September 1, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

Applicants submit this letter to update previously provided information relating to the claims of certain parties that the merger will substantially reduce competition in the provision of special access services in the BellSouth region and that the Commission should impose conditions to remedy these purported anticompetitive effects. The updated information and analysis in this letter further demonstrate that there is no substance to these contentions and that no conditions should be imposed.

There are more than 200,000 commercial buildings in the BellSouth region with sufficient demand to warrant the construction of special access facilities.[1] In its response to Specification 14.b of the Commission's Initial Information and Document Request, AT&T reported (based on records then available) that only 355 of these buildings are connected to AT&T's local fiber networks, and these buildings are located in 11 different metropolitan areas.[2] In their Public Interest Statement and in their Opposition to the petitions to deny the merger, applicants submitted declarations of Dr. Dennis W. Carlton and Dr. Hal S. Sider that applied the competitive analysis previously adopted by the Commission and the Justice Department to the then available data and determined that, based on the then available information, there are only 32 buildings that raise competitive issues under these criteria.[3]

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[1] *See* Reply Declaration of Dennis W. Carlton and Hal S. Sider ("Carlton-Sider Reply Decl."), ¶ 22.

[2] *See* AT&T Response to FCC Initial Information And Document Request, Exhibit 14.b, Tab 1.

[3] Reply Declaration of Dennis W. Carlton and Hal S. Sider at 8-11 (June 20, 2006) ("Carlton-Sider Reply Decl.") (concluding that there were no more than 32 such

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Since then, in connection with responding to questions from the Justice Department, applicants have obtained more current information relating to these issues and will now update the results of the analysis contained in the Carlton/Sider declarations. As explained in detail below, this information establishes that AT&T has connections to somewhat fewer buildings than previously reported and that when the Commission's and the Justice Department's competitive analysis is applied to the actual AT&T buildings, there are a very small number of buildings that remain.[4] Further, there is no substantial basis for competitive or public interest concerns in these scattered buildings, and under the Commission's precedents, any potential competitive issue is *de minimis* and no remedy is warranted.

Corrections To Exhibit 14.b, Tab 1. Exhibit 14.b, Tab 1 contained errors that overstated the number of buildings to which AT&T has connections. Initially, AT&T here separately reported buildings for legacy AT&T and legacy SBC. In several instances, legacy AT&T and SBC both have connections to the same building. As a result, in 31 instances, the same building appears twice on the Exhibit, once for legacy AT&T and again for legacy SBC.[5] When the duplicative

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buildings); *see also* Declaration of Dennis W. Carlton and Hal S. Sider, at 41-47 (March 31, 2006) (performing "preliminary analysis" and concluding that there were fewer than 70 buildings that could raise competitive issues under the Commission's and Department's criteria and no more than 25 in any one MSA).

[4] Attachment 1 provides a summary of Applicants' competitive analysis. Applicants are continuing to conduct inspections and to collect additional data and will provide any material additional information to the Commission if and when it becomes available.

[5] *See* Supplemental Exhibit 14.b.1, attached hereto (identifying these 31 buildings). Supplemental Exhibits 14.b.1 through 14.b.7 are in Attachment 2 to this letter. Information in Attachments 2-4 is both commercially and financially sensitive and is proprietary information that AT&T would not in the normal course of business reveal to the public or its competitors. These Attachments effectively disclose the identity of specific customers (by providing building addresses) and provide "detailed or granular engineering capacity information." *In re AT&T Inc. & BellSouth Corp. Applications for Approval of Transfer of Control,* WC Dkt No. 06-74, Second Protective Order, DA 06-1415, at 2 ¶ 5 (rel. July 7, 2006) (defining "Highly Confidential Information") ("Second Protective Order"). AT&T is designating such information as Highly Confidential pursuant to the Second Protective Order. In addition to the Highly Confidential Information just described, Supplemental Exhibits 14.b.5-6 contain information supplied to AT&T by third parties under

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entries in this exhibit are removed, the number of *unique* buildings on the list is 324.

Further, based on review of information relating to these buildings – including physical inspections of the communications rooms in many – Applicants have determined that there are 16 buildings that appear in Exhibit 14.b, Tab 1 to which AT&T does not in fact have a local fiber connection or the fiber is not "lit."[6] In most instances, AT&T has determined that a database error caused the erroneous identification of these buildings as on-net and lit. In other instances, the fiber to the building was removed from the building without AT&T's knowledge, *e.g.,* by the customer or by construction activities. Removing these buildings in addition to those removed above leaves 308 buildings.[7]

Vacant and Network Buildings. In addition, 49 of the remaining buildings merely house "network" connections, are vacant buildings, or have AT&T (or an AT&T affiliate) as the sole tenant.[8]

Network buildings raise no competitive concerns because AT&T's connections in these buildings are not used to serve customers, but are merely used to house nodes, regeneration facilities or other AT&T network facilities. Connections to vacant buildings likewise clearly raise no competitive concerns because there are no customers. Similarly, buildings where AT&T or an AT&T affiliate is the sole tenant raise no competitive issues because there are no customers in the building that could be harmed by the elimination of AT&T as an independent competitor.

That a merger cannot create potential competitive harms in each of these types of buildings was recognized by both the Justice Department and by the Commission in their prior reviews of the SBC-AT&T and Verizon-MCI mergers. As explained by the DOJ, "where there is no likely customer, there is no harm," and the United States "eliminated vacant buildings, buildings where a subsidiary of the

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confidentiality agreements. AT&T is designating the latter type of information as Confidential Information pursuant to the First Protective Order. *In re AT&T Inc. & BellSouth Corp. Applications for Approval of Transfer of Control,* WC Dkt No. 06-74, Protective Order, DA 06-1032 (rel. May 12, 2006).

[6] *See* Supplemental Exhibit 14.b.2, attached hereto (identifying these 16 buildings).

[7] AT&T's inspections also determined that in 6 instances, AT&T databases included an incorrect address for the fiber connected building. The Supplemental Exhibits report the correct addresses.

[8] *See* Supplemental Exhibit 14.b.3, attached hereto (identifying these 49 buildings).

merging firms was the only customers, and [network only and other] buildings with zero current demand for Local Private Line or related services" from the list of buildings where divestitures of IRUs was required.[9] The Commission approved this approach, concluding the Department's proposed remedy adequately addressed competitive concerns.[10] Quite plainly, in such buildings, there is no possibility that the merger "may lead to an increase in the price of Type I special access services to that building."[11] Removing these buildings in addition to those excluded above leaves 264 buildings.

Buildings Served By Other CLECs. Almost 200 of the remaining buildings are also served by other CLECs, and as both the Commission and the Department have recognized, the elimination of one supplier in these circumstances will not substantially reduce competition and lead to price increases where such actual competition exists.[12] In the *SBC-AT&T Merger Order* (¶ 37), the Commission found that there are competitive concerns *only* in buildings "where AT&T is the only carrier besides SBC that is directly connected to a particular building and where entry is unlikely," noting that it is here that "AT&T's elimination as a competitor may lead to an increase in the price of Type I special access services to that building."[13]

Data reported in Exhibit 14.b, Tab 2 indicated that 208 of the 324 unique buildings were served by a local connection from another CLEC. This report was based on information from AT&T's databases, information provided by other CLECs in the ordinary course of business, and AT&T's initial physical building inspections. AT&T's further inspections, *e.g.,* visiting the common space equipment area and/or interviewing landlords regarding fiber-to-the-floor arrangements, determined that

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[9] *See* DOJ Response to Public Comments, Civil Action Nos. 1:05CV02102 and 1:05CV02103, at 22 (filed March 21, 2006).

[10] *SBC-AT&T Merger Order,* ¶¶ 37-40.

[11] *Id.* ¶ 37.

[12] The analysis of the buildings in Miami is still in progress, as both the Department of Justice and the Applicants continue to gather and analyze additional information. We will report those results as soon as they are finalized. In this regard, all analysis of competitive alternatives in buildings in Miami reflected in the attached exhibits are subject to minor revisions.

[13] *See also* DOJ Response to Public Comments, Civil Action Nos. 1:05CV02102 and 1:05CV02103, at 22-23 (filed March 21, 2006).

CLECs have local connections to numerous additional buildings.[14] Removing these buildings in addition to those removed above leaves 67 buildings spread across 9 metropolitan areas in 5 states (subject to the ongoing refinement of the Miami analysis).

Buildings Where Fiber-Based Entry By Other CLECs Is "Likely." Although AT&T currently is the only CLEC in these remaining buildings, the Commission and the Justice Department have concluded that a merger that eliminates AT&T as a competitor in such buildings will not raise competitive concerns where entry by another CLECs is likely if the merged firm were to attempt to raise prices. As the Commission stated, it is only where "entry is unlikely" by other CLECs that "AT&T's elimination as a competitor may lead to an increase in price." *SBC-AT&T Merger Order,* ¶ 37; *see Merger Guidelines* (at ¶3.0) ("entry likely will . . . deter or counteract the competitive effects of concern"); *See also United States v. Baker Hughes, Inc.,* 908 F.2d 981, 987 (D.C. Cir. 1990) ('in the absence of significant entry barriers, a company probably cannot maintain supra-competitive pricing for any length of time."); Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd. 3271, ¶ 5 (1995) ("entry can put downward pressure on price if [an alleged monopolist] attempts to charge a supra-competitive price").[15]

In making determinations of the buildings that CLECs are likely to serve, the Department and the Commission have examined the "the criteria CLECs use in deciding to make such investments."[16] As both the Department and the

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14. *See* Supplemental Exhibit 14.b.4, attached hereto (identifying these buildings). AT&T's continuing surveys identified five buildings for which it was determined that the serving CLEC did not have a fiber connection. These buildings are not included in the more than 200 buildings served by other CLECs.

15 *See also* Declaration of W. Robert Majure at 10, filed August 7, 2006 in *United States* v. *SBC Communications, Inc.*; Civil Action No. 1:05CV02102 (D.D.C.) ("Majure Decl.") ("Harm to consumers would be unlikely if the merged firms knew that raising prices, for example, would make it profitable for a CLEC to constrict a lateral connection . . . to these buildings and offer customers a choice."). A copy of the public version of this declaration is attached.

16 *Id.* at 10-11; *see Triennial Review Remand Order* ¶ 26 (2005) ("when we consider whether 'lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic, we refer to whether entry is economic by a hypothetical competitor acting reasonably efficiently"), *aff'd Covad Communications* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006); *see also Triennial Review Order* ¶ 109 ("our test, rather than referring to the absolute costs of deployment, is based on the inferences that can be drawn from actual competitive deployment").

Commission have recognized, "the best indicators of the likelihood of [fiber-based] 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)." DOJ Response to Public Comments, at 22. *See also Triennial Review Remand Order*, ¶ 152 ("Loop impairment is more closely related to the demand of the individual customer served by such a loop"). " 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." *Id.* at 23. n.40; *See also Triennial Review Remand Order*, ¶ 154 ("economies of scale in deployment can accrue when carriers construct loops to locations that are geographically close to the transport network"). In this regard, the Commission has found that there generally are no economic barriers to the installation of OCn-level facilities because the revenue opportunities associated are sufficient to overcome the economic barriers to deploying local loops,[17] and that "it is generally feasible for a carrier to self-deploy its own high-capacity loops when demand nears two DS3s of capacity to a particular location."[18]

Similarly, in the review of the SBC-AT&T and Verizon-MCI mergers, the Department conducted an extensive investigation of the actual "criteria CLECs use in deciding to make such investments" to serve new buildings. Using compulsory process, DOJ gathered documents and data from numerous CLECs, analyzed that evidence, and synthesized it into three "demand/distance" tests for the likelihood of entry. The following "demand/distance" screens then were applied to the overlap buildings, and fiber-based entry was found to be likely if one of these screens were met:[19]

Minimum Demand	Distance
2 DS3	0.1 mile
1 OC12	0.25 mile
1 OC 48	1 mile

[17] *Triennial Review Order* ¶ 316 ("Services offered over OCn loops produce revenue levels which can justify the high cost of loop construction, providing the opportunity for competitive LECs to offset the fixed and sunk costs associated with loop construction.").

[18] *Triennial Review Remand Order* ¶ 177; *see also Triennial Review Order* ¶ 324

[19] Majure Decl. at 11 n.17.

If a building satisfied one of these screens, the Department excluded the building from its complaint and consent decree[20] and the Commission did not require any remedy with respect to that building.[21]

This same competitive analysis is fully applicable to the AT&T/BellSouth merger. As set forth in the March and June 2006 declarations of Drs. Carlton and Sider, as updated by the information in this letter, the application of these "distance/demand" screens eliminates all but a small number of the remaining buildings.[22]

Buildings that satisfy any of these criteria are reported in Supplemental Exhibits 14.b.5.4-7, attached hereto. Removing these buildings in addition to those excluded above leaves 17 buildings (which does not include the limited number of additional buildings in Miami) spread across 8 metropolitan areas in 4 states.[23]

There Is No Basis For Imposing Any Condition Or Remedy. The remaining few building are a small fraction of the more than 200,000 buildings in the BellSouth region and are scattered over multiple metropolitan areas in multiple states. There are important additional reasons to conclude there would be no harm to competition in these buildings, and the number of buildings, both *in toto* and especially in each metropolitan area, is simply too small to warrant a merger conditions and the costs of administering a remedy.[24]

In considering these remaining buildings, the Commission should focus on several factors demonstrating that there is no substantial potential that special access competition will be adversely affected. First, as we have previously noted,[25]

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[20] *Id.*

[21] *See, e.g., SBC-AT&T Merger Order,* ¶ 37.

[22] Declaration of Dennis W. Carlton and Hal S. Sider at 7, 41-49; Reply Declaration of Dennis W. Carlton and Hal S. Sider at 8-13.

[23] As noted, Attachment 1 provides the list of these remaining buildings. In Attachment 3 to this letter, applicants provide maps of each of these buildings that also identify the locations of the nearby CLEC(s). Where applicants found nearby CLEC fiber during physical building inspections, they generally photographed such fiber. Those photographs are attached hereto as Attachment 4 to this Letter.

[24] *See* AT&T-BellSouth Opposition, at 15-16 & nn.49-50; Carlton & Sider Reply Decl. ¶ 22 & n.14. This analysis is reflected in the final column of Attachment 1.

[25] *Id.,* ¶ 20.

AT&T does not provide *any* wholesale private line service to *any* of these buildings today.

Further, elimination of AT&T and its fiber as a potential competitive wholesale option will not affect other competitive alternatives for special access customers in these buildings. Low-cost wireless alternatives to fiber-based local access have now clearly emerged and are widely available. For example, XO Communications just announced on August 28, 2006 that it "has deployed fixed broadband wireless in nine metropolitan markets – Atlanta, Chicago, Dallas, Houston, Los Angeles, Miami, San Diego, Tampa, and Washington, D.C.," and that "[i]n addition to expanding our [XO's] network . . . also gives us a more cost-effective and scalable replacement to leased network elements that connect local switches to our own fiber network."[26] XO explains that its broadband wireless services will enhance its ability "to deliver business-class broadband solutions directly to businesses and help reduce local network costs." It specifically mentions that it will target businesses that "lack direct access to fiber." And it can serve *any* building that is within *5 miles* line-of-sight of its wireless hubs that are broadly deployed across these metropolitan areas.

This development confirms the Commission's prior findings that broadband wireless increasingly represents a meaningful competitive alternative to special access. *See, e.g., Sprint/Nextel Merger Order*, 20 FCC Rcd. 13967 (2005) ("we expect that this spectrum may be used to provide fixed or portable wireless broadband services (*e.g.*, Wi-Max type services) that will provide alternative service platforms for last mile services to residences and businesses"); Section 706 Fourth Annual Report to Congress, 19 FCC Rcd. 20540, 20561 (2004) ("[t]he major upperband carriers, such as Teligent and XO Communications, have begun to focus on providing backhaul transport and private line telecommunications services to other carriers and large businesses"). The XO announcement includes Atlanta and Miami where over half of the remaining buildings are. Not only does the presence of wireless alternatives eliminate any competitive concern for these buildings but it further indicates the *de minimis* nature of the remaining buildings.

Further, because of the characteristics of each of the remaining buildings in question, low cost UNE-based services can be offered to customers in these buildings. The BellSouth wire centers that serve each of these buildings satisfy the Commission's recently affirmed impairment test for UNEs. As a result, DS1 and DS3 UNE loops remain available from BellSouth at TELRIC rates to CLECs in *all* of the remaining buildings. The continuing availability of UNE access to these

[26] *See* Press Release, *XO Communications Deploys Fixed Broadband Wireless in Nine Cities to Expand Metro Coverage and Reduce Network Access Costs* (August 28, 2006), *available at* http://www.xo.com/news/316.html.

buildings further mitigates any competitive concerns from the loss of AT&T as an independent wholesale supplier of special access services, for the ability of CLECs to obtain UNEs at TELRIC rates constrains prices and allows service alternatives.

Finally, in addition to the evidence that prices for access to these buildings are already constrained by potential entry, broadband wireless and the availability of UNEs, the reality is that the remaining few buildings are an exceedingly small fraction of the commercial buildings in the region, are scattered over 8 metropolitan areas, are low demand buildings, and are buildings in which AT&T now offers no actual wholesale private line services. It simply is not plausible that BellSouth would, or administratively even could, respond to the elimination of AT&T as a *potential* independent competitor in these buildings by increasing prices to tenants in them. That would require targeted building-by-building actions in response to the elimination of mere potential competition. The extreme implausibility of such action is established by the undisputed evidence that ILECs price special access in tariffs that apply broadly to an entire metropolitan area. For example, testimony from SBC in the Special Access proceeding confirms that special access tariffs are generally "priced at the MSA level."[27]

The Commission can rely as well on recent statements by CLECs with significant presence in BellSouth's region, all issued after the announcement of the AT&T/BellSouth merger, which confirm that competition for local private line and ultimate retail business services remains fierce, and in fact has increased since the SBC/AT&T merger. Indeed, multiple CLECs who compete with AT&T for enterprise accounts have confirmed the increasingly competitive telecommunications landscape. For example, XO Holdings has stated that the "telecommunications services market is *highly competitive* and continues to experience *downward pricing pressure*." Form 10-K at 4 (Mar. 16, 2006) (emphasis added). Cbeyond Communications confirmed this analysis, stating that "we anticipate that *aggressive price competition will continue*." Form 10-K at 29 (Mar. 31, 2006) (emphasis added). ITC DeltaCom, Inc. has gone even further in noting that "the pending acquisition of BellSouth by AT&T likely would result in *more intense competition* in our markets." Form 10-K at 8 (Mar. 24, 2006) (emphasis added). And, Time Warner Telecom has observed that ILECs have originated much of this increased competition for enterprise business: "We believe that the ILECs have become *more aggressive in pricing competition* . . . . With several facilities-based carriers providing the same service in a given market, price competition is likely to continue." Form 10-K at 13 (March 16, 2006) (emphasis added).

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[27] *See e.g.*, Reply Declaration of Parley C. Casto at 24, filed in WC Docket No. 05-25 (July 29, 2005); *see also* BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1, Section 23 (Metropolitan Statistical Area Access Services).

Time Warner Telecom also advertises that it "is able to provide Ethernet services to businesses *anywhere*" and bills itself as "*the leading provider of metro-area broadband optical networks* and services to businesses . . . deliver[ing] 'last-mile' broadband data, voice, Dedicated Internet Access, and Dedicated Web Hosting in 44 major U.S. markets."[28] Moreover, Time Warner Telecom has just agreed to spend over $500 million of its shareholders' money to acquire another metro fiber network operator, Xspedius. Not only did it tout how much more competitive it will be, but it is obvious that a sophisticated company does not make such a substantial investment unless it firmly believes it can be successful and obtain a significant return. This action is another tribute to the continuing success of CLEC fiber operators and the increasing competitiveness of the special access business.

Over the last several months, Level 3 similarly has continued to invest in the acquisition of several network operators with substantial presence in the Southeast, including Progress, ICG, TelCove and Looking Glass Communications. Most significantly, Level 3 promotes its intent to continue to expand its building connections. "By constructing our network and over 650 laterals, *Level 3 is an undisputed expert in off-net lateral construction.* Last year, Level 3 delivered 200 customer construction projects with an on-time delivery rate of greater than 95 percent." *See* http://www.level2.com/2700.html (emphasis added). Level 3 advertises that "[i]f we don't already have your requested buildings On-Net, our large footprint is likely to put you close enough for a lateral."[29]

Each of the CLECs discussed above are active in the BellSouth region in general, and the specific MSAs at issue in particular. [30]

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[28] *See* http://www.twtelecom.com/Documents/Announcements/News/2006/Overture.pdf and http://www.twtelecom.com/Documents/Resources/PDF/MarketingCollateral/2701NativeLAN.pdf (emphasis added).

[29] *See* http://www.level3.com/userimages/DotCom/pdf/offnlateral_useng_global_letter_forscreen.pdf (emphasis added).

[30] *See, e.g.,* XO Network Map, *available at* http://www.xo.com/about/network/maps/complete_normal.html (showing network assets in several BellSouth MSAs, including Atlanta, Jacksonville, and Miami); ITC^Deltacom, Fiber Optic Network, *available at* http://www.deltacom.com/fiberoptic_network.asp (same); Time Warner Telecom, Network Maps, available at http://www.twtelecom.com/about_us/networks.html (showing network assets in several BellSouth MSAs, including Charlotte, Memphis, and Orlando); Xspedius, Xspedius Network Map, *available at* http://www.xspedius.com/ (showing network assets in several BellSouth MSAs,

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Statements of over a hundred AT&T and BellSouth customers further confirm that the AT&T-BellSouth merger will not harm competition. In these statements, AT&T and BellSouth retail business customers explain why they have no competitive concerns and in fact believe the combination will be pro-competitive. This wide cross-section of retail business customers certainly is sophisticated enough to recognize if their ability to obtain competitive service would be compromised, and their statements reflect their knowledge of the industry:

- "I believe the proposed AT&T/BellSouth merger will benefit the entire telecommunications industry, but will especially benefit large enterprises like Clear Channel. AT&T will have a larger footprint, so they will have more availability for us than they used to. In addition, *now they will own the last mile in the southeast, which means a single point of contact* for trouble-shooting and no more finger pointing. Once they consolidate the networks, all customers will benefit." Statement of Joe Shannon, Clear Channel Communications, Inc. (May 15, 2006) (emphasis added).

- "As BellSouth is primarily a local carrier and AT&T is predominantly a national and global carrier, AT&T post-merger will have the capabilities of providing end-to-end service. BellSouth, as a local provider, generally handles the equipment and lines that run from a customer's location to a national carrier's equipment and lines. *We have a strong preference for dealing with the operating company, and not the local company for that 'final mile.'* Dealing with multiple suppliers results in operational issues, finger-pointing between suppliers, and overall uncertainty with service problems. The combined company will therefore eliminate much of these time-consuming and cost-inducing issues." Statement of Roy Wittman, NACCO Materials Handling Group, Inc. (June 12, 2006) (emphasis added).

- "I believe that as a result of the AT&T-BellSouth merger we may in fact see *lower access prices for last-mile services* due to the economies of scale of the combined entity." Statement of Allen Van Meter, Dialogic Communications Corp. (April 27, 2006) (emphasis added).

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including Lexington, Nashville, and Tampa); Level 3 Communications, The Level 3 Network, *available at* http://www.level3.com/673.html (showing network assets in several BellSouth MSAs, including Charlotte, Atlanta, and Miami).

- "I am in favor of the merger between AT&T and BellSouth. This will take the telecommunications business in the right direction. At this time it seems that there is an artificial split between local and long distance carriers. I welcome bringing these two functions under one roof to simplify our administration of telecom spend. This should allow us to *leverage our purchases to receive better pricing*. This merger should also lower the costs of the companies, because they probably have significant overlap in infrastructure, which will also make prices lower." Statement of Peter Brodin, Metso Corporation (June 13, 2006) (emphasis added).

For all these reasons, the Commission can readily conclude that that there is no likelihood of any meaningful competitive harm in the handful of buildings that remain on the list.

Moreover, 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.[31] 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.[32] With the current building

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[31] *See, e.g., Verizon/One-Point Merger Order,* 15 FCC Rcd. 24, ¶ 7 (2000); *see also AT&T-Cingular Merger Order* ¶ 107 ("The loss of a competitor with such a small market share is *de minimis* and would not likely cause significant, merger-related anticompetitive effects."); *AT&T-Comcast Merger Order* ¶ 63 (finding no merger harms in areas where "the merger's effect on the Applicants' subscriber share would be *de minimis*"); Public Notice, *Common Carrier, International, and Wireless Telecommunications Bureaus Modify WorldCom-Intermedia Merger Conditions,* DA 01-2727, CC Docket No. 00-206, ¶ 3 (rel. Nov. 20, 2001) (finding applicants "shares of the local telecommunications business are, by any measure, de minimis"); Order & Authorization, *In re Lockheed Martin Corporation, COMSAT Government Systems, LLC, And COMSAT Corporation Applications for Transfer of Control*, 15 FCC Rcd. 22910, ¶ 19 (2000) (finding "de minimis" affect on "the level of concentration in any relevant product or geographic market").

[32] *See, e.g., OI&M Order*, 19 FCC Rcd. 5102, ¶ 35 (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

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count so few out of 200,000, and with so few buildings in any one metropolitan area, the evidence demonstrates that there cannot be substantial adverse effects on competition even in this handful of buildings, the Commission easily can and should conclude that any competitive concern with respect to those buildings is *de minimis* and thus no remedy is warranted.

In accordance with the Protective Orders and the directions of the Staff, under separate transmittal letters, we are providing five (5) unredacted paper copies and fifteen (15) unredacted CD-ROM copies of this letter and its Attachments to the Staff; we are filing one (1) unredacted CD-ROM copy with your office; and we are filing a redacted copy via ECFS. The unredacted letter and Attachments will be made available for inspection, pursuant to the terms of the Protective Orders at the offices of Crowell & Moring LLP. Counsel for parties to this proceeding should contact Jeane Thomas of that firm at (202) 624-2877 to coordinate access.

Very truly yours,

/s/ Gary L. Phillips
Gary L. Phillips

Attorney for AT&T Inc.

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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 FTC 1290 (1993); *see also Rite Aid Corporation*, 125 FTC 846 (1998) (modifying consent decree after determining costs of previously imposed divestiture would outweigh potential benefits).