record, however. Accordingly, we conclude that this transaction is unlikely to result in anticompetitive coordinated effects in the Tier I Internet backbone market.

149. For the reasons given in the *SBC/AT&T Order* and the *Verizon/MCI Order*,[414] we also are unpersuaded that, after the merger, AT&T and Verizon will be able to coordinate to de-peer a sufficient number of their backbone rivals – either through targeted and serial de-peering or global de-peering – to effectively "tip" the market to duopoly. **We** conclude that it would he difficult for AT&T and Verizon to agree tacitly on the specifics of these de-peering strategies, such as which peers to target, and in which sequence, without reaching an express agreement in clear violation of antitrust laws.[415] For the reasons given in the *SBC/AT&T Order* and the *Verizon/MCI* ***Order,*** we also find it highly unlikely that, even together, AT&T and Verizon would be able successfully to engage in global de-peering."'

b. Vertical Effects (Raising Rivals' Costs)

150. We reject commenters' assertions that the vertical integration resulting from the merger of AT&T and BellSouth could allow the merged entity to raise the costs of its VoIP and retail broadband rivals by: (a) using its backbone to discriminate against IP packets transmitted by its broadband Internet access and VoIP competitors, and other Internet content, service, and application providers; and/or (b) leveraging bottleneck control over special access to gain a competitive advantage in the backbone markets.?" For the reasons given below, we conclude that the proposed merger is not likely to have such adverse effects on competition.

151. ***Packer Discrimination and Traffic Degradation.*** We are not persuaded by commenters' assertions that the merger gives rise to an increased incentive and/or ability for the merged company to use its Internet backbone to degrade or otherwise discriminate against competitors' IP traffic. Comrnenters claim that the merger increases the potential for three forms of backbone "broadband discrimination" with respect to competing VoIP, IP video, and other IP-enabled services with limited tolerance for latency and packet loss: (i) giving the merged entity's IP packets priority over the packets generated by third party providers; (ii) affirmatively injecting latency or otherwise degrading the packets sent by third-party Internet application providers; and (iii) blocking certain transmissions."' Such

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[414] ***SBC/AT&T Order,*** 20 FCC Rcd at 18375, para. 137; ***Verizon/MCI Order, 20*** FCC Rcd at 18507, para. 138

[415] ***See DOJ/FTC Guidelines*** § 2.1 (noting that successful coordinated interaction entails reaching terms of coordination that are profitable to the firms involved and an ability to detect and punish deviations that would undermine the coordinated interaction).

[416] ***SBC/AT&T Order, 20*** FCC Rcd at 18375, para. 137; ***Verizon/MCI Order,*** 20 FCC Rcd at 18507. para. 138.

[417] Some commenters contend that AT&T currently could leverage its control over last mile facilities. on which VoIP traffic terminates, to block or degrade access and that the merger increases AT&T's incentive to do so. **See,** *e.g.*, Consumer Federation *et al.* Petition at 50 (asserting that with Cisco's product offerings, the owner of last-mile broadband networks could present third-party content and application providers with an "ultimatum – pay-up through our 'revenue sharing scheme, or else"'); New Jersey Ratepayer Advocate Baldwin/Bosley Decl. at **para. 219** (opposing a "'tiered' Internet where large carriers could act **as** gatekeepers"); New Jersey Ratepayer Advocate Reply at 17-18 (asserting that "[t]he concentration of market power gives the incumbents a monopoly over transmission and potentially content and could harm the evolution of Internet related applications") (emphasis omitted). These issues are addressed in Part V.E (Mass Market High-speed Internet Access Competition).

[418] **See,** *e.g.*, Access Point *et al.* Petition at 30-31 (asserting that "both AT&T and BellSouth have in recent months expressed an intent to engage in [IP] discrimination") (emphasis omitted); CDD Petition at **4** (asserting that the scale (continued....)

actions by the merged entity, if undertaken, conceivably could place competing providers at a significant competitive disadvantage as to quality of service.

152. We are not persuaded that commenters' concerns are sufficiently merger specific or that the merged entity is likely to pursue the alleged strategies. First, we note that no commenter has alleged that AT&T (or BellSouth) currently engages in packet discrimination or degradation. Second, to the extent that commenters allege that packet degradation *or* discrimination could occur using the merged entity's backbone, we find it unlikely that the merged entity would have the incentive to engage in such conduct. We acknowledge that, in theory, the merger could give the merged entity an increased incentive to degrade or discriminate against the IP traffic of its retail competitors. We find, however, that the merged entity will likely have strong incentives to provide VoIP (and to make others' VoIP services available to its broadband customers), in order to retain customers that seek a VoIP alternative to circuit-switched voice service."' Consequently, we believe that these countervailing incentives make it unlikely that the merged entity would choose to engage in packet discrimination or degradation of IP traffic over its backbone.

153. Third, as the Commission found in the *SBC/AT&T Order* and the *Verizon/MCI* ***Order,*** it is not clear that the merged entity would be able effectively to discriminate or degrade competitors' IP traffic using its Internet backbone.[420] Given the routing of VoIP calls today, for example, it does not appear that the backbone creates a new bottleneck for VoIP providers that use their own backbone or a virtual private network to deliver service to their customers by delivering the traffic directly to the public switched telephone network (PSTN), rather than routing it through the merged entity's backbone.'" Further, while the merged entity may have an incentive to prioritize its own traffic using queuing or other such differentiated service mechanisms, by recent measures significant excess capacity remains on backbone networks.'" Given this excess capacity and the number of Tier I backbone providers, competing providers of VoIP, IP video, and other IP-enabled services and applications are likely to be able to reroute traffic if discrimination were encountered. Thus, in the absence of affirmative efforts to degrade a competitor's traffic, queuing and packet prioritization are likely to yield only extremely small increases in latency and packet loss in many cases.

154. ***Special Access and the Internet Backbone Market.*** We also reject commenter suggestions that the merged entity will have an increased incentive and market power in the special access market to gain

(Continued from previous page)
of the merged enterprise "affords massive market power to **a** company with powerful motives and an expressed desire to leverage that power against Internet content providers, VOIP competitors and others"); Consumer Federation *et al.* Petition at 49-52 (asserting that AT&T is capable of traffic identification and prioritization and has declared intentions to do *so);* TWTC Petition at 32-42 (arguing that the merged entity will have a greater incentive "to deny. delay, and degrade competitors' access").

[419] **See** *SBC/AT&T* ***Order.*** 20 FCC Rcd at 18367, para. 142: *Verizon/MCI Order,* 20 FCC Rcd at 18508, para. 141.

[420] *See SBC/AT&T Order,* 20 FCC Rcd at 18367. para. 143; *Verizon/MCI* ***Order,*** 20 FCC Rcd at 18509, para. 142.

[421] **See** AT&T/BellSouth Reply at 82 (noting that "for the foreseeable future. VoIP traffic will be terminated via the PSTN, which will therefore remain a competitive bypass alternative, and a constraint on backbone providers' behavior").

[422] **See** *SBC/AT&T* ***Order,*** 20 FCC Rcd at 18367. para. 143; *Verizon/MCI* ***Order,*** 20 FCC Rcd at 18509, para. 142.

a competitive advantage in the backbone and broadband markets.''' As noted above, the Commission is currently addressing the issue of competition in the special access market in two ongoing rulemaking proceedings, which will allow the Commission to address any competitive issues on a full record on an industry-wide basis."'''

G. U.S. International Services Competition

155. In this section we consider the competitive effects of the proposed merger in the markets for U.S. international services.[425] We conclude that the merger is not likely to result in anticompetitive effects for international services provided to mass market, enterprise, or global telecommunications customers. Additionally, we find that the merger will not result in anticompetitive effects in the international transport, facilities-based international message telecommunications service (IMTS),[426] or international private line markets.

156. There generally appear to be few barriers to entry into the U.S. international long distance telecommunications industry for either facilities-based or resale entrants. As of 2004, there were 42 facilities-based LMTS providers, and these carriers offer service to most international destinations.''' Resale entrants, in particular, face relatively modest costs of market entry, as evidenced by the presence of 799 LMTS resellers.[428] These low entry barriers make it unlikely that the merger will result in anticompetitive effects in these international services markets.

157. We discuss below three separate end-user product markets: the mass market, enterprise, and global telecommunications markets. Before doing so, however, we also separately examine the international transport capacity market, which provides the physical transmission path that carriers use to deliver services in the end-user markets, and two wholesale (or intermediate) markets, namely, facilities-based LMTS and private line service. Input markets, particularly international transport capacity, are a significant component of the international services market. Wholesale markets for international service also are essential components to the delivery **of** end-user retail services.

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[423] **See,** *e.g.*, TWTC Petition at 32-31 (asserting that the merged entity will have a greater incentive to overprice, deny, delay, or degrade competitors' access to needed inputs); Consumer Federation *era!*. Reply at *6* (arguing that the merger will have **a** negative impact on the special access markets because, among other things. the merged AT&T/BellSouth will be able to exercise power to undermine competition).

[424] ***See*** discussion *supra* at Part V.B (Wholesale Special Access Competition)

[425] U.S. international services consist of all U.S.-billed telecommunications services, including calls that originate in the United States and terminate at a foreign point and calls that originate at a foreign point hut are hilled by **a U.S.** carrier, such **as** international calling card or prepaid card calls. The similarities and differences between domestic and international **long** distance telecommunications services are discussed in detail in the *SBC/AT&T* ***Order. See*** *SBC/AT&T* ***Order,*** *20* FCC Rcd at 18372, paras. 154-55.

[426] IMTS is "international message telecommunications service" and denotes international voice-grade services provided over the public switched network.

[427] ***See*** Strategic Analysis and Negotiations Division, FCC, *2004 International Telecommunications Data*, Table 5, Tables A2-31 (Mar. 2006) *(2004* Section *43.61* ***Report****), available at* http://www.fcc.gov/ib/sand/mniab/traffic/files/CREPOR04.pdf.

[428] ***See*** *2004 Section 43.61 Report,* Table D.

1. Input Markets: International Transport Market

158. Consistent with the *Verizon/MCI Order*, we find that international transport, particularly submarine cable capacity, is a relevant market for purposes of this merger analysis.[429] International transport refers to the international physical transmission paths carriers use to offer services between the U.S. and other countries. International traffic can be transmitted via submarine cable, satellite or terrestrial links. Most U.S. international traffic, however, is transmitted over submarine cables.[430] Because of this, and because neither of the Applicants owns international satellite capacity, we focus on how the merger will affect concentration of ownership of submarine cables.

159. The Commission employs a regional approach in analyzing the international transport market, although, at times, it also has examined international transport capacity on particular routes.[431] Typically, we evaluate submarine cable capacity in the Atlantic, Pacific, and the Americas Regions.[432] We examine ownership of U.S. half-circuits (including the U.S. half of whole-circuits), because AT&T and BellSouth predominantly own capacity on the U.S. end of cable systems. Our concern is whether the proposed merger could increase ownership concentration of U.S. half-circuits to such an extent that the combined entity would have the ability to exercise market power through unilateral or coordinated action.[433] We examine existing submarine cable capacity and take into account future capacity that may be achieved through the use of wavelength division multiplexing (WDM) technology within the next two years.[434]

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[429] *Verizon/MCI Order*, 20 FCC Rcd at 18514-15, paras. 157-58

[430] In 2004, submarine cables accounted for 80% of the overall active transmission capacity. Terrestrial links accounted for 19% and satellites for 1%. *See* International Bureau, FCC, *2004 Section* 43.82 *Circuit Status Data* at 12 (Table 2), 18 (Table 3), and 24 (Table 4) (Dec. 2005) *(2004 Circuit Status Report), available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262890A1.pdf; FCC, *International Bureau Releases 2004 Year-End Circuit Status Report for U.S. Facilities-Based International Carriers; Capacity Use Shows Healthy Growth*, News Release at 1 (Dec. 22, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262888A1.pdf.

[431] **See** *Verizon/MCI Order*, 20 FCC Rcd at 18514-15, para. 158; **see** *also AT&T/British Telecom Order*, 14 FCC Rcd at 19161-64, para. 48 (1999); *BT/MCI Order*, 12 FCC Rcd at 15389-97, paras. 94-122.

[432] We note that several countries ("thin route" countries) are not linked to the United States by cable and are served only by satellites. *See, e.g., WorldCom/MCI Order*, 13 FCC Rcd at 18073-74, para. 85. AT&T and BellSouth do not hold any ownership interest in satellite systems or satellite transponder capacity that would serve thin route countries. Thus, the merger will not increase concentration in the provision of transport capacity on these routes. Additionally, we note that traffic on the U.S.-Mexico and U.S.-Canada routes primarily uses terrestrial facilities. We are not aware of any shortage of capacity on these routes. *See, e.g., 2004 Circuit Status Report* at 21, Table 4 (on U.S.-Canada route, there were 473,701 active and 710,122 idle circuits; on U.S.-Mexico route, there were 279,577 active and 435.554 idle circuits). BellSouth has no traffic on these routes. Therefore, we do not review either the thin route markets or the U.S.-Mexico and U.S.-Canada routes as part of our transport capacity analysis in this proceeding.

[433] BellSouth holds ownership interests in the following cables: in the Atlantic Region, TAT-14; and in the Americas Region, Maya. 1 and Pan American. *See* Submarine Cable Transfer Application, SCL-T/C-20060331-00003.

[434] **See**, *e.g.*, *DOJ/FTC Guidelines* § *3.2* (Timeliness of Entry). WDM technology dramatically increases the carrying capacity of fiber infrastructure. For example. adding one wavelength to a 40 Gbps cable (four fiber pairs of ten Gbps each) will double the capacity of the cable to 80 Gbps, and upgrading to eight wavelengths will increase capacity to 320 Gbps.

160. We find that the merger will not increase concentration significantly in any of the international transport market regions, and is not likely to result in anticompetitive effects given the relatively low market shares of the Applicants, the low barriers to entry, and the substantial amount of transport capacity available now and upgradeable with WDM technology from carriers other than the Applicants. AT&T has interests in cables in all three regions."' BellSouth owns no cable capacity in the Pacific Region. In each of the other two regions, the Atlantic Region and the Americas Region, BellSouth holds less than **[REDACTED]** percent of the total capacity for 2006.'" The combination of these interests will have almost no effect on the concentration of capacity in either of the Atlantic or Americas Regions. With respect to barriers to entry, we note that the planning and construction of a new cable system can he implemented within two years while WDM upgrades can he implemented in less than a year.[437] Thus we find entry barriers to be modest.

161. *Cable Landing Station* ***Access.*** Access to cable landing stations, both in the U.S. and abroad, is an essential input for the provision of **U.S.** international services and, therefore, constitutes **a** relevant market for the purpose of this merger proceeding. AT&T is a major owner of U.S. cable stations.[438] Because BellSouth does not have any ownership interests in cable landing stations,'" the merger will not increase concentration in these markets. Therefore, we do not analyze cable landing station input markets as a part of this merger analysis.

2. Intermediate Facilities-Based Markets

a. Facilities-Based IMTS

162. IMTS consists of telecommunications services provided over the public switched networks of U.S. international carriers. In recent years, IMTS has evolved into a two-sector industry – awholesale sector in which carriers can buy and sell bulk IMTS minutes, and a retail sector in which carriers sell minutes to "end users." The source of all wholesale IMTS minutes are IMTS minutes provided by facilities-based U.S. international carriers that terminate those minutes over their own networks through

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[435] AT&T holds ownership interests in the following cables. In the Atlantic Region. Columbus 11, Columbus III, TAT-12/13, TAT-14; in the Pacific Region, China-U.S., Guam-Philippines, Japan-U.S., PacRimEast, TPC-5; and in the Americas Region, Americas-I, Americas-2, Antillas-I, Arcos-1, Bahamas-2, Maya-1. Pan American, Taino-Carib. ***See 2004 Circuit Status Report*** at 34-35. Table 7 (listing various cable landing license orders).

[436] For the Atlantic Region, BellSouth and its affiliates own less than [REDACTED]% of **total** cable capacity. For the Americas Region, BellSouth and its affiliates own less than [REDACTED]%. ***See*** AT&T Info. Req.. Exh. 45; 2004 *Circuit* ***Status Report,*** Table 7.

[437] ***See,*** *e.g.*, *WorldCom/MCI* ***Order,*** 13 FCC Rcd at 18084, para. 105 (stating that a firm can decide to construct and begin operating a **new** cable system **in** response to an exercise of market power within two years); ***id.*** at 18081, para. 101 (stating that WDM upgrades can he implemented in less than **a** year). With WDM technology, capacity can now be added to submarine cables at **a** fraction of the cost necessitated by older technologies. in large part because with WDM there is no need to lay additional cable to increase capacity.

[438] **See** ***supra*** note 435 (AT&T cable landing station information **is** contained in the joint applications for the relevant cable landing licenses).

[439] ***See*** BellSouth Info. Req. at 86

interconnection agreements with foreign correspondents.[440] As the basis for all IMTS provisioning, facilities-based IMTS is the fundamental international service provided over the public switched network.[441]

163. According to data filed pursuant to section 43.61 of the Commission's rules, as of 2004 – the most recent year for which data are available – there were 42 carriers that competed in the markets for facilities-based IMTS. These carriers generated revenues of $8.7 billion with sales of 63.7 billion U.S. billed facilities-based IMTS minutes for all international routes combined.[442] Overall, **MCI** and AT&T were the largest providers,[443] with 26.7 percent and 26.3 percent, respectively, of **U S .** billed facilities-based IMTS *minutes.*[444] Other carriers with large shares of U.S.-billed facilities-based IMTS minutes were IDT, with 12.9 percent, and Sprint, with 12.1 percent.[445] None of the remaining carriers had more than **[REDACTED]** percent of U.S.-billed minutes for 2004. SBC was not a facilities-based IMTS carrier in 2004 and BellSouth, which filed confidentially. provided only **[REDACTED]** percent of U.S.-billed facilities-based IMTS *minutes.*[446] Neither *Cingular* nor any other wireless carrier reported U.S. facilities-based IMTS minutes.[447]

164. In 2004, legacy AT&T had not yet merged with SBC. However, because SBC provided no facilities-based IMTS in 2004, AT&T (post-merger with SBC) would have provided the ***same*** share of

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[440] Approximately 61% of all facilities-based IMTS minutes are sold to other carriers which then resell them to end users or to other resellers. **See** *2004 Section 43.61 Report*. Table A1, Table D. U.S. facilities-based carriers also sell IMTS services to foreign carriers, many of which find it profitable to terminate their international calls to third countries via the United States.

[441] Facilities-based IMTS is the first point in a supply chain of international inputs at which full end-to-end connectivity between the United States and any foreign point is available within the United States.

[442] These numbers include confidential as well as non-confidential data filed pursuant to section 43.61 of the Commission's rules. Unlike previous years, the carrier summary Table AI in the *2004 Section 43.61 Reporr* aggregates confidential and non-confidential data at the route-specific level. ***See*** *2004 Section 43.61 Report*, Table A1. We also cite, however, where necessary in this order, specific 2004 section 43.61 filings for which the filing company requested confidential treatment pursuant to section 0.459 of the Commission's rules. ***See*** 41 C.F.R. § 0.459. Although facilities-based IMTS may be provisioned through switches serving local areas or regions, this product can be resold easily and at very little cost over national transmission facilities. Thus, the price of wholesale IMTS does not differ significantly, or at all, between locales in the United States. Data aggregated to the nationwide level for facilities-based IMTS are available in the Commission's *Section 43.61 Reports* for each U.S. international route and for the aggregation of all **U.S.** international routes, termed "world total" data.

[4.17] Neither the merger of Verizon and MCI, nor the merger of AT&T and SBC, had been approved as of the filing deadline for the *2004 Section 43.61 Report*. MCI's numbers are therefore reported separately from Verizon. Verizon had **[REDACTED]%** of U.S.-billed minutes for 2004. **See** Verizon's confidential 2004 section 43.61 tiling. SBC had no facilities-based IMTS in 2004.

[444] These numbers were calculated using approximately 63.7 billion US-billed minutes in 2004. ***See*** *2004 Section 43.61 Report*, Table *AI*. The 63.7 billion minutes include Confidential as well as non-confidential data filed pursuant to section 43.61 of the Commission's rules.

[445] ***See*** *id.*

[456] **See** BellSouth's confidential 2004 section 43.61 filing.

[447] These companies provided IMTS resale, exclusively.

U.S. facilities-based IMTS minutes as legacy AT&T, *i.e.*, 26.3 percent. Because BellSouth provided such a small share of facilities-based IMTS minutes, the percentage of **U.S.** billed facilities-based IMTS minutes provided by a combination of the current AT&T (including SBC) and BellSouth does not represent a significant increase over the percentage provided by AT&T alone, *i.e.*, **[REDACTED]** percent.

165. Because final 2005 section 43.61 data are not yet available to the FCC,[448] we cannot calculate the percentage of total facilities-based IMTS minutes provided hy the Applicants in 2005. However, 2005 IMTS data provided by AT&T and BellSouth in their responses to the Information Request suggest that their shares in 2005 of total U.S. facilities-based **IMTS** are likely to be lower than their share in 2004.[449]

166. Evaluation of route-specific data shows that BellSouth provides facilities-based IMTS on only seven of 247 international routes (Guatemala, Panama, Argentina, Chile, Ecuador, Peru. and Venezuela) and has only a small market share of U.S. billed minutes except on a few routes.[450] BellSouth's market share is less than **[REDACTED]** percent on each of these routes, except for Ecuador.[451] BellSouth's market share for Ecuador is **[REDACTED]** percent.[452] Post merger, the combined entity would have a market share of **[REDACTED]** percent on the Ecuador route?[453] With this exception, there are either no increases in market concentration or minor increases, reflecting the fact that BellSouth has either no traffic or only a very small portion of total traffic on all hut this international route.

167. Moreover, we find that the absence of significant barriers to entry will serve to constrain any attempt by the merged entity to exercise market power on any of these eight routes. For facilities-based carriers, substantial international transport capacity exists in all regions. Foreign termination services are widely available on almost every route. Specifically, the 2004 ***Section*** 43.61 ***Report*** shows that there are ten or more reporting facilities-based IMTS carriers on 217 of 247 international routes. More relevant, there are 21 or more U.S. facilities-based **IMTS** carriers offering service on each of the seven routes served by BellSouth (Guatemala, Panama, Argentina, Chile, Ecuador, Peru, and Venezuela). We also note that there **is** a growing "spot market" for international termination services whereby carriers with excess capacity to various foreign destinations can auction foreign termination services to any U.S.

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[448] Carriers had until October 31,2006 to submit a revised report correcting any inaccuracies included in their annual report. ***See*** 47 C.F.R. § 43.61(a)(2).

[14Y] ***See*** AT&T Info. Req., Exh. 46.1; BellSouth Info. Req., Exh. 47.1. **[REDACTED]**

[450] ***See*** Letter from Bennett L. Ross, General Counsel – D.C., BellSouth. to Marlene H. Dortch. Secretary, FCC, WC Docket No. 06-74 at 1 (tiled Sept. 8. 2006) (BellSouth Sept. 8 ***Ex Parte*** Letter); *2004 Section* 43.61 ***Report***, Table **A;** ***see*** *also* BellSouth's 2004 section 43.61 confidential filing;Letter from Richard E. Wiley, Counsel for BellSouth, to Gary Remondino, Wireline Competition Bureau. FCC. WC Docket 06-74, Attach. at 2 (filed Aug. 22,2006) (BellSouth Aug. 22 ***Ex Parre*** Letter) (supplemental information responsive to specification 47).

[4SI] BellSouth Info. Req., Exh. 47(1). These numbers were calculated using approximately 63.7 billion U.S.-billed minutes in 2004. ***See*** 2004 Section 43.61 Report, Table **AI.** The 63.7 billion minutes include confidential as well as non-confidentialdata tiled pursuant to section 43.61 of the Commission's rules.

[452] BellSouth Info. Req., Exh. 47(1).

[453] ***Id.***

carrier seeking such services.[454] Given the presence of other facilities-based IMTS carrier and the absence of significant barriers to entry, any attempt by the merged entity to exercise market power on any international route would be frustrated by competitive entry.

168. Finally, as the Commission noted in the ***Verizon/MCI Order,*** the emergence of international VoIP services as a substitute for facilities-based IMTS should also constrain the market power of any provider of facilities IMTS.[455]

b. International Private Line Services

169. Facilities-based international private line services provide dedicated connectivity between points in the U.S. and foreign destinations.[456] AT&T is a major provider of international private line services.[457] Because BellSouth does not provide any facilities-based international private line services,[458] the merger will not increase concentration in these markets. We do not, therefore, analyze the wholesale facilities-based market as a part of this merger analysis.

3. End-User Markets

a. Mass Market

170. The mass market for international telecommunications services consists of international telecommunications services sold directly to residential and small business customers. The primary suppliers of such services are facilities-based IMTS carriers and **IMTS** resellers.[459] We find that the market is not highly concentrated and that the merger is not likely to have anticompetitive effects. We also find that structural characteristics of the mass market facilitate entry and will ensure that the market remains competitive post-merger.

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[454] Arhinet is an example of a company bringing buyers and sellers of international termination services together. **See** Arhinet-Thexchange, Inc., SEC Form 10-K at **3** (filed Mar. 14, 2006), ***available*** *at* **http://www.sec.gov/Achives/edgar/data/1136655/000112506053757/d10k.htm.**

[455] ***Verizon/MCI Order, 20*** **FCC** Rcd at 18518-59, para. 167.

[456] Private lines are facilities that provide dedicated connectivity between two geographically distant customer points and are sold to customers as common carriage offerings. Private line services are offered to the public in sizes ranging from 64-Kbps circuits (DSO) up to very high-speed trunks equivalent to 1,890 64-Khps circuits (STM-I), *or* higher. International private lines provided **by** U.S. carriers connect customer locations in the United States to locations abroad.

[457] ***See*** *2004 Section* ***43.61 Reporf,*** Tables B-1, B-2

[458] ***See*** BellSouth Sept. **8** ***Ex Parte*** Letter at 1; BellSouth's 2004 section 43.61 confidential filing

[459] Although we cannot identify precisely which VoIP providers should be included in the same market as mass market IMTS, we nevertheless find that certain VoIP providers should be also included as participants in this market. *Cf.* ***supra*** Part V.D (Mass Market Telecommunications Competition). We also find that wireless providers of IMTS are market participants to a limited degree. However, because of difficulty in evaluating precisely the participation of VOIP and CMRS providers in the IMTS market, we do not include these carriers in our market share analysis below.

171. Consistent with the *SBC/AT&T Order* and the *Verizon/MCI* ***Order,*** the record suggests that many consumers approach international IMTS as an "a la cane" service often purchased from providers other than their presubscribed carrier, including independent resellers.[460] The IMTS mass market *is* not highly concentrated. There are approximately 42 facilities-based carriers and approximately 799 resellers providing IMTS service.[461] Many of these carriers offer service on all or most international routes and sell directly lo residential and small business customers. Major market participants include Verizon, AT&T, IDT Corporation, and Sprint, as well as a number of other highly active facilities-based carriers and resellers."' Within the last several years, AT&T, Verizon, and Sprint have begun focusing on the provision of wholesale IMTS to resale carriers. Many smaller, highly competitive resellers have entered in recent years to compete against the traditional carriers in the provision of mass market IMTS. As a result, the traditional international carriers no longer hold the substantial market shares in mass market IMTS that they once held. Although BellSouth has the most presuhscribed lines of any carrier within its region, the fact that BellSouth sold only **[REDACTED]** IMTS minutes to residential customers in 2004 and **[REDACTED]** minutes in 2005 is evidence that it possesses only a limited share of mass market IMTS within its region.[463] Given such a competitively dynamic environment, we find that the merger is not likely to result in anticompetitive effects in the IMTS mass market.

172. We also find that various structural characteristics of the IMTS mass market will ensure that the market remains competitive. Mass market IMTS customers have multiple access channels through which to obtain international service, including calling plans offered by their presubscribed long distance carrier, "dial-around" services, prepaid calling cards, as well as important emerging access channels such as discounted international calling plans offered by wireless carriers and VoIP providers. In addition, there are no significant barriers to entry in the provision of mass market IMTS. For facilities-based providers, substantial international transport capacity exists in all regions and foreign termination services are available on virtually every route. Because facilities-based IMTS minutes are a crucial input for resellers, their wide availability will continue to sustain a highly active resale sector. Indeed, the

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[460] ***See SBC/AT&T Order,*** 20 FCC Rcd at 18374, para. 161; *Verizon/MCI* ***Order,*** 20 FCC Rcd at 18519-20, para. 171. In 2004, **U.S.** end-user customers purchased approximately 56.6 billion IMTS minutes. ***See 2004*** *Section* ***43.61 Report,*** Tables 34 and 35. Resellers reported approximately **18.6** billion IMTS minutes in 2003, although this figure may include substantial double-counting. *Id.*, Table D. Resold IMTS is mostly, but not entirely, provided as a non-presuhscrihed service, such as prepaid calling cards or "dial-around."

[461] ***See supra*** para. 156

[462] ***See 2004*** *Section* ***43.61 Report,*** Tables A and D

[463] An extremely rough upper hound on BellSouth's market share can he derived as follows: Nationwide, end-user IMTS minutes provided by wireline carriers totaled approximately 54.4 billion minutes in 2004, the most recenl year for which we have total industry data. ***See 2004*** *Section* ***43.61 Report,*** Tables A34, A35 (adjusted to exclude CMRS IMTS minutes in Table D and confidential section 43.61 filings). The proportion of residential minutes to total end-user minutes is approximately 60%, **so** that the residential market in 2004 consisted of approximately 32.6 billion minutes nationwide. Because BellSouth has approximately 13% of total U.S. local loops in its region, we estimate that approximately 4.2 billion residential minutes were sold by all carriers in the BellSouth region in 2004. ***See*** FCC, *Statistics* of *Communications Common* ***Carriers*** at Tables 2.4, **2.6,** 5.7 (Nov. 2005) ***available*** *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262086A1.pdf. BellSouth reported **[REDACTED]** residential IMTS minutes in 2004. ***See*** BellSouth Aug. 22 *Ex Parte* Letter, Attach. at **3** (supplemental information responsive to specification 49). Thus, BellSouth's approximate share of residential IMTS minutes in its region was only **[REDACTED]%,** which we assume to be representative of small business IMTS as well and thus indicative of its market share of the IMTS mass market in its region.

presence of approximately 799 resellers nationwide demonstrates that successful entry into the IMTS mass market is feasible even for smaller, non-facilities-based carriers.'''

b. Enterprise Market

173. The enterprise market for international telecommunications services consists of international telecommunications services sold directly to medium and large. business customers. **As** discussed above in the context of domestic enterprise services, we find that medium and large enterprise customers are sophisticated purchasers of telecommunications services likely to make informed choices based on expert advice about service offerings and prices. **As** we concluded above, so long as no structural barriers prevent carriers from offering services to such customers, they will seek out best-priced alternatives.[465] The provision of international services to larger business customers depends in large part on the ability to obtain critical inputs, such as international transport capacity and operating agreements with carriers on the foreign end, as well as the technical ability to provide the specific services demanded by larger business customers. The combined entity would not have the ability to exercise market power over these critical inputs. Moreover, we find that many carriers have the technical capability to provide business services. In light of these facts, we conclude that the merger is unlikely to reduce competition in this market.

c. **Global** Telecommunications Services

174. The global telecommunications services (GTS) market, also known as the global seamless services market, is a segment of the enterprise market that is focused on large multi-national customers that require connectivity to multiple locations throughout the world, not just within the U.S.[466] These customers are generally large multi-national corporations that have significant expertise in telecommunications issues.[467] Although AT&T is a competitor in the **GTS** market,[468] BellSouth does not provide any GTS services;[469] thus the merger will not increase concentration in these markets. Therefore, we do not analyze the GTS market as a part of this merger analysis.

[4b] ***See** 2004 **Section** 43.61 **Report.*** Table D.

[465] ***See supra*** para. 82

[466] The **Commission** has defined the global seamless services market as "a combination of voice, data, video, and other telecommunications services that are offered by a single source or multiple sources over an integrated global or regional international network of owned or leased facilities, and that have equivalent (though not identical) quality, chsracteristics, features and capabilities wherever they are provided." *AT&T/British Telecom* ***Order,*** I4 **FCC** Rcd **at** 19153, para. 28; ***see also, e.g., Sprint Corporation, Petition for Declaratory Ruling Concerning Section 310(b)(4) and (dj and the Public Interest Requirements of the Communications Act of 1934, as amended,*** File No. 1-S-P-95-002, Declaratory Ruling and Order, 11 **FCC** Rcd 1850, 1864, para. **84** (1996) ***(Sprint Declaratory Ruling);*** United States v. Sprint Corp., Civil Action No. 95-1304, Complaint **at** paras. 18, 29, 39 (D.D.C. filed July 13, 1995) (defining market of "seamless international telecommunications services" that **is** distinct for purposes of antitrust **law).**

[467] *AT&T/British Telecom* ***Order,*** 14 FCC Rcd at 19151-57, paras. **22-39.**

[468] ***See*** AT&T **Info.** Req. at 101-102.

[469] ***See*** BellSouth Info. Req. at 94

H. Wireless Broadband Services Competition

175. Commenters allege that the aggregation of AT&T's and BellSouth's holdings of Broadband Radio Service (BRS) spectrum in the 2.5 GHz band and Wireless Communications Services (WCS) spectrum in the 2.3 GHz band will result in competitive harms.[470] Consistent with the Commission's analysis in the *Sprint/Nextel* **Order,** we assess the potential effects of the proposed BRS and WCS transfers on competition in the product markets where BRS and WCS spectrum seem most likely to be used: (1) the mobile data services market and *(2)* the fixed broadband services market.[471] For the reasons discussed below, we find that there is unlikely to be a merger-specific Competitive effect on the mobile data services market, the fixed broadband services market, or the merged entity's incentive and/or ability to "warehouse" spectrum.

176. ***Mobile Data Services Market.*** Several petitioners and commenters raise concerns about the amount of WCS and BRS spectrum that the merged entity would control, both in local markets and in the aggregate, and its position as a provider with a national footprint in the WCS and BRS bands.[472] In particular, Clearwire argues that the merged entity will prevent competitive entry in local markets and will use its BRS spectrum holdings in BellSouth's territory to prevent Clearwire from becoming a "national" competitor in the provision of mobile data services.[473] We reject these arguments.

177. There are only three circumstances in which the proposed transfer of WCS and BRS spectrum could have a merger-specific competitive effect on the mobile data services market:[474] **(1)** if AT&T and BellSouth both hold WCS or BRS licenses in overlapping geographic areas outside of their respective in-region territories, *(2)* if AT&T licensed or controlled spectrum overlaps BellSouth licensed or controlled spectrum in BellSouth's territory, or **(3)** if BellSouth licensed or controlled spectrum overlaps AT&T licensed or controlled spectrum in AT&T's territory. Only the first of the three circumstances exists here. The record shows that AT&T holds no BRS spectrum,[475] and that AT&T's WCS holdings overlap

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[470] ***See.*** *e.g.*, CDD Petition at 6; Clearwire Petition at 2-3, 6-8, 15-18; COMPTEL Petition at 16-24; Consumer Federation ***et a/.*** Petition at 20-25; Ruhin Comments at 16-18; Clearwire Reply at 9-10; Clearwire Reply to Joint Opposition at 9-10, 19 (filed June 27, 2006) (Clearwire June 27 Reply); Consumer Federation ***et al.*** Reply at 20-24.

[471] *Sprint/Nextel* **Order** at 14021-22, para. 150. WCS and BRS spectrum, though licensed under different rules, appears to he suitable for the provision of some form of fixed or mobile wireless broadhand service. ***See*** *id.* at 14024-25, paras. 154-156; ***see*** *also* Clearwire June 27 Reply at 9; ***Amendment*** of ***rhe Commission's Rules*** to ***Establish Part*** 27, ***rhe Wireless Communications Service*** *("WCS")*, GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10798-99, 10816-17, paras. 27-28, 67 (1997) ***(WCS Order); Eleventh CMRS Competition Report,*** paras. 29-33. We therefore treat those hands **as** substitutable for the purposes of this analysis. In doing ***so,*** we do not opine as to the actual substitutability of the WCS and BRS hands, or any services offered therein.

[472] **See,** *e.g.*, Clearwire Petition at 4-5, 7-9, 14, 17; Clearwire June 27 Reply at 12.

[473] Clearwire Petition at 8, 12; Clearwire June 27 Reply at 12-13, 16-18.

[474] We note that any spectrum held by Cingular would not affect this analysis because Cingular is jointly owned by the applicants. In any event, Cingular does not hold WCS, BRS or EBS licenses or lease or otherwise own or control WCS, BRS, or EBS spectrum. ***See*** AT&T Info. Req. at 55.

[475] **See** AT&T/BellSouth Reply at *65;* Letter **from** Gary L. Phillips, AT&T, and Bennett L. Ross, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 **n.2** (filed Oct. 2, 2006) (AT&T/BellSouth Oct. 2 ***Ex Parte*** Letter); Joint ***Ex Parte*** of AT&T Inc. and BellSouth Corporation. WC Docket No. 06-74 at 2 (Aug. 4, 2006); (AT&T/BellSouth Aug. 4 ***Ex Pane);*** AT&T Info. Req. at 55.

BellSouth's BRS holdings only in a small portion of one county in Indiana with a total population of 2,022.[476] This overlap involves a 5 MHz WCS license held by AT&T, KNLB325, and BRS spectrum held by BellSouth.[477] We do not believe this overlap rises **to** a level of merger-specific competitive harm because its geographic scope is extremely limited, encompassing less than one percent of the population of RSA410 Indiana 8-Brown, and there is a wide variety of spectrum available in that overlap area that is suitable for the provision of mobile data services that is licensed to parties other than the Applicants."'

178. Further. notwithstanding Clearwire's arguments to the contrary,[479] significant blocks of spectrum are available, or soon will be available, to competitors wishing to provide competing wireless mobile broadband services. As we noted in the *Sprint/Nextel Order*, HRS spectrum does not appear to be uniquely suitable for any specific wireless service, and we anticipate that, if BRS spectrum is used for the provision of mobile data service, it will be one of several existing and potential inputs for the mobile data services market.'" For example, we believe the 90 MHz of bandwidth made available in the Advanced Wireless Service (AWS) auction will enable entry into either mobile or fixed broadband markets."' We therefore continue to believe that "[w]hat is clear, at this point in the development of these nascent services, is that there is meaningful competition among current mobile data service providers and that substantial opportunities exist for service providers to develop and offer even higher speed services over numerous spectrum blocks that will become available in the future."[482]

179. ***Fixed Broadband Services.*** Consistent with the *Sprint/Nextel* **Order,** we define the fixed broadband services market as the market for fixed advanced telecommunications capability, *i.e.*, "high-speed, switched, broadband telecommunications capability that enables users to originate and receive

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[476] AT&T/BellSouth Reply at 65 n.265. The area is a circle with a radius of **35** miles in RSA8, with a population of 2,022 according to the 2002 census. AT&T Info. Req. at **55.**

[477] AT&T/BellSouth Reply at 65 n.265; AT&T Info. Req. at ***55.***

[478] ***See, e.g., Sprint/Nextel Order,*** 20 FCC Rcd at 14025-26, para. 158

[479] Clearwire July 27 Reply at 5-11

[480] ***Sprint/Nextel Order,*** 20 FCC Rcd at 14022, 14025, paras. 151, 157. The same holds true for WCS spectrum ***WCS Order***, 12 FCC Rcd at 10816-17, para. 63.

[481] ***See Sprint/Nextel Order,*** 20 FCC Rcd at 13980, para. 29. The auction of 90 MHz of Advanced Wireless Services spectrum (AWS-I), Auction No. 66, concluded on Sept. 18, 2006. ***See*** Factsheet for Auction 66, Advanced Wireless Services (AWS-1), ***available at*** http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=66; *Auction of Advanced* ***Wireless*** *Services* ***Licenses Closes,*** Public Notice, Report No. AUC-06-66-F, 21 FCC Rcd 10521 (2006). There are a variety of other bands which may he suitable for the provision of mobile or fixed wireless broadhand services. *See* AT&T/BellSouth Reply at 67-68; AT&T/BellSouth Oct. 2 ***Ex Parte*** Letter at 2; ***bur*** **see** Clearwire July 27 Reply at 5-9 (arguing that some hands identified by AT&T and BellSouth are not now suitable for the provision of mobile wireless broadhand services).

[482] *Sprint/Nextel* ***Order,*** 20 FCC Rcd at 14025, para. 156. We reject for the same reasons Clearwire's argument that the merged entity's holdings in the 2.5 GHz band and "nearly national" footprint in the ***2.3*** GHz hand will prevent Clearwire or other competitors from becoming national competitors. Clearwire Petition at 8, **12;** Clearwire June 27 Reply 16-18. We also reject for the same reasons Clearwire's contention that the merged entity will hold "key" spectrum that can he used to block development of a nationwide mobile wireless broadband network by a competitor. ***See. e.g.***, Clearwire June 27 Reply at 12-13. The fact that the merger causes no significant concentration coupled with the availability of alternative spectrum renders such arguments implausible.

high-quality voice, data, graphics. and video telecommunications capability using any technology."[483] Although we are uncertain as to the exact nature of services that will he provided in the WCS and BRS bands, we expect that these spectrum hands may be used to provide fixed or portable wireless broadband services that will provide alternative service platforms for last mile connections to residences and businesses.[484] Operators providing such services will likely compete with digital subscriber line (DSL) and cable modem service providers that already hold significant market share.'*'

180. There are only three circumstances in which the proposed transfer of WCS and BRS spectrum will have a merger-specific effect on fixed broadband services: (1) if AT&T and BellSouth both hold WCS or BRS licenses in overlapping geographic areas outside of their respective in-region territories, *(2)* if AT&T licensed or controlled spectrum overlaps BellSouth's territory, or **(3)** if BellSouth licensed or controlled spectrum overlaps AT&T's territory. All three circumstances exist here.'"

181. **As** discussed above, AT&T's WCS holdings overlap BellSouth's BRS holdings in a small portion of one county in Indiana, which county is outside AT&T's and BellSouth's in-region territory.'"' The record further shows that AT&T has three WCS licenses which overlap very slightly with BellSouth's territory in **[REDACTED],"'*** and BellSouth has **[REDACTED]** licenses which overlap with AT&T's territory.'"' Such overlaps, especially given the wide variety of spectrum allocations held by parties other than the Applicants, do not rise to the level of a cognizable competitive harm.[490] **As** discussed in para. 178 above, significant blocks of spectrum are available, or soon will be available, to competitors wishing to provide competitive wireless broadband services. Further, the Commission has

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[483] ***Sprint/Nextel Order,*** 20 FCC Rcd at 14029, para. 167 (citing 47 U.S.C. § 706); *see also* Availability of Advanced Telecommunications Capability in the United States, ***Fourth Report to Congress***, 19 FCC Rcd 20540 (2004).

[484] ***Sprint/Nextel Order,*** 20 FCC Rcd at 14022, 14025, paras. 151, 157. The same holds true for WCS spectrum. WCS Order, 12 FCC Rcd at 10816-17, para. 63. **See** WCS Coalition, Consolidated Request for Limited Extension of Deadline for Establishing WCS Compliance with Section 27.14 Substantial Service Requirement at 10-11, filed Mar. 22. 2006 (noting that 802.16e WI-Max equipment is expected to be developed for use in the 2.3 GHz WCS band); Comments of Motorola, Inc., WT Docket No. 06-102, filed June 9, 2006 (noting that WI-Max technology is widely held to be the most promising technology for a successful broadhand service for WCS consumers).

[485] ***See Sprint/Nextel Order,*** 20 FCC Rcd at 14027-28, para. 162. ***See*** *also* ***High-Speed Services Dec. 2005 Report,*** Tables 7-9.

[486] For the sake of clarity, we note that the circumstances in which the proposed transfers will have a merger-specific effect on the fixed broadhand services market differ from those circumstances germane to the mobile data services market, discussed ***supra*** para. 176. A merger-specific effect in the mobile data services market occurs only where there is an overlap of the Applicants' spectrum holdings. whereas a merger-specific effect in the fixed broadband services market will occur where there is a newly created overlap of the Applicants' spectrum ***or*** one Applicant's spectrum with the other Applicant's in-region territory, As noted above, Cingular does not affect this analysis because Cingular is jointly owned by the applicants. and does not otherwise own, lease, or otherwise control WCS, BRS or EBS spectrum. ***See*** AT&T Info. Req. at 55.

[487] *See* ***supra*** para. 177.

[488] **(REDACTED].** **See** AT&T Info. Req., Exh. 23.1

[489] The overlapping areas and spectrum are as follows: **[REDACTED].** *See* BellSouth Info. Req.. Exh. 27.a.l

[490] ***See, e.g., Sprint/Nextel Order, 20*** FCC Rcd at 14025-26, para. 158.

noted that, in the future. there will be a wide variety of technologies that will be available to provide broadband services to consumers and businesses, including fiber, broadband over power line, unlicensed wireless technologies, and satellite.[491] We continue to believe that, to the extent that uses of BRS and WCS spectrum evolve into a fixed broadband service, it will be just one of several broadband services and that no competitive harm is likely to result from the merger in this product market.[492]

182. *Warehousing.* Finally, we reject commenters' arguments regarding the merged entity's incentive and/or ability to "warehouse" spectrum.[493] The Commission recently required all BRS licensees to demonstrate substantial service by May 1, 2011 and established safe harbors that licensees could use to make a substantial service showing.[494] We concluded that "establishing a substantial service standard with safe harbors will ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . . promote investment in and rapid deployment of new technologies and services."[495] In this case, based upon our review of the record, we conclude that none of the commenters have made a showing that the recently adopted substantial service standards would be insufficient to prevent warehousing.[496] Since WCS licensees are required to demonstrate substantial service at renewal, the same logic applies to WCS spectrum.[497]

I. Effect of the Enlarged Local Footprint

183. Citing the Commission's *SBC/Ameritech Order* and *Bell Atlantic/GTE Order*,[498] certain commenters argue that the merged entity's expanded geographic scope (*i.e.*, its "big footprint") will increase its incentive to discriminate in the provision of wholesale inputs to rivals in various retail

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[491] *Sprint/Nextel Order*, 20 FCC Rcd at 14025-26, para. 162; *Section 706 Fourth Annual Report to Congress*, 19 FCC Rcd at 20553-62, 20583.

[492] *Sprint/Nextel Order*, 20 FCC Rcd at 14025-26, para. 162.

[493] *See, e.g.*, CDD Petition at 6; Clearwire Petition at 17; Clearwire Reply at 19; Clearwire June 27 Reply at 19; Consumer Federation *et al.* Reply at 23-24; AAI Condition Comments at 5; Clearwire Condition Comments at 3-6. *but see* AT&T/BellSouth Oct. 2 *Ex Parte* Letter at 3.

[494] *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Third Memorandum Opinion and Order and Second Report and Order, WT Docket No. 03-66, 21 FCC Rcd 5606, 5718-36, paras. 274-310 (2006).

[495] *Id.* at 5720, para. 278.

[496] *See, e.g.*, CDD Petition at 6; Clearwire Petition at 17-18; Consumer Federation *et al.* Petition at 9, Consumer Federation *et al.* Cooper/Roycroft Decl. at 67; Rubin Comments at 16-18; Clearwire Reply at 10; Consumer Federation *et al.* Reply at 21-24; Telephone USA Reply at 2; Letter from Larry Day, Director, Wireless Pathways, Inc., to Marlene H. Dortch. Secretary, FCC, WC Docket No. 06-74 (filed Oct. 27, 2006); AAI Condition Comments at 5; Clearwire Condition Comments at 15-18.

[497] *See* 47 C.F.R. § 27.14(a). *See* WCS Coalition, Consolidated Request for Limited Extension of Deadline for Establishing WCS Compliance with Section 27.14 Substantial Service Requirement at 10-11, filed Mar. 22, 2006.

[498] *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14115-16, paras. 176-178; *SBC/Ameritech Order*, 14 FCC Rcd at 14797-98, paras. 192-193.

markets.'" Commenters further assert that the merger will increase the merged entity's incentive to discriminate by reducing the number of companies against which the merged entity's practices can be compared, or "benchmarked."'" For the reasons given below, we do not find that these broad, generalized, quasi-theoretical arguments justify the imposition of conditions.

1. Big Footprint

184. The "big footprint" theory postulates that, where an incumhent LEC possesses market power over certain essential wholesale inputs, that incumbent LEC may not discriminate against rivals to the full extent of its ability, because the benefits of full discrimination may not justify the costs (which include the risk that the discrimination may be detected and punished by regulators). The theory further assumes that, when an incumbent LEC (incumbent LEC **A)** does discriminate against a rival that competes not only in its in-region service territory, but also in that of another incumbent LEC (incumbent LEC B), the benefits of incumbent LEC **A's** discrimination may "spill-over" and benefit incumbent LEC B. If incumbent LECs A and B subsequently merge, the theory postulates that these spill-over effects, or externalities. will be internalized by the merged entity, which should increase to some degree the incentive of the merged incumbent LEC to discriminate.'"'

185. Consistent with past Commission decisions, we find that this "big footprint" theory **is** theoretically valid.[502] We are not persuaded, however, that the general arguments presented by commenters justify the imposition of burdensome conditions in this proceeding. First, commenters present no rigorous theoretical model that generates even a rough estimate of the merger's incremental impact on AT&T's incentive to discriminate, whether through price or non-price methods. Second, although there have been several mergers of large incumbent LECs, including BOCs, in recent years, commenters present no convincing empirical evidence showing that such mergers led to increased post-merger discrimination against rivals.[503] Third, the "big footprint" theory assumes that each incumbent LEC operates only within its own service territory, but AT&T, unlike parties in earlier large-incumbent LEC mergers, already is a major competitor in BellSouth's territory. Commenters fail to address **how** and whether the merged entity's incentives are affected by the fact that AT&T, through **its** out-of-region

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[199] ***See,*** *e.g.*, Access Point *et al.* Petition at 20-24; Cbeyond ***et al.*** Comments at 88-90; TWTC Petition at 42-45; TWTC Reply Attachment B, Joint Declaration of Stanley M. Besen **and** Bridger M. Mitchell, CRA International. ai 19-25 (tiled Aug. 8, 2006) (TWTC Besen/Mitchell Reply Decl.); Cable Companies Sept. 27 ***Ex Parte*** Letter at 7; b*ut* **see** AT&T/BellSouth Application at 115-120, 230; AT&T/BellSouth Reply at 90-100.

[500] ***See,*** *e.g.*, Access Point *et al.* Petition at 13-20, Cbeyond *et al.* Comments at 78-88; MSV LLC Comments at 7: TWTC Petition at 51-71; Cbeyond **et** *al.* Reply at 13-15; Consumer Federation *et al.* Reply at 27-30; ***see generally*** *Bell Atlantic/GTE* ***Order,*** 15 FCC Rcd at 14099-114, paras. 127-72, ***SBC/Ameritech Order,*** 14 FCC Rcd at 14760-95, paras. 101-85. ***Bur*** *see* AT&T/BellSouth Application at 120-24; AT&T/BellSouth Reply at 100-10: Cable Companies Sept. 27 ***Ex Parte*** Letter at 8-9.

[501] ***Bell Atlantic/GTE Order,*** 15 FCC Rcd 14116, para. 178; ***SBC/Ameritech Order,*** 14 FCC Rcd at 14798, para. 193.

[502] ***Bell Atlantic/GTE Order.*** 15 FCC Rcd at 14115-16, paras. 176-178; ***SBC/Ameritech Order,*** 14 FCC Rcd **at** 14797-98, paras. 192-93.

[503] Indeed, only the Applicants cite a case study of incumbent LEC mergers – one that finds no reduction in competitive LEC competition in areas served by merged incumbent LECs. ***See*** AT&T/BellSouth Application at 115-16, citing Dennis Carlton, *Case* ***Study:*** *ILEC* ***Mergers, in*** Econometrics: Legal, Practical, and Technical Issues 378 **(Am.** Bar. Ass'n. Section of Antitrust Law, ed. *2005).*

operations, should already be internalizing some of the externalities of any discriminatory activity."' Finally, we note that AT&T made certain commitments in the SBC/AT&T proceeding which the Commission adopted as conditions to its approval of that merger.[505] Those conditions, which remain effective and which include price commitments and performance metrics, should reduce any incremental effect of the pending merger on the incentive to discriminate. For these reasons,[506] we do not find that the "big footprint" theory justifies the imposition of burdensome conditions.

186. ***Spread* of *"Worst Practices."*** Commenters also contend that the merged entity will be better able to coordinate and rationalize discriminatory conduct through the "spread of worst practices" throughout the merged entity's region.[507] We find this argument unpersuasive. First, AT&T and BellSouth currently are free to adopt whatever legal terms, conditions and practices they deem appropriate, including those that may currently be employed by their merger counterpart, whether they be a "best practice" or "worst practice."[508] Second, and relatedly. opponents fail to present a clear and persuasive explanation as to why the merger will cause the merged entity to adopt worse practices than

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[504] Cheyond ***er al.*** cite evidence of lingering inconsistencies in AT&T's in-region and out-of-region policies. Cbeyond *et al.* Aug. 30 ***Ex Parte*** Letter at 12. It is true that AT&T may not be fully capturing externalities in BellSouth's region. Nevertheless, AT&T's pre-merger presence in BellSouth region must reduce, to some extent, the theoretical post-merger effect on AT&T's incentive to discriminate.

[505] ***SBC/AT&T Order,*** 20 FCC Rcd at 18411-21. Appendix F.

[506] We note that we are not persuaded by AT&T's argument that "full implementation" of sections 251 and 271 of the Act offsets any concerns ahout AT&T's market power in the context of special access. **See,** ***e.g.***, AT&T Aug. 21 ***Ex Parte*** Letter at 2-3. The implementation status of sections 251 and 271, however, has no hearing on the empirical question of whether AT&T and BellSouth possess market power in the special access market. We also are not persuaded by the Applicants' argument that the availability of UNEs offsets any concerns ahout the effect of the merged entity's enlarged footprint on its incentives to discriminate in the provision of special access services. **See,** *e.g.*, AT&T Aug. 21 ***Ex Parte*** Letter at 3. As the Commission explained in the ***Triennial Review Order,*** "[t]he purposes of a market power analysis are not the purposes of section 251(d)(2) . . . the Act requires only that network elements be unbundled if competing carriers are impaired without them, regardless of whether the incumbent LEC is exercising market power or the unbundling would eliminate this market power." ***Triennial Review Order,*** 18 FCC Rcdat 17051, para. 109; ***see also SBC/AT&T Order***, 20 FCC Rcdat 18310, para. 39 n.105.

[501] ***See, e.g.***, TWTC Petition at 42-43, 46-47 (alleging that AT&T's less-favorahle Ethernet prices, terms, and conditions will spread throughout the merged entity); TWTC Taylor Decl. at 14-15, 17, paras. 32-34, *39;* TWTC Besen/Mitchell Reply Decl. at paras. 19-20 (objecting to AT&T's special access volume commitment and [REDACTED]); Cheyond *et al.* Comments at 83-85, *93-95;* Cbeyond *et al.* Comments, Attach. 1, Declaration of James C. Falvey on Behalf of Xspedius Communications at paras. 7-8, 12-11 (Cbeyond ***et al.*** Falvey Decl.) (alleging that the merged entity will adopt anti-competitive terms and conditions of both AT&T and BellSouth); Access Point ***er al.*** Petition at 36-38, 69-70 (alleging that AT&T's unfavorable policies regarding interconnection with competitive tandem switching and transit services will spread throughout the merged entity); ***bur*** **see** AT&T/BellSouth Reply at 96 (alleging that TWTC attempts to use the merger to gain leverage in on-going contract negotiations).

[508] Cbeyond ***et al.*** also argue that. pre-merger, policies towards competitive LECs vary not only between the merging entities hut also within them, and that, after the merger, any variations that benefit competitive LECs will likely be eliminated. ***See*** Cheyond ***et al.*** Comments at 83-84; Cbeyond *et al.* Aug. 30 ***Ex Parte*** at 12. Cheyond ***et al.*** fail to demonstrate, however, that such streamlining. should it occur, would be adverse to competitive LECs.

the Applicants adopted prior to the merger.[509] Thus, we question whether this argument represents a merger-specific concern. Finally, vague speculation about steps the merged entity might take to impair entrants offering new or advanced services does not serve as a reasonable basis for imposing conditions, much less for denying the merger.""

2. Benchmarking

187. Commenters also argue that the merged entity will have a greater ability to discriminate against its competitors because the merger will reduce the number of similarly situated companies against which it will be possible to compare, or "benchmark," practices.'''

188. Benchmarking was a regulatory tool developed in the years following the creation of the BOCs. In decisions rendered in 1990 and 1993, the U.S. Court of Appeals for the D.C. Circuit recognized that the ability to benchmark one BOC's practices against the others' made regulating the seven BOCs easier than regulating pre-divestiture AT&T.[512] The Commission endorsed benchmark comparison as a means of establishing technical feasibility when it first implemented the 1996 Act.[513] In addition, in late 1999 and early 2000, the Commission, in the *SBC/Ameritech Order* and ***Bell***

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[509] The "Big Footprint" theory would provide one explanation for why the merged entity would be more likely to adopt worst practices. but for the reasons given above, we do not find this theory justifies the imposition of conditions.

[510] AT&T and TWTC are currently involved in contract negotiations for a custom agreement with many elements, including Ethernet loops. AT&T contends that TWTC attempts to use this proceeding to gain negotiating leverage in these negotiations. ***See,*** *e.g.*, AT&T/BellSouth Reply at 96; AT&T/BellSouth Casto Reply Decl.; Letter from Gary L. Phillips, AT&T Inc. and Bennett L. **Ross,** BellSouth Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Dec. **5**, 2006). We find AT&T's argument plausible, and we decline to consider or discuss in the context of this proceeding terms and conditions included in those negotiations. TWTC also claims that "there are no stable regulatory arrangements established for access to Ethernet local transmission facilities." TWTC Petition at 46. We decline the implied invitation to create Ethernet standards in the context of this merger proceeding. and direct TWTC to the Commission's rules that provide for a petition for rulemaking. 47 C.F.R. §§ 1.401-1.407. We also dismiss Cbeyond **et** *al.*'s argument that BellSouth **is** or might emerge as **a** maverick with respect to business practices. Cbeyond *et al.* Comments at *83*. The record contains no empirical evidence suggesting that BellSouth is or will become a maverick. We also note that Cbeyond **et** *ai.* elsewhere complain that where BellSouth's policies differ from AT&T's, the comparison is unfavorable. *See* Cbeyond *et al.* Comments at 93-95; **see** *also* Ochshorn Condition Comments (urging that BellSouth be required to adopt AT&T's Lifeline and Linkup program provisions).

[511] **See,** *e.g.*, Access Point *et al.* Petition at 13-20; Cheyond *et a/.* Comments **at** 78-85, 94-95; EarthLink Comments at 32-36; MSV LLC Comments at 6-7, 16; TWTC Petition at 51-71; TWTC Reply at 35-36; TWTC Besen/Mitchell Reply Decl. at paras. 63-121; New Jersey Ratepayer Advocate Comments at 15-16; Sprint Nextel Comments at 8-9; Consumer Federation *et a/.* Reply at 27-30; MSV LLC Reply at 4-5; *but* **see** AT&T/BellSouth Application at 120-124; AT&T/BellSouth Reply at 100-110; Cable Companies Sept. 27 *Ex Parte* Letter at 8-9; Letter from Thomas Jones, Counsel for TWTC, to Marlene **H.** Dortch, Secretary, FCC, WC Docket No. 06-74 at 9-10 (filed Nov. 20. 2006).

[512] ***U.S.*** *v. Western Electric Co.*, 900 F.2d 283, 299 (D.C. Cir. 1990); *U.S. v. Wesrern Electric Co.*, 993 F.2d 1572, 1580 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 984 (1993).

[513] *Local Competition Order*, 11 FCC Rcd at 15606, para. 204 (1996).

Atlantic/GTE ***Order,*** expressed concern about the potential loss of its ability to benchmark, particularly in the context of disputes relating to the introduction of new technologies and services.[514]

189. With the benefit of six additional years of regulatory history and experience, we come to a different conclusion with respect to the value of benchmarking. Specifically, we find that benchmarking does not represent as useful or important a regulatory tool as the Commission previously believed. First, we agree with AT&T and BellSouth that measuring a company's performance over time is the most appropriate way to detect and evaluate reversion to discriminatory practices, *i.e.*, "backsliding."[515] Since 2000, BOCs have been subjected to comprehensive performance plans containing thousands of metrics and numerous self-executing remedies to measure the success of the competition-opening provisions of the 1996 Act.[516] The performance of other companies is not germane to the question of whether the performance of the company under scrutiny is improving, deteriorating, or staying the same. If closer monitoring were to become necessary, the Commission would more likely evaluate an incumbent LEC's performance over time, and specifically compare the carrier's current performance against previous performance measurements, rather than compare the incumbent LEC against another BOC carrier.[517] Similarly, when an incumbent LEC provides the same service to itself as it does to carrier-customers. we use performance metrics to measure functional equality of treatment or "parity."[518] Finally, we note that. in the years since the Commission issued the *SBC/Ameritech* and ***Bell*** *Atlantic/GTE* orders, the Commission has rarely used benchmarking in either rulemaking or enforcement proceedings. In fact, commenters fail to cite any enforcement decisions or rulemaking orders where the Commission relied on, or even cited, benchmarking evidence.[519]

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[514] ***See,*** *e.g.*, ***Bell*** *Atlantic/GTE* ***Order,*** 15 FCC Rcd at 14101-03, pares. 132-137, ***SBC/Ameritech Order;*** 14 FCC Rcd at 14770-80, paras. 125-143.

[515] AT&T/BellSouth Reply at 105-106.

[516] AT&T/BellSouth Reply at 102-103; AT&T/BellSouth Dysart/Watkins/Kissel Reply Decl. at paras. 16-18; AT&T/BellSouth Pate/Graulich Reply Decl. at paras. 7-37. For example, a 2004 review of BellSouth's Georgia performance plan revealed 464 metrics with "meaningful volume," *i.e.*, more than ***30*** transactions. The Georgia plan includes a total of 1631 metrics. AT&T/BellSouth Pate/Graulich Reply Decl. at para. 11. The New Jersey Ratepayer Advocate endorses the theory of benchmarking hut cites no instance where New Jersey or any other state has relied on it. New Jersey Ratepayer Advocate Comments at 18-19; New Jersey Ratepayer Advocate Baldwin/Bosley Decl. at paras. 199-212. The Florida and Georgia Public Service Commissions are the only other state regulators commenting in this proceeding, and neither mentions benchmarking. We believe that the rough justice of BOC benchmarking pales in comparison to the detailed examination that state regulators apply when they arbitrate section 252 interconnection agreements. Such arbitrated agreements permit competitive LECs to compare charges and findings of technical feasibility. ***Bur see*** TWTC Petition at 53-55 (citing instances where state commissions have used benchmarkingj.

[517] *Cf.* 47 U.S.C. § 271(d)(6) (granting enforcement authority if the Commission determines that a BOC has ceased to meet conditions lor approval).

[518] ***See*** *Performance Measurements* ***and Standards for*** *Interstate* ***Special Access*** *Services*, CC Docket No. 01-321, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001).

[519] ***See*** TWTC Petition at 55-56 (stating the Commission cited benchmarking in the ***Virginia*** *Arbitration* and in the New York. Texas, and Georgia-Louisiana section 271 proceedings – none of which are enforcement or rulemaking proceedings).

J. Qualifications to Acquire Control of BellSouth's Licenses

190. As previously noted, section 310(d) of the Communications Act provides that no station license may he transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience and necessity will be served thereby."[520] Among the factors that the Commission considers in its public interest inquiry is whether the applicant for a license or license transfer has the requisite "citizenship, character, financial, technical, and other qualifications."[521] Therefore, as a threshold matter, the Commission must determine whether the parties meet the requisite qualifications to hold and transfer licenses under section 310(d) of the Act and the Commission's rules.[522]

191. We recognize that the standard for evaluating the qualifications of the transferor is less stringent than that applied to the transferee.[523] Section 310(d) requires the Commission to consider whether AT&T, the proposed transferee, is qualified to hold a Commission license."[524] The Commission has previously determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units: and (3) violations of antitrust or other laws protecting competition."[525] With respect to Commission-related conduct, the Commission has stated that it would treat any violation of any provision of the Act, or of the Commission's rules, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications."[526] In prior merger orders, the Commission has used the Commission's character policy in the broadcast area as guidance in resolving similar questions in transfer of licenses proceedings.[527] For expositional simplicity, we will apply the higher standard applicable to transferees Io both AT&T and BellSouth.

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[520] 47 U.S.C. § 310(d).

[521] *SBC/SNET Order*, 13 FCC Rcd at 21305, para. 26

[522] *See* 47 U.S.C. § 310(d); 47 C.F.R. §§ 1.948, 25.119.

[523] The Commission does not, as a general rule, reevaluate the qualifications of transferors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing. See, *e.g.*, *SBC/AT&T Order*, 20 FCC Rcd at 18379, para. 171.

[524] *See SBC/BellSouth Order*, 15 FCC Rcd at 25465, para. 14

[525] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20092-93, para. 236.

[526] *Policy Regarding Characrer Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209-IO, para. 57 (1986) *(Character Qualificarions), modified.* 5 FCC Rcd 3252 (1990) *(Character Qualifications Modification), recon. granted in parr*, 6 FCC Rcd 3448 (1991), *modified in parr*, 7 FCC Rcd 6564 (1992) *(Further Character Qualifications Modification); MCI Telecommunications Corp.*, Order and Notice of Apparent Liability, 3 FCC Rcd 509 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context). The Commission has also determined that allegations that an applicant has engaged in unreasonable or anticompetitive conduct are relevant to the Commission's public interest analysis. *SBC/SNET Order*, 13 FCC Rcd at 21306-07, paras. 28-30.

[527] *See, e.g.*, *SBC/AT&T Order. 20* FCC Rcd at 18739, para. 172; *SBC/SNET Order*, 13 FCC Rcd at 21305, para. 26: *Bell Atlantic/NYNEX Ordrr*, 12 FCC Rcd at 20092-93, para. 236; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21548-51, paras. 47-56; *Sprint/Nextel Order*, 20 FCC Rcd at 13979-80, paras. 24-25.

192. We disagree with commenters that suggest that we should reevaluate concerns regarding the Applicants' character qualifications that were addressed in previous Commission actions.[528] Additionally, the Commission has previously stated that voluntarily entered consent decrees do not call into question a carrier's authority to hold Commission licenses and authorizations.[529] We also reject the ACLU's and other commenters' argument that we must investigate allegations of AT&T providing assistance to the NSA.[530] As the Commission determined previously, these allegations are outside the scope of the FCC's investigative powers.[531]

193. We likewise reject commenter claims expressing concerns about the Applicants' character qualifications based on their exercise of their legal rights, such as petitioning courts and regulatory bodies."' As the Commission previously has concluded, an applicant's lawful exercise of its rights does not raise character concerns, even if the activity arguably has "the effect of delaying and minimizing the emergence of competition."[533]

194. We also do not agree with commenters' alleged character concerns based upon specific. unresolved disputes with AT&T or BellSouth.[534] Some of the alleged violations of the Act or

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[528] **See.** *e.g.*, Earthlink Petition at 27-32, Exh. C (arguing that AT&T and BellSouth have a demonstrated practice of violating FCC rules and attaching a list of a numher of FCC orders as examples); Fones4All Comments at 21 (repeating Telscape's comments from the SBC/AT&T merger proceeding regarding allegations that AT&T engages in efforts to stifle competition); **see** *also* AT&T/BellSouth Reply at 112 (stating that virtually all of the character challenges rely on charges that the Commission has addressed in other proceedings and rejected).

[529] ***See SBC/AT&T Order,*** 20 FCC Rcd at 18379-80, para. 173; ***Cingular/AT&T Wireless Order,*** 19 FCC Rcd at 21550, paras. 53-54. As we have stated before, "the Commission does not consider matters resolved in consent decrees adjudicated misconduct for the purposes of assessing an applicant's character qualifications." ***See Cingular/AT&T Wireless Order;*** 19 FCC Rcd at 21550, para. 53 (citing 1986 ***Characrer Qualifications Policy*** *Statement*, 102 FCC 2d at 1205).

[530] ***See,*** *e.g.*, ACLU Comments at 2-3; Letter from Linda ***G.*** Ackerman, to Marlene H. Dortch, Secretary, FCC, Docket No. 06-74 at 1-2 (filed June 28,2006); ***see*** *also* Leslie Cauley, ***NSA Has Massive Database of Americans' Phone*** *Calls*, USA Today, May 1 **1,**2006, at AI.

[531] Letter from Kevin J. Martin, Chairman, FCC, to The Honorable Edward J. Markey, Ranking Member, Subcommittee on Telecommunications and the Internet, Energy and Commerce Committee, United States House of Representatives at **1** (filed May 22, 2006).

[532] **See.** *e.g.*, Earthlink Petition at 25; Letter from Ross A. Buntrock, Counsel for Fones4All, to Marlene Dortch, Secretary. FCC, WC Docket No. 06-74 at 1-2 (filed May 9, 2006); Letter from Ross A. Buntrock, Counsel for Fones4All, to Marlene Dortch, Secretary, FCC, WC Docket No. 06-74 at 1-3 (filed May 19,2006); Letter from **Ross** A. Buntrock, Counsel for Fones4All, to Marlene Dortch, Secretary, FCC, WC Docket No. 06-74 at 1-4 (filed May 24, 2006); Letter from Ross A. Buntrock, Counsel for Fones4All, to Marlene Dortch, Secretary, FCC, WC Docket No. 06-74 at 1-7 (filed Sept. 1, 2006); ***bur see*** Letter from Gary L. Phillips, Gen. Atty and Asst. Gen. Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 at 1-7 (filed June 22, 2006); Letter from Gary L. Phillips. Gen. Atty and Asst. Gen. Counsel, AT&T Services, Inc., to Marlene H. Dortch. Secretary, FCC, WC Docket No. 06-74 (filed Oct. 4,2006).

[533] ***SBC/Ameritech Order***, 14 FCC Rcd at 14950, para. 571

[534] **See.** *e.g.*, ACCESS Comments at **3** (asserting that BellSouth's retail prices are substantially lower than wholesale rates that ACCESS must pay under its agreement); Cbeyond **et** *al.* Comments at 7-8, 83, 95; Cbeyond *et al.* Falvey Decl. at paras. 4-6, 10-14; Cheyond *et al.* Youngers Decl. at paras. 6-7 (alleging that the merger will result in the standardization of unfair and anticompetitive practices because of various AT&T and BellSouth practices);

(continued.. ..)

Commission rules involve legal interpretations that would apply to numerous companies in the industry. The Commission previously has declined to address in merger proceedings matters in which the public interest would he better served through consideration and resolution in broader proceedings of general applicability.[535] Moreover, we note that the Applicants have specifically rebutted the majority of the allegations concerning the Applicants' conduct.[536] We therefore conclude that none of the foregoing allegations provides a basis for finding that AT&T lacks the fitness to acquire licenses and authorizations currently held by BellSouth or that BellSouth lacks the fitness to transfer the licenses.

VI. OTHER ISSUES

195. ***Wholesale** Long **Distance.*** The record does not support the contention that the merger will adversely affect the viability of the wholesale interexchange market by eliminating BellSouth as a purchaser of wholesale long distance services.[537] While the merger likely will gradually eliminate BellSouth as a purchaser of wholesale long distance service:" BellSouth does not appear to be a significant purchaser of wholesale **long** distance service,[539] nor is there any record evidence to indicate that the **loss** of BellSouth as a customer will cause any of its current suppliers to exit the market.[540]

(Continued from previous page)

Concerned Mayors Alliance Petition at 13-20, 26-7 (arguing that AT&T has engaged in the practice of rcdlining); Earthlink Petition at 30 (claiming that AT&T stalled or refused to negotiate on any hroadhand transmission arrangements); FISPA Comments at 1 (claiming that BellSouth refused to provide certain wholesale DSL agreements);Fones4All Comments at 16 (alleging that AT&T used its monopoly power to exclude Fones4All from marketing at the 2006 Fiesta Broadway Show); New Jersey Ratepayer Advocate Comments at 20-21 (arguing that AT&T's and BellSouth's service quality is declining); Resale Joint Commenters Comments at 7-10 (arguing that BellSouth's customer retention and winback practices are discriminatory and designed to eliminate competition); STS Comments at 13-14 (claiming that BellSouth sought to harm STS by forcing it to spend large amounts of money on a network solution); Swiftel Comments at 2 (arguing that its relationship with BellSouth has been plagued with problems hy BellSouth'sunwillingness to adhere to contract terms); Letter from David Lockwood. President, Telecom 555, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74. Attach. (filed Oct. 19,2006).

[535] ***See SBC/AT&T Order***, 20 FCC Rcd at 18380-81, para. 175; ***SBC/Ameritech Order,*** 14 FCC Rcd at 14950. para. 571; **see *also SBC/SNET Order***, 13 FCC Rcd at 21306, para. **29.**

[536] **See, *e.g.*,** AT&T/BellSouth Reply at 112, App. **A** at A-16-19 (stating that Cheyond ***et al.***'s allegations are either unfounded or untrue); AT&T/BellSouth Reply at 114 (responding to CMA's argument for redlining conditions and arguing that there is no evidence that AT&T has engaged or will engage in "discriminatory conduct based on income or other impermissible factors"); AT&T/BellSouth Reply, App. **A** at A-3-4 (stating that Earthlink is attempting improperly to gain leverage through the merger proceeding with its commercial dealings with AT&T and that once AT&T reassesses its product portfolio for hroadhand transmissions it looks forward to negotiating with Earthlink); AT&T/BellSouth Reply at 112 (disputing New Jersey Ratepayer Advocate's arguments); AT&T/BellSouth Reply, App. A at A-7 (responding to STS's complaint); AT&T/BellSouth Reply, App. **A** at A-8 (arguing that BellSouth worked with Swiftel to resolve its complaints); Letter from Bennett L. Ross, General Counsel-D.C., BellSouth D.C.. Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed June 27,2006) (arguing that BellSouth is working with STS to develop a "mutually acceptable plan" to resolve their issues).

[537] **See,** *e.g.*, Access Point ***et al.*** Petition at 34-36

[538] **See** AT&T/BellSouth Application at 54.

[539] AT&T/BellSouth Reply at 62.

[540] **See** AT&T/BellSouth Reply at 63 (noting that BellSouth purchases the majority of its wholesale long distance services from Sprint Nextel, Verizon and Qwest).

Further, as this process will take some time, affected carriers will have an opportunity to seek other customers.'" As the Commission has noted previously, "[o]ur statutory duty is to protect efficient competition, not competitors."'"'

196. *Retirement of Copper Loops.* A number of commenters argue that incumbent LECs have incentives to retire copper loops to hinder the ability of competitive LECs to provide advanced services over such loops.[543] Rules governing the circumstances under which a carrier may retire copper loops are more appropriately addressed in the context of a rulemaking proceeding.'"

197. *Access to IP-Enabled Services by Disabled Americans.* One commenter seeks conditions relating to ensuring disabled Americans have access to IP video and VoIP services offered by the merged company.[545] Rules governing disability accessibility requirements for IP-enabled services such as IP video and VoIP have been raised, and are appropriately addressed in the *IP-Enabled Services* proceeding.[546]

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[541] AT&T/BellSouth Reply at 62 (stating that "BellSouth will continue to honor existing contractual obligations").

[542] *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company*, File Nos. 00762-CL-AL-I-95 through 00803-CL-AL-1-95; 00804-CL-TC-1-95 through 00816-CL-TC-1-95; 00817-CL-AL-1-95 through 00824-CL-AL-I-95; and 00825-CL-TC-1-95 through 00843-CL-TC-1-95. Memorandum Opinion and Order, 12 FCC Rcd 22280, 22288, para. 16 (1997) (citing *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1491-92 (D.C. Cir. 1995)).

[543] *See, e.g.*, Letter from Patrick J. Donovan, Counsel for FDN Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (dated Oct. 2, 2006): Letter from David L. Sieradzki, Counsel for SouthEast Telephone, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 at 1 (filed Oct. 24, 2006); Letter from Brad E. Mutschelknaus and John J. Heitmann. Counsel for XO Communications, NuVox, Inc. and Talk America, Inc. to Marlene H. Dortch, Secretary, FCC. WC Docket No. 06-74 (filed Oct. 27, 2006); Letter from Andrew D. Lipman, Eric J. Branfman, and Patrick J. Donovan, Counsel for Access Point *et al.*, to Marlene H. Dortch, Secretary, FCC. WC Docket No. 06-74 (filed Nov. 14, 2006); Letter from Patrick J. Donovan, Counsel for Cavalier Telephone, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket 06-74. Attach. at 6-8 (filed Dec. 11, 2006).

[544] We note that the Commission previously has addressed the issue of copper loop retirement. *See, e.g.*, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996: Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003) (*Triennial Review Order*), corrected by Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *vacated arid remanded in part, affirmed in part, United Stares Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (USTA II) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293 (2004) .

[545] *See* American Association of People with Disabilities Condition Comments.

[546] *IP-Enabled Services NPRM*, 19 FCC Rcd at 4901-02, para. 58

198. ***Minority Ownership.*** Commenters have sought conditions intended to increase minority ownership of telecommunications assets.[547] Concerns regarding the level of minority ownership in the telecommunications industry are not appropriately addressed in the context of this merger review.[548]

199. ***Rate Integration Waiver.*** AT&T has petitioned for a waiver of the rate integration and averaging rules adopted by the Commission pursuant to section 254 of the Act for a period of 120 days after consummation of the proposed merger.[549] AT&T states that a waiver will permit it to "evaluate BellSouth's various rate plans and the contractual obligations that BellSouth has incurred under those plans, to rationalize the BellSouth and AT&T plans, and to make any changes necessary to ensure compliance with all applicable requirements of section 254 and the Commission's rules."[550] We find that grant of such petition will serve the public interest.

VII. POTENTIAL PUBLIC INTEREST BENEFITS

A. Introduction

200. In addition to assessing the potential harms of the proposed transaction, we also consider whether the combination of these companies' operations is likely to generate verifiable, merger-specific public interest benefits.[551] In doing so, we ask whether the combined entity will be able, and is likely, to pursue business strategies resulting in demonstrable and verifiable benefits that could not be pursued but for the combination. **As** discussed below, we find that the proposed transaction is likely to generate several significant merger-specific public interest benefits, although it is difficult to quantify precisely the magnitude of some of these benefits.

B. Analytical Framework

201. The Commission has recognized that "[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products."[552] Under

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547 ***See generally*** Telephone USA Reply.

548 The Commission previously has initiated rulemakings addressing minority ownership issues. ***See, e.g.***, 2006 ***Quadrennial Regulatory Review,:*** 2002 ***Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules,*** MB Docket Nos. 06-121, 02-277, Further Notice of Proposed Rulemaking. **21** FCC Rcd 8834, 8837, para. 5 (2006) (addressing proposals lo foster minority ownership of broadcast stations).

549 ***See*** Letter from Gary L. Phillips, Gen. Atty and Asst. Gen. Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC. WC Docket No. 06-74, CC Docket No. 96-61 (filed Aug. 28, 2006) (AT&T Rate Integration Waiver Petition); 47 U.S.C. § 254; 47 C.F.R. § 64.1801.

550 AT&T Rate Integration Waiver Petition ai 1

551 **See**, *e.g.*, ***SBC/AT&T Order,*** 20 FCC Rcd at 18384, para. 182; ***Verizon/MCI Order-.*** 20 FCC Rcd at **18530.** para. 193: ***Bell Atlantic/GTE Order***, 15 FCC Rcd at 14130, para. 209; ***SBC/Ameritech Order.*** 14 FCC Rcd at 14825, para. 255; ***WorldCom/MCI Order,*** 13 FCC Rcd at 18134-35, para. 194.

552 ***See, e.g.***, ***SBC/AT&T Order, 20*** FCC Rcd at 18384, para. 183; ***Verizon/MCI Order.*** **20** FCC Rcd at 18530, para. 194; ***EchoStar/DirecTV Order,*** 17 FCC Rcd at 20630, para. 188; ***Bell Atlantic/NYNEX Order,*** 12 FCC Rcd at 20063, para. 158; **see also** ***DOJ/FTC Guidelines*** **§** 4.

Commission precedent, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transfer outweigh the potential public interest harms."'

202. There are several criteria the Commission applies in deciding whether a claimed benefit is cognizable. First, the claimed benefit must be transaction- or merger-specific. This means that the claimed benefit "must he likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects."'" Second, the claimed benefit must be verifiable. Because much of the information relating to the potential benefits of a merger is in the sole possession of the Applicants, they are required to provide sufficient evidence supporting each benefit claim so that the Commission can verify the likelihood and magnitude of the claimed benefit.[555] In addition, as the Commission has noted, "the magnitude of benefits must be calculated net of the cost of achieving them."[556] Furthermore, speculative benefits that cannot be verified will be discounted or dismissed. Thus, as the Commission explained in the *EchoStar/DirecTV Order*, "benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present."[557] Third, the Commission has stated that it "will more likely find marginal cost reductions to be cognizable than reductions in fixed cost."[558] The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.[559]

203. Finally, the Commission applies a "sliding scale approach" to evaluating benefit claims. Under this sliding scale approach, where potential harms appear "both substantial and likely, the Applicants'

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[553] ***See. e.g.***, *SBC/AT&T Order, 20* **FCC** Rcd at 18384, para. 183; *Verizon/MCI Order,* 20 **FCC** Rcd at 18530, para. 194; *EchoStar/DirecTV Order.* 17 **FCC** Rcd at 20630, para. 188; *SBC/Ameritech Order,* 14 **FCC** Rcd a! 14825, para. 256; *see also Bell Atlantic/NYNEX Order,* 12 **FCC** Rcd at 20063, para. 157.

[554] *EchoStar/DirecTV Order,* **I7 FCC** Rcd at 20630, para. 189; **see** *also Bell Atlantic/NYNEX Order,* **12 FCC** Rcd at 20063-64, para. 158 ("Pro-competitive efficiencies include only those efficiencies that art: merger-specific. *i.e.*, that would not he achievable hut for the proposed merger. Efficiencies that **can *be*** achieved through means **less** harmful to competition than the proposed merger . . . cannot he considered to he true pro-competitive benefits of the merger.") (footnote omitted); *SBC/Ameritech Order,* 14 **FCC** Rcd at 14825, para. 255 ("Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger. . ."); *BellSouth/Comcast Order,* 17 **FCC** Rcd at 23313, para. 173 (Commission considers whether benefits are "merger-specific"); *cf. DOJ/FTC Guidelines* § 4.

[555] *EchoStar/DirecTV Order,* **17 FCC** Rcd at 20630, para. 190; **see** *also* ***Bell Atlantic/NYNEX Order,*** 12 **FCC** Rcd at 20063, para, 157 ("These pro-competitive benefits include any efficiencies arising from the transaction if such efficiencies. . . are sufficiently likely and verifiable . . . ."); *BellSouth/Comcast Order,* 17 **FCC** Rcd a! 23313, para. 173 **(Commission** considers whether benefits are "verifiable"); *SBC/Ameritech Order,* 14 **FCC** Rcd at 14825, para. 255: *DOJ/FTC Guidelines* § 4 ("[T]he merging firms must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), [and] how each would enhance the merged firm's ability to compete. . . .").

[556] *EchoStar/DirecTV Order,* 17 **FCC** Rcd at 20630, para. 190

[557] *Id.*

[558] *Id.* at 20631, para. I91; *see also DOJ/FTC Guidelines* § 4.

[559] **See** *EchoStar/DirecTV Order,* 17 **FCC** Rcd at 20631, para. 191; **see** *also DOJ/FTC Guidelines* § 4.

demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand."[560] On the other hand, where potential harms appear less likely and less substantial, as in this case, we will accept a lesser showing to approve the merger.

C. Accelerated Broadband Deployment

204. In section 706 of the 1996 Act, Congress directed the Commission to encourage, without regard to transmission media or technology, the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis through, among other things, removing barriers to infrastructure investment.[561] By virtue of the voluntary commitments that the Applicants have offered, we are persuaded that consumers will benefit from the deployment of broadband in the merged entity's territory more rapidly than might otherwise have occurred absent the merger.'"'

D. Benefits of Unifying Cingular's Ownership

205. We agree with the Applicants that unifying the ownership of Cingular will result in public interest benefits, such as a quicker rollout of new converged services and enhanced efficiency.[563] Currently, AT&T and BellSouth each have negative control of Cingular.[564] The Applicants explain that the interests of Cingular's parents are not fully aligned,[565] and that "[a]ll of Cingular's key strategic

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[560] *EchoStar/DirecTV* **Order, I7** FCC Rcd at 20631, para. I92 (quoting *SBC/Ameritech* **Order,** 14 FCC Rcd at 14825); *cf. DOJ/FTC* **Guidelines** $ 4 ("The greater the potential adverse competitive effect of a merger . . . the greater must he cognizable efficiencies **in** order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to he particularly large, extraordinarily great cognizable efficiencies would he necessary to prevent the merger from being anticompetitive.").

[561] Section *706* **is** reproduced in the notes to section 157 of the Act. ***See*** 47 U.S.C. § 157 nt.

[562] **See** Appendix F.

[563] **See** AT&T/BellSouth Application at 6-19; AT&T/BellSouth Kahan Decl. at paras. 17-32; AT&T/BellSouth Rice Decl. at paras. 18-28; AT&T/BellSouth Carlton/Sider Decl. at paras. 42-53: AT&T/BellSouth Carlton/Sider Reply Decl. at paras. 154-68. We reject the notion raised by certain commenters that the merger will result in a reduction of competition **in** retail and wholesale markets due to the loss of Cingular as an "independent competitor." **See** Cbeyond *et al.* Comments at 76-78; MSV LLC Comments at **7.** Because AT&T and BellSouth already jointly and wholly own **and** control Cingular, ***see*** *infra* note 564, the proposed merger will not change the structure of competition in the wireless market and is unlikely to result in any diminishment of competition in either retail or wholesale markets. We ahove address claims that the present merger will give the Applicants the incentive and ability to raise Cingular's rivals' costs. ***See*** *supra* Part **V.B** (Wholesale Special Access Competition).

[564] AT&T and BellSouth each have negative control of Cingular both because each Applicant holds a 50% voting interest in Cingular Wireless Corp. (*i.e.*, Cingular's manager) and because of specific provisions **in** the Applicants' joint venture agreement. Thus, AT&T and BellSouth each have the ability to exercise what amounts to a veto over Cingular's decisions. See AT&T/BellSouth Application. App. A at **A-4** (describing the ownership structure of Cingular); ***see also*** *Cingular/AT&T* **Wireless Order,** 19 FCC Rcd at 21522. para. *26;* ***Applications*** *of SBC Communications* **arid BellSouth Corp.,** WT Docket No. 00-81, Memorandum Opinion and Order, 15 FCC Rcd 25459,25462, para. 7 (WTB/IB 2000).

[565] ***See*** AT&T/BellSouth Application at 9-10 (stating that "the operating profiles of Cingular's parents have diverged during the five years since its creation'' and providing evidence that the Applicants have different incentives in marketing integrated services that would involve the migration of traffic off Cingular's network); AT&T/BellSouth

(continued.. ..)

decisions" must be approved by a committee composed of three representatives each from AT&T and BellSouth.[566] Given the facts presented in the record and the well-recognized inefficiencies associated with joint control, we find persuasive Applicants' contentions that unifying the ownership of Cingular will align the Applicants' incentives, facilitating a more efficient decision making structure.[567] In particular, we believe the more streamlined ownership structure will enable the Applicants and Cingular more quickly and efficiently to bring – among other products and services – new IP Multimedia Subsystems (IMS) networks and services to market, which will speed to enterprise and mass market customers the significant improvements in integration of services offered across multiple IP networks that such systems provide.[568]

206. We find that by streamlining the ownership of Cingular, the Applicants' ability to provide converged wireline/wireless services will be enhanced. We are persuaded that as a result of the merger, customers will benefit not only from new services, but also will benefit from the improvements in performance and reliability resulting from the network integration, and will benefit from improved converged offerings sooner.

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Carlton/Sider Reply Decl. at para. 155-66 (discussing how the integration of Cingular and its parents would align the interests of these entities and allow the merged entity to provide enhanced converged wireline/wireless offerings more cost-effectively).

[566] See AT&T/BellSouth Application at 9; AT&T/BellSouth Kahan Decl. at paras. 18, 21 (stating that the different priorities of AT&T and BellSouth have "rendered the joint decision-making process required by the Cingular joint venture more cumbersome and time-consuming than would be the case with a single point of control. Decisions relating to technology choices, utilization of multiple networks, control of and access to information, and timing of investments of resources are made more difficult and result in time-consuming delays."). The Applicants also state that AT&T and BellSouth have equal representation on Cingular's Board of Directors. *See* AT&T/BellSouth Application at 9; AT&T/BellSouth Kahan Decl. at para. 18; AT&T/BellSouth Carlton/Sider Decl. at para. 23.

[561] See AT&T/BellSouth Application at 10 (stating that. under the current structure, "decisions relating to technology choices, utilization of multiple networks and when and where to make certain essential investment" are more difficult and happen more slowly than they would if the present merger is consummated); *see also* AT&T/BellSouth Carlton/Sider Reply Decl. at paras. 155-161 (discussing difficulties that have arisen related to certain proposed enterprise offerings due to the current nonalignment of interests between Cingular and its parents). We disagree with certain commenters who challenge the Applicants' contention that a unified ownership structure would be more efficient by citing the Applicants' claims that they face competition from joint venture participants. *See* Consumer Federation *et al.* Cooper/Roycroft Decl. at 29-31. The Applicants neither allege nor imply that the current ownership structure of Cingular, or any other joint venture competitor, is so inefficient or cumbersome that an entity so structured would he utterly unable to compete in the wireless market. See. *e.g.*, AT&T/BellSouth Application at 9 ("Even though Cingular has been successful, it increasingly is facing challenges due to its joint venture management structure.").

[568] See AT&T/BellSouth Application at 12-17. Applicants and Cingular currently are constructing three separate IMS platforms over which these entities likely eventually would roll out new integrated services. See, *e.g.*, AT&T/BellSouth Reply at 3-5. Therefore. while we agree with Access Pointer *al.* and the other commenters who argue that the Applicants "can deploy IMS via an intercarrier agreement providing for the combination of services and networks and the ability of the customer to be easily switched between services and networks" – *see* Access Point et *al.* Petition at 52; see *also* Rubin Comments at 19 – we disagree with such commenters that this proves that the construction of one IMS network rather than three separate IMS networks will not result in any public interest benefits. See, *e.g.*, AT&T/BellSouth Rice Decl. at para. 24 (noting that AT&T, BellSouth, and Cingular currently are "investing in and building out three separate IMS networks, each with somewhat different architecture and functionality").