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

Other competitors that oppose the merger have made recent moves:

- In March 2006, Cbeyond boasted of capturing its 20,000th small/medium business customer, mentioning Atlanta as one key area of its activity.[158]

- TalkAmerica launched new digital business services in Atlanta in April 2006, following-upon its acquisition last year aimed at capturing business "market share in the Southeast."[159]

- Supra Telecom announced just a month ago its expansion of services in Florida.[160]

- Xspedius even more recently revealed growth plans in Alabama, Florida and Tennessee (as well as Texas).[161]

- New Edge Networks was acquired by EarthLink as part of a strategy to further penetrate the business segment.[162]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Customers Confirm the Key Points in the Competitive Analysis

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

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

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

[169] Cbeyond Comments at 55-56.

[170] Public Interest Statement at 67.

[171] *SBC/AT&T Merger Order* ¶ 68.

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

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

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

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

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

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

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

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

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

[177] *See* Customer Statements Attachment.

[178] FPL Stmt. ¶ 4 (emphasis added).

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

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

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

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

[183] *Id.*

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

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

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

[186] MCNC Stmt. ¶ 5. *See also* Statement of Chris Smith, Security Bank ¶ 4 ("Cox Cable has been very active in pitching their fiber network services to Security Bank"); Commercial Bank Stmt. ¶ 4 ("Among the firms that have sought to sell data services to Commercial Bank are . . .
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Business customers also confirm that their use of VoIP instead of traditional telephone services is increasing.[187] For example, Bancorp South currently uses VoIP in approximately 10-15 branches, but "[b]y the end of 2006, this could grow to 30 to 40 locations."[188] Jewish Hospital and St. Mary's Health Care, with 70 locations, uses VoIP and "expects that [it] will move [its] call center, which is used to schedule patient procedures to VoIP. That may ultimately grow to allow the physicians' offices to utilize the Internet to make their calls as well."[189] Many other businesses are in the process of transitioning to VoIP.[190]

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

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

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

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

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

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

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

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

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

C. The Merger Will Not Harm Mass Market Competition

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

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

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

a. Wireline Residential Services

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

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

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

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

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

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

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

[198] *Id.*

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

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

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

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

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

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

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

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

[203] Cbeyond Comments at 44.

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

[205] Cbeyond Comments at 40.

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

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

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

b. VoIP

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

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[208] *Id.* at 43.

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

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

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

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

c. Small Business

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

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

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

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

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

[215] Cbeyond Comments at 54-57.

[216] Public Interest Statement at 107.

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

d. Broadband Services

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

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[217] *See* Public Interest Statement at 87-92.

[218] EarthLink Pet. at 7-8.

[219] *SBC/AT&T Merger Order* ¶ 103 n.317.

[220] *Id.*

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

2. The Merger Will Have No Adverse Unilateral Effects

a. Market Share-Based Claims

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

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

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

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

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

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

[224] *SBC/AT&T Merger Order* ¶ 101.

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

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

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

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b. Wireless Pricing

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

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

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

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

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

[231] *See, e.g.*, *Cingular/AT&T Wireless Merger Order* ¶¶ 248-49 & nn.590-91 (rejecting similar claim); *Sprint/Nextel Merger Order* ¶¶ 108-113 (risk of unilateral price increases by merged firm
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AT&T would be left with the worst of all worlds, for it would retain these customers as neither wireline nor wireless customers. Accordingly, AT&T will have no incentive to scale back the existing aggressiveness of its wireless pricing once the merger is approved.

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

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

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

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

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

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

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

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

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

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

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

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

239 Cooper & Roycroft Decl. at 7, 66.

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

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

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

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

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

[243] Cbeyond Comments at 99.

[244] Access Point Pet. at 73.

[245] Cbeyond Comments at 104.

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

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

[248] Cbeyond Comments at 102-03.

[249] New Jersey Ratepayer Advocate Comments at 22.

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

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

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

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

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

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250 CFA Pet. at 9.

251 Access Point Pet. at 34-36.

252 Sprint Nextel Comments at 12.

253 *SBC/AT&T Merger Order* ¶ 151.

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

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

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

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

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

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

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

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

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

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

[261] *SBC/AT&T Merger Order* ¶ 151.

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

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

E. The Merger Will Not Lessen Competition for Broadband Services

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

Several merger opponents assert that the merger will increase concentration of ownership of spectrum suitable for wireless consumer broadband services and lessen actual or potential competition in broadband services markets. But these merger opponents generally make only perfunctory and conclusory assertions to this effect.[262] The only attempt to support these claims is made by Clearwire, which offers service in the 2.5 GHz band of spectrum and which argues that the Commission should order divestiture of BellSouth's 2.5 GHz holdings to permit Clearwire to increase its already extensive holdings.[263]

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

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

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