

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

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

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

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

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

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

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

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

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

⁵² See Carlton & Sider Reply Decl. ¶ 20.

⁵³ *Id.* at 21.

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

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

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

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

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

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

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

⁵⁸ DOJ Response to Public Comments at 24.

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

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

⁵⁹ *Id.*

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

⁶¹ DOJ Response to Public Comments at 26.

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

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

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

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

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

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

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

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

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

⁶⁷ See DOJ Tunney Act Reply at 16.

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

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

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

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

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

Nor is there any merit to COMPTTEL’s unsupported assertion that AT&T has been a price leader for wholesale special access services in the BellSouth region⁷⁴ – a claim that is impossible to reconcile with AT&T’s extremely small wholesale sales in those areas. In fact, based on detailed evidence that it obtained from CLECs and AT&T, the DOJ concluded in the SBC/AT&T proceedings that “AT&T was often among the *highest-priced* CLECs for Local Private Lines.”⁷⁵ The same is true in the BellSouth region.⁷⁶

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

⁷² See Carlton & Sider Reply Decl. ¶ 38.

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

⁷⁴ COMPTTEL Pet. at 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸³ *SBC/AT&T Merger Order* ¶ 41.

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

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

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

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

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

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

⁸⁸ *SBC/AT&T Merger Order* ¶ 45.

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

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

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

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

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

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

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

COMPTEL’s speculation that AT&T/BellSouth and Verizon may agree not to compete⁹⁸ was properly rejected by both the Commission and the DOJ in the prior mergers. The “billions of dollars” SBC and Verizon spent to acquire AT&T and MCI create “strong incentives to fully utilize [their] assets” in each others’ regions.⁹⁹ Likewise, this merger will enhance AT&T’s ability to use all of its assets to compete vigorously with Verizon (and the many other robust competitors). This merger will thus *expand* the scope of aggressive head-to-head facilities-based competition between AT&T and Verizon.¹⁰⁰ In all events, as the Commission pointed out, the

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

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

⁹⁶ *Id.*

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

⁹⁸ COMPTEL Pet. at 14.

⁹⁹ *SBC/AT&T Merger Order* ¶ 54.

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁵ Carlton & Sider Reply Decl. ¶ 46.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶ 47.

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

wireless providers while purchasing special access services and that the market was fully “competitive.”¹⁰⁹

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

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

Accordingly, the Commission has repeatedly rejected claims that ILECs could use market power

¹⁰⁹ *TR Remand Order* ¶ 36 & n.106.

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

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

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

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

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

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

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

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

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

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

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

In any event, the allegations raised by merger opponents are baseless. Competition has resulted in *reductions*, not increases, in special access prices since 2000.¹¹⁷ The data presented by merger opponents distort AT&T's and BellSouth's actual prices by focusing solely on base rates (*i.e.*, list prices) that do not reflect available discounts. TWTC concedes this point, acknowledging that "the availability of volume and term discount plans permits most competitors to purchase special access services at reasonable rates."¹¹⁸ Indeed, TWTC recently signed a contract tariff with AT&T that provides steep special access discounts that, in TWTC's own words, "strengthens Time Warner Telecom's ability to compete effectively for the nationwide business market."¹¹⁹

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

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

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

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

¹²⁰ TWTC Pet. at 15.

negotiated contract tariff¹²¹ designed, in part, to provide incentives to the customer that chose that arrangement to use AT&T's services. And special access customers can choose from among many existing and differing discount plans or negotiate their own individualized contract tariff arrangements - as TWTC is well aware, having recently entered its own individually negotiated contract tariff with AT&T.¹²²

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

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

¹²¹ *Id.* at 15 & n.23.

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

¹²³ TWTC Pet. at 15 & n.24.

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

¹²⁵ TWTC at 15 & n.25.

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

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

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

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

¹²⁷ Falvey Decl. ¶ 12.

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

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

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

Finally, the Commission should reject the wish lists of special access conditions that merger opponents do not even attempt to link to any merger-specific harm – and, in many cases, do not discuss at all in their comments.¹³⁰ Many of these proposals simply rehash arguments for conditions that the Commission and the DOJ properly rejected in the SBC/AT&T merger case.¹³¹ Others seek relief that would duplicate the Act’s existing nondiscrimination and other requirements.¹³² And the remaining proposals¹³³ all have one common theme – each seeks price breaks or competitive advantages that are unwarranted and entirely unrelated to the merger.

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

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

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

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

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

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

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

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

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

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

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

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

a. Cable Competition

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

¹³⁶ *Id.* ¶ 73.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* ¶ 74.

¹⁴⁰ *Id.* ¶¶ 74-75.

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

- “The *commercial services opportunity* (i.e. voice and data for small and medium sized businesses) will also draw lots of attention. The opportunity is *a large one*, and is the most likely candidate for the ‘*next big thing*’ to drive sustained revenue growth.”¹⁴²
- The “*biggest natural opportunities for cable* appears to be . . . *business services*, with Cablevision indicating that it has only penetrated 20% of the revenue opportunity in its footprint.”¹⁴³

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

- Comcast COO Stephen Burke recently stated that *the next big focus for Comcast is small and medium business customers*, noting that the company’s wires “cross a huge percentage of small and medium business” in its footprint.¹⁴⁴
- *Time Warner Cable* announced “*strong continued growth*” in *business services*, noting its “Road Runner Business Class” was awarded the 2005 J.D. Power and Associates Award for “Highest Customer Satisfaction with Business Broadband and Data Service Providers.”¹⁴⁵
- In April 2006, *Charter Communications* announced the “deployment and implementation of an optical solution providing highly reliable, secure network services for *enhanced business continuity* between the U.S. Corporate Office of automaker BMW and its new state-of-the-art research facilities” located in South Carolina. Robert Carter, vice president of Charter’s Southeast operating division, commented that “Charter is committed to providing industry-leading multi-service connectivity to our *growing base of enterprise customers*.”¹⁴⁶
- Motorola recently announced “*Cable operators now have a new weapon in their arsenal for addressing business customers*”: a wireless broadband solution for cable companies to deploy last-mile access.¹⁴⁷

¹⁴² *Id.* (emphasis added).

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

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

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

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

¹⁴⁷ Carol Wilson, *Motorola Offers Cable Wireless Alternative*, *Telephony*, Apr. 7, 2006, http://telephonyonline.com/home/news/Motorola_cable_Canopy_040706/index.html. (“Motorola on April 6 announced a version of its Motorola MOTOWi4 Canopy wireless broadband solution

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b. VoIP Competition

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

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

¹⁴⁸ See *SBC/AT&T Merger Order* ¶ 65.

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

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

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

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

c. CLEC/IXC Competition

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

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

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

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

¹⁵⁵ *See id.*

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

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