the market to replace AT&T's competitive presence.[72]

The Commission should heed these warnings regarding the impact of its premature deregulation of special access services.

Both wireline and wireless markets will be affected by the consolidation of special access markets resulting from the merger. As Sprint Nextel explains to the Commission:

> Sprint Nextel is heavily dependent on the special access services of BellSouth and AT&T, which it purchases in order to provide wireless services to Sprint Nextel customers. In fact, ***Sprint Nextel has no alternative to BellSouth or AT&T for more than 99 percent of Sprint Nextel's PCS cell sites in the BellSouth and AT&T service areas.*** BellSouth and AT&T, the providers of this key input, however, are also the two owners of Sprint Nextel's competitor, Cingular, the nation's largest wireless provider.[73]

COMPTEL notes:

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70. Time Warner Telecom Petition to Deny, p. 3.
71. COMPETEL Comments, p. 4.
72. COMPTEL Comments, p. 7, footnotes omitted.
73. Sprint Nextel Comments, p. i, emphasis in original.

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

> [Wireless] carriers are major consumers of ILEC special access services. They have no choice. Although wireless services are increasingly viewed as a form of inter-modal competition to wired telephony services, including broadband services, the ironic fact is that wireless networks out of necessity consist largely of wireline facilities. . . . These [facilities] overwhelmingly are made with landline transport facilities purchased from ILEC special access tariffs.[74]

From the point of view of wireline providers, the merger will increase market power and harm competitors. Global Crossing notes:

> Global Crossing estimates that 38% of its national annual special access purchases would be directed to a combined AT&T/BellSouth. Naturally, such levels of concentration are worrisome especially considering that Global Crossing has implemented numerous optimization measures over the years in an attempt to reduce its reliance on AT&T and BellSouth's special access services. This concentration, combined with increasing pricing flexibility, raise serious concerns regarding AT&T/BellSouth's pricing power and willingness to deal.[75]

Global Crossing proposes a "Commercial Arbitration Remedy" to deal with the growing market power in special access markets that the merger will cause.[76]

Time Warner Telecom expresses sentiments similar to those advanced by the commenters previously cited, but with a broader focus:

> Perhaps the most serious harm caused by the proposed merger is that combining the incumbent local operations of AT&T and BellSouth would give the merged entity a greater incentive to overprice, deny, delay or degrade competitors' access to needed inputs than is the case with either AT&T or BellSouth today. . . . the instant merger would have serious anti-competitive effects with respect to interconnection, exchange of IP voice

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74. COMPTEL Comments, p. 9, citing to Comments of AT&T Wireless Services, Inc., In the Matter of AT&T Corp. Petition to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service, RM-10593, at 2-3 (filed Dec. 2, 2002).
75. Global Crossing Comments, p. 3.
76. Global Crossing Comments, pp. 11-14.

> traffic and access to local transmission facilities needed to serve the business market.[77]

Thus, while the problems identified by COMPTEL, Sprint/Nextel, and Global Crossing have their origins in the special access market, the Commission must recognize that the detrimental effects of the merger extend well beyond special access. If the Commission loses sight of the big picture, the interrelated impacts of this merger on competition in multiple markets and the negative competitive synergies resulting from these compounding competitive harms will result in a profoundly negative impact on competition.

a. Negative Impact on Special Access Markets of the Expanded Footprint Resulting from the Merger

Commenters note that the merger will create an expanded footprint for AT&T, which may have a negative impact on the already low levels of special access competition in the BellSouth region:

> The combination of AT&T and BellSouth will have anticompetitive effects on the availability of reasonably priced special access service in the enlarged footprint of the merged company in at least three ways. First, as the Commission found in the SBC-Ameritech merger, the expanded service territory of the merged company will increase its incentive and opportunities to engage in anticompetitive practices designed to harm national competitors. . . Further, because it will be able to control special access rates over a wider geographic area, increases in special access prices by the merged company will have a greater adverse impact on retail competition. Second, because Cingular will become a wholly-owned subsidiary, the merged company will have a greater incentive to use special access pricing flexibility to benefit its wireless affiliate. Third, the proposed transaction will eliminate AT&T as an unaffiliated purchaser and provider of special access service in BellSouth's region.[78]

Sprint/Nextel expresses similar concerns:

> Currently, BellSouth and AT&T share ownership of Cingular. This reduces their incentives to engage in discriminatory practices in the provi-

77. Petition to Deny of Time Warner Telecom, pp. 33-34.
78. Sprint Nextel Comments, p. 5.

> sion of wireline services, such as special access, that benefit Cingular because each company bears the full cost of any such behavior, but neither company would receive the full benefit of the downstream effects.[79]

Likewise, Time Warner states:

> [T]he merger would increase the merged entity's incentive to use its persisting (and, after the merger, increased) market power over inputs to raise rivals' costs. As the Commission found in the context of the SBC-Ameritech and Bell Atlantic-GTE mergers, the extension of an ILEC's network footprint through merger allows the merged firm to appropriate a larger share of the benefits from raising rivals' costs. This increase in the benefits from exclusionary conduct increases the merged entity's incentive to engage in this conduct. The more the network footprint expands, the more the incentive to harm competitors increases.[80]

Thus, the Commission is facing the same market reality in this merger as it has faced in previous mergers. The expanded footprint that will result from this latest merger will continue to reinforce AT&T's market power, and feed the incentives to raise rivals costs and discriminate. CFA *et al.* encourage the Commission to put a stop to this downward spiral to outright monopoly, and deny the merger. If the Commission does not stop the merger, it must condition its approval on the parties' compliance with one of the merger conditions proposed by CFA *et al.* (namely, the divestiture of AT&T's assets and customers in BellSouth's territory). This condition will undermine the post-merger company's incentives to disadvantage its rivals, and prevent these incentives from growing any further.

b. Special Access Rate Levels Indicate Continuing Market Power

Commenters Global Crossing, Access Point *et al.*, and Cbeyond *et al.* point to the high and rising prices, and high returns earned by AT&T and BellSouth, as evidence of

79. Sprint Nextel Comments, p. 9.
80. Petition to Deny of Time Warner Telecom, p. 4.

continuing market power in special access markets.[81] Similarly, the New Jersey Division of Ratepayer Advocate points out that market forces are certainly not sufficient to guarantee the flow-through of merger synergies to consumers in markets which continue to exhibit monopoly power, including the special access market.[82] There is ample evidence of monopoly power in special access markets. Cbeyond *et al.* point to the published research of FCC economists Uri and Zimmerman,[83] who have analyzed, in detail, market performance in the post pricing-flexibility period. Uri and Zimmerman note:

> Given the prevailing situation, there is a clear need to revisit the pricing flexibility order. First, the product market for special access service needs to be more carefully examined and, second, the metrics used to define the potential for competition need to be revamped.[84]

Thus, there is ample evidence to justify Commission consideration of the level of special access rates as part of the merger process. The Commission should revisit special access rate levels even if it denies this merger application. If the Commission does decide to approve the merger, it should consider adopting the merger conditions proposed by OPASTCO, Sprint/Nextel, and Access Point *et al.,* all of whom recommend that the combined company's special access rates be evaluated and set to reasonable levels, or that the special access rates be capped.[85]

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81. Comments of Global Crossing, pp. 4-5. Comments of Cbeyond *et al.*, p. 69. Comments of Access Point *et al.*, p. 35.
82. Comments of the New Jersey Division of Ratepayer Advocate, Baldwin/Bosley Declaration, p. 100.
83. Comments of Cbeyond *et al*., p. 69.
84. Noel D. Uri and Paul R. Zimmerman, "Market power and the deregulation of special access service by the Federal Communications Commission," Information & Communications Technology Law, Volume 13, Number 2 / June 2004, pp. 129 - 173.
85. Sprint/Nextel Comments, p. 14. Access Point, et al., Comments, p. 66. OPASTCO Ex Parte, June 16, 2006, p. 3.

c. Increasing Special Access Market Power Enables Price Squeezes

With regard to increased incentives to discriminate against competing wireless carriers, COMPTEL states:

> [T]he post-merger single owner of both the ILEC input supplier and the downstream mobile wireless carrier will have an incentive to raise input prices to Cingular as well as all of its rivals. By raising its rivals' costs, the merged firm could either collect higher profits through a combination of higher access revenue and higher retail wireless revenue (if the rivals raised their retail rates and Cingular followed), or the merged firm could raise its rivals' costs, not follow their price increase, and simply take profits through increased access revenues and higher market share in the retail market. In both AT&T and BellSouth territories, the acquisition of BellSouth by AT&T will create the incentive and ability to manipulate wholesale input and retail prices for wireless services that did not exist previously.[86]

A similar evaluation is provided by Mobile Satellite Ventures:

> In fact, AT&T has been known to leverage its region-wide coverage by insisting that customers enter into exclusive agreements for region-wide special access services, thereby forestalling any potential competition from competitive special access service providers who serve specific routes or smaller regions. Thus, competing wireless carriers such as MSV are in the unfortunate position of having to depend on AT&T and BellSouth for special access services within their service regions, with the ILECs having the incentive and ability to discriminate against them in favor of competing wireless carrier Cingular.[87]

Even the applicants have not asserted that this merger will improve competition in special access markets. On the contrary, all of the record evidence points to increasing market power, replete with increased incentives to discriminate, increase prices, and undermine competition.

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86. COMPTEL Comments, p. 11.

87. Comments of Mobile Satellite Ventures Subsidiary LLC, p. 12, citing T-Mobile Reply Comments in WC Docket No. 05-65 at 10 n.29.

d. Summary of Special Access Market

In the Petition to Deny, CFA *et al.* made it clear that the proposed merger would provide no benefit for special access markets:

> The complete dominance of the local transport and special access markets by the incumbent local exchange carriers, particularly after the absorption of their two largest competitors has been clearly demonstrated in prior merger proceedings. This merger extends that process to another region. The longstanding failure of competition to discipline price in the special access market, even prior to recent absorption of the largest competitive providers of local transport and special access refutes the claim that there would be sufficient post-merger competition to prevent anticompetitive abuse in this market. The track record on special access rates provides a chilling warning about the concentration of these facilities. The FCC de-regulated these rates in 1999 on the mistaken belief that this market was competitive. Since then, rates and profits have risen dramatically. There is simply inadequate competition to discipline BOC market power over price.[88]

To address the lack of competition and the clear evidence of market power, CFA *et al*. have proposed that a structural solution would provide the most benefits for competition. By requiring divestiture of AT&T's operations in BellSouth's service area, the Commission could kill two birds with one stone. It would both enhance CLEC competition through the spin-off of AT&T's mass market customers to an independent entity, and preserve an independent supplier of special access services, one that will be lost if AT&T absorbs BellSouth.

The divestiture of AT&T's in-BellSouth-region assets is also supported by Access Point *et al.,* who note that the divestiture of assets in the SBC/AT&T DOJ consent decree was not as effective as it could have been:

> The Commission should go considerably further in terms of divestiture of BellSouth in-region assets than agreed to by SBC/AT&T in its consent decree with the Department of Justice. Those divestitures as a practical matter appear to involve unused fiber. Therefore, their divestiture will have

88. Petition to Deny of CFA, et al. Cooper/Roycroft Declaration, pp. 41-42.

> little impact on competition. Instead, the Commission should require a substantially greater divestiture possibly including all of the local exchange and exchange access facilities and residential and business customers of AT&T in the BellSouth region. This is the only divestiture that would prevent further concentration in the local market that is already dominated by BellSouth in its service territory.[89]

In the event that the Commission does not require divestiture, which is within the Commission's authority,[90] CFA *et al.* recommend that conditions be placed on the combined companies' special access offerings, including conditions similar to the DOJ's divestiture requirement, which "spun off" special access facilities through indefeasible rights of use. In addition, CFA *et al.* recommend the adoption of the same service quality merger conditions which were adopted by the Commission in the AT&T/BellSouth and Verizon/MCI mergers. Finally, special access rates, across the board, must be evaluated regardless of the disposition of the merger application.

5. Long Distance Competition

CFA *et al.* have highlighted the negative impact of this merger on long distance competition, noting that "the merger will result in AT&T establishing an overwhelming market position for wireline long distance services in BellSouth's region."[91] Access Point *et al.* note the following with regard to long distance.

> The combined region would include nearly half the states in the US, including seven of the ten most populous (California, Texas, Florida, Illi-

89. Petition to Deny of Access Point, ACN, DeltaCom, FDN Globalcom, Lightyear, McLeodUSA Pac-West Telecomm Smart City,US LEC. WC Docket No. 06-74. June 5, 2006, p. 65.

90. As noted in ACN *et al.*'s Petition to Deny: "The Commission has ample jurisdiction to require divestiture. See, e.g., BellAtlantic/GTE Merger Order, at 1-2, 28-29 (Commission required the transfer of the Internet backbone and related assets of GTE Internetworking, Inc. (Genuity) to "an independently owned public corporation" be completed prior to merger closing)." ACN Petition, p. 65.

91. CFA *et al.* Petition to Deny, Affidavit of Mark Cooper and Trevor Roycroft, p. 14.

> nois, Ohio, Michigan and Georgia) and two-thirds of its population. Combined, the population of these states in 2005 was over 195 million, or nearly two-thirds of the total population of the US! Effectively, since AT&T's long distance operations would now be part of the merged entity as well, the merger would have the effect of reconstituting the old Bell monopoly for two-thirds of the American people, and the bad old pre- divestiture days of rampant discrimination and favoritism, which have already been on the rise, will for all intents and purposes complete their triumphant return. As the Commission cogently and – it turns out – presciently noted in 1999:
>
> > This merger would partially reverse the breakup of the Bell System prompted by complaints against AT&T's discrimination towards nascent competitive long distance carriers. As noted above, the old Bell system, with its large footprint, made it difficult for rivals to obtain access to necessary inputs, thus prompting its ultimate breakup. This merger would result in a large footprint that would take a big step toward recreating the Bell System whose discrimination against interexchange carriers led to divestiture in the first place. We find this inconsistent with our mandate under the Act to reduce regulatory involvement in telecommunications markets.[92]

EarthLink points out:

> Given that the proposed merger would add the entire Southeastern United States to the geographic territory in which AT&T would be the primary incumbent LEC, the post-merger AT&T would control both the terminating and originating access ends to a striking share of the country's access lines. For example, if the merger is consummated, PSTN callers in San Francisco, CA who call anywhere to the former BellSouth regions (e.g., Miami, FL, Atlanta, GA or Raleigh, NC) would be served by AT&T at both the originating and terminating ends of the call. With this greatly enhanced control over in-region calling on an end-to end basis, the merged AT&T would have a better ability to evade regulatory oversight since it would be the primary originating and terminating carrier on an end-to-end basis, making it easier to be even more effective at obstructing competitors.[93]

Likewise, the New Jersey Division of Ratepayer Advocate points to the decline of competition in the long distance market, and additional lessons which can be learned from the long distance market:

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92. Access Point *et al*., p. 22-23 footnotes omitted. Quoting SBC/Ameritech Merger Order at ¶103.
93. Petition to Deny of EarthLink, Inc., p. 25, footnotes omitted.

> The prospect of competitive choice among suppliers of basic local telecommunications services for mass market consumers has already suffered serious setbacks. The FCC's approvals of legacy SBC's entry into the long distance market in twelve jurisdictions and BellSouth's long distance entry in nine jurisdictions has enabled these Bells to leverage their unique position in the local market to enter new markets by bundling local and long distance services for consumers. Furthermore, the FCC decided to eliminate the requirement of regional Bell operating companies to share their broadband. Without detailed accounting, which is subject to regulatory audit, it is difficult to detect and to prevent cross-subsidization of Bell's entry into broadband and IPTV markets with revenues from non-competitive services.[94]

The negative impact of this merger on long distance competition, which still is a distinct service provided by firms specializing in the provision of long distance services, provides another reason for this Commission to reject this merger.

6. Intermodal Competition

CFA *et al.* have told the Commission that it has placed too much faith in the ability of "intermodal" alternatives, such as "over-the-top" VoIP and wireless, to provide market forces capable of disciplining the market power of the merged AT&T/BellSouth. Other commenters also find this to be the case. Access Point *et al.* indicate that there are numerous issues which prevent over-the-top VoIP and wireless services from being reasonable substitutes for AT&T/BellSouth's wireline services.[95] With regard to intermodal alternatives, the New Jersey Division of Ratepayer Advocate notes:

> Facilities-based voice-over-Internet-protocol (or "VoIP") and "over-the-top" VoIP services are not viewed as substitutes by mass market consumers and, in many cases, are simply not comparable in terms of cost. Cable-based telephony raises concerns with respect to safety issues and is not comparable in terms of price and consumer satisfaction. As recognized by the Commission in its *SBC/AT&T Merger Order*, "over-the-top" VoIP services may not be economical because of the requirement for purchasing

94. Comments on Behalf of the New Jersey Division of the Ratepayer Advocate, p. 10.

95. Access Point *et al.*, pp. 44-46.

> broadband and customers who already subscribe to broadband may still not view the services as substitutes depending on "the attributes of the service and the consumer's willingness to trade off service characteristics for lower prices."[96]
>
> Cable companies do not discipline the prices, quality, and terms of conditions of basic telecommunications services offered to customers that do not seek bundles. Furthermore, even those customers who are willing and able to pay for bundled packages of voice, data, and/or video services confront high transaction costs to migrate from one supplier to another. Transaction costs include the time and financial outlay for service installation, equipment, and an e-mail address change.[97]
>
> [T]he emerging rivalry between cable and telco companies, which seek to offer customers bundles of video, data, and voice, represents at best a duopoly. A duopoly is not an effective form of competition.[98]

Other commenters who also question VoIP's ability to constrain AT&T's market power include Cbeyond *et al.*[99]

Commenters also have stated that wireless services do not provide a reasonable replacement for wireline services. The New Jersey Division of Ratepayer advocate notes:

> The Applicants' own filing suggests that even the carriers themselves view wireline and wireless as complements, rather than perfect substitutes. Carlton and Sider state that one of the benefits of the merger will be the simplified governance of Cingular and the facilitation of "the merged firm's ability to *jointly market wireline and wireless services to mass market and business customers.*"[100]

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96. Comments on Behalf of the New Jersey Division of the Ratepayer Advocate, Baldwin/Bosley declaration, ¶116, footnote omitted.
97. Comments on Behalf of the New Jersey Division of the Ratepayer Advocate, Baldwin/Bosley declaration, ¶141, footnotes omitted.
98. Comments on Behalf of the New Jersey Division of the Ratepayer Advocate, p. 14, referencing Baldwin/Bosley declaration, ¶¶139-147.
99. Comments of Cbeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc. XO Communications, Inc. and Xspedius Communication, pp. 48-49.
100. Comments of the New Jersey Division of Ratepayer Advocate, Baldwin/Bosley Declaration, pp. 64-65.

The wireless and wireline bundling that AT&T recognizes as an essential marketing strategy, as CFA *et al.* discussed in our Petition to Deny,[101] speaks volumes to the cross-price elasticity between wireless and wireline. Creating bundles of services always requires that the services be complements.[102] If substitutes are sold in a bundle, customer confusion is the result.

Furthermore, before the Commission gives any weight to claims that intermodal competition provides a competitive check on AT&T and BellSouth's market power, the Commission must consider the leverage that AT&T and BellSouth already have over these intermodal alternatives. BellSouth does not sell stand-alone DSL service,[103] thus "over-the-top" VoIP fights an uphill battle in the BellSouth region. Cingular is the largest wireless provider in the nation, and the combination of AT&T and BellSouth, by the applicants' own account, will result in a deeper integration of wireless and wireline marketing.[104] This integration will do nothing to encourage intermodal substitution, unless the combined company finds that substitution to be more profitable. Furthermore, as was discussed earlier in these Reply Comments, the record clearly shows that the combined company will exercise significant leverage over competing wireless carriers through its dominance of the special access market, a dominance which will only increase if this merger is approved without requiring a divestiture of AT&T's in-BellSouth-region assets,

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101. Petition to Deny of CFA *et al.,* Declaration of Mark Cooper and Trevor Roycroft, p. 17.
102. Bolton, R. "Evaluating Pricing Strategies for New Residential Consumer Services in the Telecommunications Industry." Advances in Telecommunications Management, pp. 114-124.
103. Comments of the Georgia Public Service Commission, p. 2.
104. Carlton and Sider Declaration, ¶10.

or otherwise imposing substantial merger conditions relating to special access markets. Thus, intermodal competition does nothing to offset the competitive harm of this merger.

7. The Need for a "Fresh Look" Post-Merger

CFA *et al.* have recommended that the Commission, should it approve this merger, examine all competition-related rulings, given the tremendous impact that this merger will have on the competitive landscape. This sentiment also has been expressed by other commenters, especially with regard to the non-impairment issue.[105] While non-impairment is certainly an important issue, CFA *et al.* view the need for a fresh look as being much broader. For example, as was discussed earlier, there is ample evidence that the assumptions surrounding the degree of competition in special access markets are no longer relevant. Thus, a wide-ranging assessment of competition policy following the merger is in order. This sentiment is expressed by OPASTCO, which requests that a number of conditions oriented toward the special access and other wholesale markets be imposed as merger conditions:

> Prior to the completion of the minimum five-year period for which the above conditions are in effect (which govern private line, special access, and Internet backbone), the FCC should conduct an analysis for each of the relevant wholesale services to determine whether or not they are sufficiently competitive. A service is sufficiently competitive if AT&T would not have undue market power over rural ILECs in contract negotiations. Only to the extent that the FCC determines that a specific service is sufficiently competitive should AT&T be relieved of some or all of the conditions for that particular network access service.[106]

105. Comments of Cbeyond, et al., p. 103. Comments of the New Jersey Division of Ratepayer Advocate, Baldwin/Bosley Declaration, p. 126.
106. OPASTCO ex parte notice, June 16, 2006, p. 3.

While OPASTCO's focus is on the post-merger firm's market power *vis-à-vis* rural ILECs, the Commission, to serve the public interest, must evaluate market power broadly, both with regard to wholesale and retail markets under its jurisdiction, and with respect to markets for Internet-related services, such as backbone services.

CFA *et al.* also recommend that a pro-competitive "fresh-look" be allowed for AT&T/BellSouth customer contracts permitted following the merger, should the merger be approved. Cbeyond also supports such a fresh look policy.[107] Given the overall negative impact of this merger, inclusion of a "contractual" fresh-look provision would be an incremental offset to the competitive harm done by this merger.

8. Summary–The AT&T/BellSouth Merger Clearly Harms Competition

Overall, the impact of this merger on the competitive landscape is negative. The tired argument that AT&T must "bulk up" to meet the competition should be laid to rest once and for all. AT&T is already the largest and most dominant telecommunications firm in the nation. Following this merger, should it be approved, AT&T will become even larger, with service areas ranging from coast-to-coast, and serving the majority of major market areas in the nation. The harms to competition arising to this merger are many, and the Commission has ample record evidence to support this contention. For competition's sake, this merger must be denied. If it is not denied, significant and enforceable pro-competitive conditions, such as those offered by CFA *et al.* in our Petition to Deny, and further discussed in these Reply Comments, must be placed on this merger.

107. Comments of Cbeyond *et al*., p. 107.

III. Conclusion

Unless the Commission takes action now, the Commission will take a path which can only lead to the re-monopolization of the U.S. telecommunications industry. The Comments filed in this proceeding provide ample evidence that this latest merger does not serve the public interest. Rather, the combination of AT&T and BellSouth will result in significant harm to current and future competition. As a result, the Commission should simply deny the applicants' request. If the Commission does allow this merger to go forward, it must place substantial and enforceable conditions on the operations of the combined company.

The Commission cannot ignore the impact of this merger on competition in BellSouth's service area. AT&T continues to be a major provider of both mass-market services and special access services. Absent Commission action, this competition will be erased. If this merger goes forward, these AT&T customers and assets must be spun off to an independent entity. Similarly, the Commission cannot stand by and allow anti-competitive actions pursued by BellSouth, which still bundles its DSL and voice services, to continue. If the "future" which the Commission sees is "intermodal" competition, BellSouth's anticompetitive actions undermine this emerging alternative. In addition, the applicants, already joint venture partners in Cingular, one of the largest national wireless providers, also control vast, but almost completely untapped, spectrum resources in the 2.3 to 2.5 GHz range. These spectrum resources could be put to productive use by one or more independent firms to provide broadband services in competition with AT&T and BellSouth. The applicants' apparent warehousing of spectrum resources is yet another anti-competitive practice which must be stopped whether or not this merger is allowed to proceed. Suitable spectrum is too scarce to allow joint applicants to undermine the poten-

tial for last-mile broadband competition. Likewise, given the current differences associated with AT&T and BellSouth's dealings with CLECs, the Commission should insist on the best practices across the two companies being implemented system-wide. Furthermore, UNE rates should be frozen and end-users should be given a fresh look following the merger, should the Commission allow it. The Commission will be remiss in its duties if it fails to take these remedial steps with regard to competition should this merger be allowed to go forward. As explained in CFA *et al.'s* Petition to Deny, the Commission could resolve some of these problems by requiring the divestiture of all of AT&T's operations in BellSouth's service area. However, should the Commission not follow this recommendation, a thorough examination of AT&T's operations in BellSouth's service area should be conducted, and divestiture conditions similar to those pursued in the SBC-AT&T merger should be implemented.

Finally, as the Commission considers this merger, it must carefully weigh the impact of the merger on the Internet. The U.S. holds a unique position as the birthplace of the Internet, and the Commission's previous pro-competition policies played no small part in the growth of the Internet. AT&T will become the largest provider of broadband services following this merger. This role, combined with its substantial Internet backbone facilities, gives rise to new risks to the Internet by providing AT&T with increased leverage over both end-user customers and the providers of Internet content, services, and applications. The Commission must impose conditions requiring network neutrality, as well as safeguards to protect peering arrangements, if it decides to allow this merger to proceed. The Internet is at risk, and the Commission should not allow the vibrant competition which has been the defining feature of the provision of Internet content, services, and

applications to date to succumb to the same dismal fate that has befallen local and long distance competition on the Commission's watch.

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Certificate of Service

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