

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

In the Matter of)
)
SBC Communications Inc. and)
AT&T Corp. Applications for) WC Docket No. 05-65
Approval of Transfer of Control)
)

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 2005

Released: November 17, 2005

By the Commission: Chairman Martin and Commissioner Abernathy issuing separate statements;
Commissioners Copps and Adelstein concurring and issuing separate statements.

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I. INTRODUCTION

1. SBC Communications Inc. (SBC) and AT&T Corp. (AT&T) (collectively, “the Applicants”) have filed a series of applications¹ pursuant to sections 214 and 310(d) of the Communications Act of 1934, as amended (Communications Act or Act)² and section 2 of the Cable Landing License Act³ in connection with their proposed merger. This merger would combine one of the largest regional Bell Operating Companies (BOCs) with one of the largest providers of interexchange and competitive local service. This proposed merger occurs against the backdrop of ongoing change in the industry, including the pending merger of Verizon and MCI and the recent merger of Sprint and Nextel.⁴ SBC and AT&T

¹ *Commission Seeks Comment on Application For Consent to Transfer of Control Filed By SBC Communications Inc. and AT&T Corp.*, Public Notice, WC Docket No. 05-65, DA 05-656 (rel. Mar. 11, 2005), corrected by Erratum, WC Docket No. 05-65 (rel. Mar. 14, 2005) (*Public Notice*).

² 47 U.S.C. §§ 214, 310(d).

³ *Id.* § 35; see generally An Act Relating to the Landing and Operation of Submarine Cables in the United States, 47 U.S.C. §§ 34-39 (Cable Landing License Act).

⁴ This merger is one of three in little more than a year involving the former “Big 3” long distance carriers (AT&T, MCI, and Sprint), which faced rapidly declining revenues in some of their core retail markets in the past few years as a result of increasing competition from local carriers, wireless carriers, cable companies, and others. See *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, FCC 05-184 (rel. Nov. 17, 2005); *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, File Nos. 0002031766, *et al.*, Memorandum Opinion and Order, FCC 05-148 (rel. Aug. 8, 2005) (*Sprint/Nextel Order*).

offer competing services in many communications markets, and each also supplies wholesale inputs relied upon by the other Applicant and other competitors in various retail markets. Thus, the proposed merger requires us to examine its effects on competition – which are both horizontal and vertical in nature – in a wide range of significant communications markets.

2. In accordance with the terms of sections 214(a) and 310(d), we must determine whether the Applicants have demonstrated that the proposed transfers would serve the public interest, convenience, and necessity.⁵ Based on the record before us, and as discussed more fully below, we find that the transaction meets this standard. After analyzing the record, we conclude that significant public interest benefits are likely to result from this transaction. These benefits, which are likely to flow to consumers, relate to enhancements to national security and government services, efficiencies related to vertical integration, economies of scope and scale, and cost savings. We further conclude that, in light of the consent decree executed between the Department of Justice and the Applicants (DOJ Consent Decree),⁶ the transaction is not likely to have anticompetitive effects in the relevant markets discussed below. Moreover, to the extent that the merger increases concentration in relevant markets, we find that the public interest benefits of the merger outweigh any potential public interest harms. Finally, we note that the Applicants have offered certain voluntary commitments.⁷ Because we find these commitments will serve the public interest, we accept them and adopt them as conditions of our approval of the merger.

II. EXECUTIVE SUMMARY

3. As discussed below, our analysis of the competitive effects of the merger, which focuses on the following key services, finds that the merger is not likely to result in anticompetitive effects in relevant markets.

- **Special access competition.** The record indicates that, in a limited number of buildings where SBC and AT&T are the only carriers with direct connections, the merger is likely to have an anticompetitive effect on the market for Type I wholesale special access services. We find, however, that the DOJ Consent Decree adequately addresses these likely anticompetitive effects. With respect to Type II wholesale special access services, we find that other competitors with similar types of local facilities will remain post-merger to help mitigate the loss of AT&T.
- **Retail enterprise competition.** We find that the merger will not likely have anticompetitive effects for enterprise customers, even though we find that the Applicants currently compete against each other with respect to a range of enterprise customer classes and enterprise services. We find that competition for medium and large enterprise customers should remain strong after

⁵ *Sprint/Nextel Order*, FCC 05-148 at para. 20; *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19987 at para. 2 (1997) (*Bell Atlantic/NYNEX Order*); *Merger of MCI Communications Corp. and British Telecommunications PLC*, GN Docket No. 96-245, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15353 at para. 2 (1997) (*BT/MCI Order*).

⁶ *United States v. SBC Communications, Inc.*, Civil Action No. 1:05CV02102, Final Judgment (D.D.C. filed Oct. 27, 2005) (*DOJ-SBC/AT&T Consent Decree*); see also *United States v. SBC Communications, Inc.*, Civil Action No. 1:05CV02102, Complaint (D.D.C. filed Oct. 27, 2005) (*DOJ-SBC/AT&T Complaint*).

⁷ See generally Letter from Thomas F. Hughes, Vice President-Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, Attach. (filed Oct. 31, 2005) (SBC Oct. 31 *Ex Parte* Letter); see also Appendix F.

the merger because medium and large enterprise customers are sophisticated, high-volume purchasers of communications services that demand high-capacity communications services, and because there will remain a significant number of carriers competing in the market. With respect to small enterprise customers, we recognize that AT&T had announced its gradual withdrawal from that market, and we conclude after examining the record that it was not exerting significant competitive pressure with respect to those customers.

- **Mass market competition.** We conclude that the merger will not likely have anticompetitive effects in the mass market. While AT&T currently retains a significant share of mass market customers, we find, as with small business customers, that AT&T has ceased marketing mass market services and has been gradually withdrawing from that market. Consequently, we find that, immediately prior to the announcement of the merger, AT&T was not exerting significant competitive pressure on SBC within SBC's own region. Moreover, we note the rapid growth of intermodal competitors – particularly cable telephony providers (whether circuit-switched or voice over IP (VoIP)) – as an increasingly significant competitive force in this market, and we anticipate that such competitors likely will play an increasingly important role with respect to future mass market competition.
 - **Internet backbone competition.** Based on the record, we are persuaded that the merger is not likely to result in anticompetitive effects in the Internet backbone market. We do not find that the Tier 1 backbone market is likely to tip to monopoly or duopoly, based either on market share or on other factors, such as changes in relative traffic volumes or through targeted de-peering or degraded interconnection. Rather, we expect a number of Tier 1 backbones to remain as competitive alternatives to the merged entity. We also are not persuaded that the merger will increase the Applicants' incentive and/or ability to raise rivals' costs. Given the level of competition we expect to remain in the Tier 1 backbone market, we are not persuaded that such actions would be viable.
 - **Wholesale interexchange competition.** We find that the merger is not likely to result in anticompetitive effects for wholesale interexchange services. We conclude that the market will remain competitive post-merger, due primarily to the presence of numerous competitive nationwide fiber networks with excess capacity.
 - **International competition.** We find that the merger is not likely to result in anticompetitive effects for international services provided to mass market, enterprise, or global telecommunications services customers. Additionally, we find that the merger is not likely to result in anticompetitive effects in the international transport, facilities-based IMTS, or international private line markets.
 - **Applicants' commitments.** The Applicants offered certain voluntary commitments related to special access, stand-alone DSL, the Commission's Internet Policy Statement, and Internet backbone services. Because we find these commitments serve the public interest, we accept them and adopt them as express conditions of our merger approval.
4. Accordingly, based on the record, we find that the merger of SBC with AT&T is in the public interest and we grant the applications for transfer of control.

III. BACKGROUND

A. Description of the Applicants

1. AT&T Corp.

5. AT&T, a publicly-traded corporation incorporated under the laws of the State of New York in 1885, and headquartered in Bedminster, New Jersey,⁸ is one of the nation's largest providers of local exchange, long distance, and international telecommunications services. Today, AT&T provides telecommunications services through two principal divisions – a business services division and a consumer services division. AT&T owns, operates, monitors and maintains extensive communications networks, and holds numerous Commission licenses and authorizations, including domestic and international section 214 authorizations, wireless and earth station licenses, and interests in submarine cable landing licenses, with facilities in countries and cities throughout North America, Latin America, Europe, Africa, and the Asia-Pacific region.⁹

6. AT&T Business Services (ABS) provides a variety of communications services to domestic and multi-national businesses and government agencies.¹⁰ These services include “retail and wholesale domestic and international voice services, and a wide range of retail and wholesale IP and other data transport and managed data services.”¹¹ AT&T is one of the most significant providers of communications services to the United States government.¹² It provides services that include capabilities for the highest levels of security, reliability, recoverability, and global coverage.¹³ Because of these network capabilities, AT&T is also an established provider to many of the largest businesses and

⁸ AT&T Corporation, SEC Form 10-K at 1 (filed Apr. 28, 2005), *available at* <http://www.sec.gov/Archives/edgar/data/5907/000095012305002878/y06520e10vk.txt> (AT&T 2004 Form 10-K).

⁹ SBC/AT&T Application, App. A at A-1 – A-3; Applications for Approval of Transfer of Control, WC Docket No. 05-65, Electronically Filed Applications; *Public Notice* at 2-3 (listing international section 214 authorizations, cable landing licenses, satellite earth station authorizations, and wireless radio service licenses for which AT&T is seeking to transfer control to SBC); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File No. SES-T/C-200500232); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File Nos. SES-T/C-20050224-00230; SES-T/C-200501224-00231); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File Nos. ITC-T/C-20050224-00072 *et al.*, SCL-T/C-20050222-0002); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File No. 0012-EX-TU-2005, Confirmation No. EL656885); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (adding call sign S2379 inadvertently omitted from FCC Form 312-Alascom); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File No. 0002052535); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File No. 0002052427); *see also* Appendix B.

¹⁰ SBC/AT&T Application, App. A at A-1.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

wholesale customers, including those with requirements in multiple, widely dispersed locations in this country and around the world.¹⁴ Revenues from business services provided by AT&T were \$22.6 billion in 2004.¹⁵ As a result of significant competitive pressure, these revenues have declined more than 18 percent over the past four years.¹⁶

7. AT&T Consumer Services (ACS) provides communications services to AT&T's remaining mass market customers and small/home-based businesses.¹⁷ These services include traditional long distance voice services, such as domestic and international dial and toll-free voice services, as well as operator-assisted services.¹⁸ Approximately 65 percent of AT&T consumer services revenue is from stand-alone long distance offerings.¹⁹ In addition, AT&T provides dial-up Internet services and local exchange services, and often relies upon unbundled network element platform (UNE-P) arrangements with incumbent local exchange carriers (incumbent LECs) such as SBC.²⁰ AT&T's local services constitute about 35 percent of consumer services revenue, and are usually bundled with its facilities-based long distance services to provide all-distance voice services.²¹ In mid-2004, AT&T announced that it would no longer actively compete for new mass market customers.²²

2. SBC Communications Inc.

8. SBC is a publicly-traded Delaware corporation, headquartered in San Antonio, Texas.²³ Through its operating subsidiaries, SBC provides communications services and products to businesses and consumers in the United States.²⁴ SBC's products and services vary by market, and include local exchange services, wireless communications, long distance services, Internet services, telecommunications equipment, network access, and directory advertising and publishing.²⁵ SBC also

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Last year's revenues for services provided by ABS were down from \$25.1 billion in 2003, \$26.6 billion in 2002, and \$27.7 billion in 2001. *Id.*; AT&T, 2002 Annual Report at 12 *available at* http://www.att.com/ar/docs/annualreport_2002.pdf (AT&T 2002 Annual Report).

¹⁷ SBC/AT&T Application, App. A at A-1-A-2.

¹⁸ *Id.*

¹⁹ SBC/AT&T Application, Declaration of Dennis W. Carlton and Hal S. Sider (SBC/AT&T Carlton/Sider Decl.) at para. 41. Specifically, ACS earned approximately \$5.2 billion for stand-alone long distance, transactional and other services in 2004. AT&T, AT&T Corp. Fourth-Quarter and Full-Year 2004 Financial Results, Historical Segment Data (Jan. 20, 2005) *available at* http://www.att.com/ir/pdf/4q04_financials.pdf (AT&T 2004 Financials).

²⁰ SBC/AT&T Application, App. A at A-1-A-2.

²¹ SBC/AT&T Carlton/Sider Decl. at para. 41. Specifically, ACS earned approximately \$2.7 billion for bundles of local and long distance services in 2004. AT&T 2004 Financials, Historical Segment Data.

²² SBC/AT&T Application, App. A at A-2.

²³ SBC Communications Inc., SEC Form 10-K at 1 (filed Mar. 11, 2005), *available at* <http://www.sec.gov/Archives/edgar/data/732717/000073271705000176/form10k.htm> (SBC 2004 Form 10-K).

²⁴ *Id.*

²⁵ *Id.* SBC publishes Yellow and White Pages directories and electronic directories. *Id.* at 4.

offers satellite television services through an arrangement with EchoStar Communications Corp.²⁶ In addition, SBC has investments in communications companies with operations in 14 countries.²⁷

9. SBC was created as one of several regional holding companies to hold AT&T's local telephone companies.²⁸ Originally, SBC operated in five southwestern states, but it expanded its operation to 13 states through mergers with Pacific Telesis Group, Southern New England Telecommunications Corporation, and Ameritech Corporation in 1997, 1998, and 1999, respectively.²⁹ Currently, SBC provides telecommunications services in Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, Ohio, Oklahoma, Texas, and Wisconsin,³⁰ and serves a total of approximately 52 million local access lines in-region.³¹

10. SBC provides landline telecommunications services, including local and long distance voice, data, and messaging services, on a retail and wholesale basis.³² Although SBC is authorized to offer long distance services nationwide, it provides long distance and international services primarily to customers in its region and to customers in selected areas outside of its wireline subsidiaries' operating areas.³³ SBC also provides various data services, such as switched and dedicated transport, Internet access and network integration, and sells data equipment.³⁴ SBC's Internet offerings include basic dial-up access service, dedicated access, web hosting, e-mail, and high-speed access, such as digital subscriber line (DSL), services.³⁵ SBC also holds a 60 percent economic interest and 50 percent voting interest in Cingular

²⁶ *Id.* at 1.

²⁷ *Id.* at 1. The international investments include companies that provide local and long distance telephone services, wireless communications, voice messaging, data services, Internet access, telecommunications equipment, and directory publishing. *See id.* at 5-6.

²⁸ *Id.* at 1. On January 1, 1984, SBC was spun off from AT&T Corp. as a result of a 1982 antitrust consent decree. *Id.*; *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States.*, 460 U.S. 1001 (1983).

²⁹ SBC 2004 Form 10-K at 1; *Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries*, Report No. LB-96-32, Memorandum Opinion and Order, 12 FCC Rcd 2624 (1997) (*SBC/PacTel Order*); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor To SBC Communications, Inc., Transferee*, CC Docket No. 98-25, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21306, para. 29 (1998) (*SBC/SNET Order*); *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control*, Memorandum Opinion and Order, CC Docket No. 98-141, 14 FCC Rcd 14712, 14737, para. 48 (1999) (*SBC/Ameritech Order*).

³⁰ SBC 2004 Form 10-K at 1.

³¹ SBC Communications Inc., *SBC Investor Briefing No. 246, SBC To Acquire AT&T, Creates Premier, Global Provider for New Era of Communications* at 2 (Jan. 31, 2005), available at http://sbc.merger-news.com/downloads/sbc_att_IB.pdf (SBC Jan. 2005 Investor Briefing).

³² SBC 2004 Form 10-K at 3.

³³ *Id.* at 2.

³⁴ *Id.* at 4. Network integration services include installation of business data systems, local area networking, and other data networking offerings. *Id.*

³⁵ *Id.* SBC has approximately 5.1 million digital subscriber lines (DSL). SBC Jan. 2005 Investor Briefing at 2-3.

Wireless.³⁶ Through Cingular, SBC provides wireless services nationwide, and with Cingular's alliances with other GSM-based providers, Cingular offers coverage in 170 countries worldwide.³⁷ SBC markets many of its services, including local and long distance, DSL, and satellite television, along with Cingular wireless service, as bundled offerings.³⁸

B. Description of the Transaction

11. In July and November 2004, members of AT&T's and SBC's management held discussions on a possible merger.³⁹ In January 2005, AT&T's and SBC's management again held discussions, and on January 30, 2005, AT&T and SBC entered into a merger agreement ("Merger Agreement"). According to the terms and conditions of the Merger Agreement, a wholly-owned subsidiary of SBC will merge with AT&T, and AT&T will thereby become a wholly-owned subsidiary of SBC.⁴⁰ Pursuant to the Merger Agreement, each share of AT&T stock will be converted into 0.77942 shares of SBC common stock.⁴¹ AT&T will continue to own the stock of its subsidiaries, and AT&T and its subsidiaries will continue to hold all of the Commission licenses and authorizations that they held prior to the merger.⁴² SBC will become the new parent of AT&T, resulting in the indirect transfer of control of the Commission licenses and authorizations.⁴³

12. The Applicants contend that approval of the proposed transaction is in the public interest. They assert that "[t]he public will benefit from the merger's creation of a vigorous U.S. carrier with global reach,"⁴⁴ and claim that the merger will strengthen national security by enabling AT&T, as a robust, U.S.-owned carrier, to improve and expand the important services it provides to numerous government customers.⁴⁵ Finally, the Applicants assert that the merger will increase innovation and investment in the

³⁶ SBC Jan. 2005 Investor Briefing at 2.

³⁷ SBC/AT&T Application at 10.

³⁸ SBC Communications Inc., 2004 Annual Report 7, 11, 22, 28 (Feb. 25, 2005), *available at* http://www.sbc.com/investor_relations/company_reports_and_sec_filings/SBC_2004_AR.pdf (SBC 2004 Annual Report).

³⁹ AT&T Corp., SEC Schedule 14A at 28 (filed May 23, 2005) *available at* <http://www.sec.gov/Archives/edgar/data/5907/000095012305006605/y04651dmdefm14a.htm> (AT&T 2005 Proxy Statement). AT&T also was having discussions with six other third parties, and exchanged confidential information with one of them. *Id.*

⁴⁰ SBC/AT&T Application at 11.

⁴¹ *Id.* In addition, prior to the closing of the merger, AT&T will pay its shareholders a special dividend in cash, in the amount of \$1.30 per share of AT&T common stock. *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 4.

⁴⁵ *Id.*

telecommunications industry, as the companies will have greater incentives to invest in research and development.⁴⁶

13. The Applicants also assert that the merger will not reduce competition. The Applicants argue that the two companies' services are "largely complementary."⁴⁷ They contend that AT&T focuses on national and global enterprise customers, while SBC focuses on residential consumers and regional businesses.⁴⁸ They also contend that there are numerous other competitors in each market segment in which they compete.⁴⁹ Finally, they suggest that the market definitions the Commission has traditionally applied in merger proceedings may not be suitable given the continual advances in communications technologies, the substitution of services based on Internet Protocol (IP) for circuit-switched services, and the substitution of wireless services for traditional wireline services.⁵⁰

C. Applications and Review Process

1. Commission Review

14. On February 21, 2005, SBC and AT&T jointly filed a series of applications seeking Commission approval of the proposed transfer of control of licenses and authorizations held by AT&T and its subsidiaries to SBC.⁵¹ On March 11, 2005, the Wireline Competition Bureau released a Public Notice seeking public comment on the proposed transaction.⁵² In response to the Public Notice, more than 50 parties filed petitions to deny the applications or formal comments supporting or opposing grant of the

⁴⁶ *Id.* at 5.

⁴⁷ *Id.* at 6.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 5-6.

⁵¹ Pursuant to section 214 of the Communications Act, SBC and AT&T filed applications seeking Commission approval to transfer to SBC control of domestic and international section 214 authorizations held by AT&T and its subsidiaries. 47 U.S.C. § 214. The Applicants also filed an application for consent to transfer control of AT&T's interests in submarine cable landing license to SBC pursuant to section 2 of the Cable Landing License Act. 47 U.S.C. § 35. Pursuant to section 310(d) of the Communications Act, SBC and AT&T filed applications seeking Commission approval to transfer to SBC control of wireless and earth station licenses and authorizations held by AT&T and various subsidiaries, and filed an application for Commission approval to transfer control of Experimental Radio Service Licenses from AT&T to SBC. 47 U.S.C. § 310(d); *see also* Appendix B (listing licenses and authorizations subject to transfer of control).

⁵² *Public Notice.* The *Public Notice* set due dates of April 25, 2005 for the filing of Comments and Petitions to Deny and May 10, 2005 for Responses and Oppositions. *Id.* The Wireline Competition Bureau (Bureau) adopted protective orders under which third parties would be allowed to review confidential or proprietary documents. *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Order Adopting Protective Order, 20 FCC Rcd 5196 (2005) (*First Protective Order*); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Order Adopting Second Protective Order, 20 FCC Rcd 8876 (2005) (*Second Protective Order*).

applications.⁵³ On April 18, 2005, Wireline Competition Bureau and International Bureau staff requested additional information from the Applicants (“Information Request”).⁵⁴ The Applicants’ responses to the Information Request, along with their responses to additional Commission requests, are included in the record.⁵⁵

2. Department of Justice Review

15. The Antitrust Division of the U.S. Department of Justice (DOJ) reviews telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition.⁵⁶ The Antitrust Division’s review is limited solely to an examination of the potential competitive effects of the acquisition, without reference to national security, law enforcement, or other public interest considerations. The Antitrust Division reviewed the proposed merger between SBC and AT&T and entered into a consent decree with the Applicants on October 27, 2005.⁵⁷ Under the DOJ Consent Decree, the Applicants agreed to divest certain assets in the form of Indefeasible Rights of Use (IRUs) to certain buildings where only SBC and AT&T had direct connections.

⁵³ The parties that filed formal pleadings in this proceeding are listed in Appendix A. In addition to those formal pleadings, we have received informal comments and *ex parte* submissions. All pleadings and comments are available on the Commission’s Electronic Comment Filing System (ECFS) website at www.fcc.gov/cgb/ecfs/.

⁵⁴ See Letter from Michelle M. Carey, Deputy Chief, Wireline Competition Bureau, FCC, to Patrick J. Grant, Counsel for SBC, and David L. Lawson, Counsel for AT&T, WC Docket No. 05-65 (Apr. 18, 2005) (Information Request).

⁵⁵ Several petitioners and commenters raised various objections to the manner in which information provided by the Applicants was made available for their review. See Letter from Brad E. Mutschelknaus *et al.*, Counsel for Cbeyond *et al.*, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed May 25, 2005); Letter from Gary R. Lytle, Senior Vice President – Federal Relations, Qwest, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed May 25, 2005); Letter from Brad E. Mutschelknaus *et al.*, Counsel for Cbeyond *et al.*, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed June 7, 2005); Letter from Gary R. Lytle, Senior Vice President – Federal Relations, Qwest, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed June 7, 2005); Letter from Colleen Boothby, Counsel for Ad Hoc Telecom Users, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed June 8, 2005). These complaints elicited a vigorous defense from the Applicants. See Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Kevin J. Martin, Chairman, FCC, WC Docket No. 05-65 (filed May 27, 2005); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed June 1, 2005); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Kevin J. Martin, Chairman, FCC, WC Docket No. 05-65 (filed June 9, 2005); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Kevin J. Martin, Chairman, FCC, WC Docket No. 05-65 (filed June 13, 2005); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Kevin J. Martin, Chairman, FCC, WC Docket No. 05-65 (filed June 15, 2005). The Commission reviewed the multiple pleadings filed on both sides, met with both the Applicants and those opposing the applications, and considered the merits of the complaints, including potential alternative mechanisms to balance the risks of granting access to certain highly confidential sensitive competitive information in electronic form against the additional benefit of such access in providing material support on issues of real controversy. Under the particular circumstances of this case, including the risks, the procedural difficulties, and the apparent success of the opponents in obtaining sufficient information on key points, either from that provided by the Applicants or from other sources (such as their own confidential records or third-party sources), we chose not to intervene further in the production process.

⁵⁶ 15 U.S.C. § 18.

⁵⁷ *DOJ-SBC/AT&T Consent Decree*; see also *DOJ-SBC/AT&T Complaint*.

IV. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

16. Pursuant to sections 214(a) and 310(d) of the Communications Act,⁵⁸ and the Cable Landing License Act,⁵⁹ the Commission must determine whether the proposed transfer of control to SBC of licenses and authorizations held by AT&T will serve the public interest, convenience, and necessity.⁶⁰ In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules. If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against the potential public interest benefits.⁶¹ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.⁶² If we are unable to find that the proposed transaction

⁵⁸ 47 U.S.C. §§ 214(a), 310(d).

⁵⁹ 47 U.S.C. §§ 34-39. The Cable Landing License Act provides that approval of a license application may be granted "upon such terms as shall be necessary to assure just and reasonable rates and service. . . ." 47 U.S.C. § 35. The Commission does not conduct a separate public interest analysis under this statute. *See, e.g., WorldCom, Inc. and Its Subsidiaries (Debtors-in-Possession), Transferor, and MCI, Inc., Transferee*, WC Docket No. 02-215, Memorandum Opinion and Order, 18 FCC Rcd 26484, 26492, para. 12 (2003) (*WorldCom Order*); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025 (1998) (*WorldCom/MCI Order*).

⁶⁰ 47 U.S.C. § 310(d) requires that we consider the applications for transfer of Title III licenses (wireless licenses and earth station authorizations in this case) under the same standard as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. *See Applications of Western Wireless Corporation and Alltel Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-50, Memorandum Opinion and Order, FCC 05-138, para. 17 (rel. July 19, 2005) (*Alltel/Western Wireless Order*); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket 04-70, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21542, para. 40 (2004) (*Cingular/AT&T Wireless Order*); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 485, para. 18 (2004) (*News Corp./Hughes Order*). Thus, we must examine the Applicants' qualifications to hold licenses. *See* discussion *infra* at Part V.H (SBC's Qualifications to Acquire Control of AT&T's Licenses).

⁶¹ *See, e.g., Sprint/Nextel Order*, FCC 05-148 at para. 20; *Alltel/Western Wireless Order*, FCC 05-138 at para. 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-43, para. 40; *News Corp./Hughes Order*, 19 FCC Rcd at 483, para. 15; *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14046, paras. 20, 22 (2002) (*Bell Atlantic/GTE Order*); *Applications of VoiceStream Wireless Corporation and Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee*, IB Docket No. 00-187, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789, para. 17 (2001) (*Deutsche Telekom/VoiceStream Order*); *SBC/Ameritech Order*, 14 FCC Rcd at 14737-38, para. 48; *WorldCom/MCI Order*, 13 FCC Rcd at 18031, para. 10; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, para. 2.

⁶² *See, e.g., Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-44, para. 40 (citing *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to subsidiaries of Cingular Wireless LLC*, WT Docket 03-217, Memorandum Opinion and Order, 19 FCC Rcd 2570, 2581, para. 24 (2004) (*Cingular/NextWave Order*); *News Corp./Hughes Order*, 19 FCC Rcd at 483, para. 15; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70, Memorandum Opinion and Order, (continued....)

serves the public interest for any reason, or if the record presents a substantial and material question of fact, we may designate the application for hearing.⁶³

17. Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,”⁶⁴ which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest.⁶⁵ Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.⁶⁶ In conducting this

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17 FCC Rcd 23246, 23255, para. 26 (2002) (*AT&T/Comcast Order*); *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20574, para. 25 (2002) (*EchoStar/DirecTV Order*); *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14046, para. 22; *Applications of SBC Communications Inc. and BellSouth Corporation*, 15 FCC Rcd 25459, 25464, para. 13 (*BellSouth/SBC Order*); *Applications of Vodafone Airtouch, PLC and Bell Atlantic Corporation*, File Nos. 0000032969, et al., Memorandum Opinion and Order, 15 FCC Rcd 16507, 16512, para. 13; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3169-70, para. 15 (1999) (*AT&T/TCI Order*); *WorldCom/MCI Order*, 13 FCC Rcd at 18031-32, para. 10).

⁶³ We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications. *See ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979). We may, however, do so if we find that a hearing would be in the public interest. However, with respect to the applications to transfer licenses subject to Title III of the Act, if we are unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we designate the application for hearing. 47 U.S.C. § 309(e); *see EchoStar/DirecTV Order*, 17 FCC Rcd at 20574, para. 25; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-44, para. 40.

⁶⁴ *See Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41 (citing *News Corp./Hughes Order*, 19 FCC Rcd at 483-84, para. 16; *AT&T/Comcast Order*, 17 FCC Rcd at 23255, para. 27; *EchoStar/DirecTV Order*, 17 FCC Rcd at 20575, para. 26; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9821, para. 11 (2000) (*AT&T/MediaOne Order*); *AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses*, IB Docket No. 98-212, Memorandum Opinion and Order, 14 FCC Rcd 19140, 19146-47, para. 14 (1999) (*AT&T/British Telecom Order*); *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31, para. 9).

⁶⁵ *See* 47 U.S.C. §§ 157 nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) (1996 Act), 254, 332(c)(7)); 1996 Act, Preamble; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41; *see also Cingular/NextWave Order*, 19 FCC Rcd at 2583-84, para. 29; *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31, para. 9; *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668, 22696, para. 55 (2001) (citing 47 U.S.C. §§ 301, 303, 309(j), 310(d)); *cf.* 47 U.S.C. §§ 521(4), 532(a).

⁶⁶ *See Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41 (citing *AT&T/Comcast Order*, 17 FCC Rcd at 23255, para. 27; *AT&T/MediaOne Order*, 15 FCC Rcd at 9821-22, para. 11; *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31, para. 9).

analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.⁶⁷

18. In determining the competitive effects of the merger, our analysis is informed by, but not limited to, traditional antitrust principles.⁶⁸ The Commission and the DOJ each have independent authority to examine telecommunications mergers, but the standards governing the Commission's review differ from those of the DOJ.⁶⁹ As stated above, the DOJ reviews mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to lessen competition substantially in any line of commerce.⁷⁰ The Commission, on the other hand, as stated above, is charged with determining whether the transfer of control serves the broader public interest. In the communications industry, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players.⁷¹ In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition.⁷² We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.⁷³

19. Our public interest authority also enables us to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.⁷⁴ Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions not

⁶⁷ See *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41.

⁶⁸ See, e.g., *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *News Corp./Hughes Order*, 19 FCC Rcd at 484, para. 17; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14046, para. 23; *WorldCom/MCI Order*, 13 FCC Rcd at 18033, para. 13.

⁶⁹ See, e.g., *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *News Corp./Hughes Order*, 19 FCC Rcd at 484, para. 17; see also *Satellite Business Systems*, 62 FCC 2d 997, 1088 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72 (DC Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

⁷⁰ 15 U.S.C. § 18.

⁷¹ See *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *AT&T/Comcast Order*, 17 FCC Rcd at 23256, para. 28.

⁷² See *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14047, para. 23; *AT&T/British Telecom Order*, 14 FCC Rcd at 19148, para. 15.

⁷³ See, e.g., *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6550, 6553, paras. 5, 15 (2001) (*AOL/Time Warner Order*); *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42.

⁷⁴ See, e.g., *Alltel/Western Wireless Order*, FCC 05-138 at para. 21 (conditioning approval on the divestiture of operating units in specified markets); *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21545-46, para. 43 (same); see also *WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10 (conditioning approval on the divestiture of MCI's Internet assets).

inconsistent with law that may be necessary to carry out the provisions of the Act.⁷⁵ Similarly, section 214(c) of the Act authorizes the Commission to attach to the certificate “such terms and conditions as in its judgment the public convenience and necessity may require.”⁷⁶ Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to impose and enforce conditions based upon our extensive regulatory and enforcement experience to ensure that the merger will, overall, serve the public interest.⁷⁷ Despite broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms)⁷⁸ and that are related to the Commission’s responsibilities under the Communications Act and related statutes.⁷⁹ Thus, we will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.

V. POTENTIAL PUBLIC INTEREST HARMS

A. Analytical Framework

20. In this section, we consider the potential public interest harms, including potential harms to competition, arising from the merger. Because SBC and AT&T currently compete with respect to a wide variety of services and groups of customers, we must consider the potential horizontal effects of this merger.⁸⁰ In addition, because both SBC and AT&T provide critical inputs, particularly special access services, to various communications markets, we need to consider the potential vertical effects of the merger – specifically, whether the merged entity will have an increased incentive or ability to injure competitors by raising the cost of, or discriminating in the provision of, inputs sold to competitors.⁸¹

21. With respect to the horizontal effects, consistent with Commission precedent, we first perform a structural analysis of the merger to examine whether it is likely to result in anticompetitive effects.⁸² We

⁷⁵ 47 U.S.C. § 303(r).

⁷⁶ 47 U.S.C. § 214(c); *see also Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21545-46, para. 43; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14047, para. 24; *AT&T/British Telecom Order*, 14 FCC Rcd at 19148, para. 15.

⁷⁷ 47 U.S.C. § 303(r); *see, e.g., Alltel/Western Wireless Order*, FCC 05-138 at para. 21; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21545-46, para. 43; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14047, para. 24; *WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10; *FCC v. Nat’l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989).

⁷⁸ *See Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 43; *News Corp./Hughes Order*, 19 FCC Rcd at 534, para. 131.

⁷⁹ *See Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 43.

⁸⁰ A transaction is said to be horizontal when the firms in the transaction sell products that are in the same relevant markets and are therefore viewed as reasonable substitutes by purchasers of the products. *News Corp./Hughes Order*, 19 FCC Rcd at 507, para. 69.

⁸¹ *Id.* at 508, para. 71.

⁸² Structural merger analysis, as the name suggests, considers structural characteristics of the merging firms and the relevant markets, such as market shares and entry conditions, to make predictions about the likely competitive effects of a proposed merger.

begin by defining the relevant product markets⁸³ and relevant geographic markets.⁸⁴ We next identify market participants and examine market concentration and how concentration will change as a result of the merger. We also consider whether entry conditions are such that new competitors could likely enter and defeat any attempted post-merger price increase.

22. If our structural analysis suggests that the merger may have anticompetitive effects, we must then examine in more detail whether and how the merger might affect competitive behavior. In performing this behavioral analysis, we consider whether the merger is likely to have anticompetitive effects either through unilateral actions of the merged entity or through coordinated interaction among firms competing in the relevant market.⁸⁵

23. With regard to potential vertical effects, we will examine how the merger affects the Applicants' incentives and ability to discriminate in provisioning inputs to competitors. In particular, we will consider the effect of the merger on the merged entity's incentives and ability to discriminate in the provision of special access services.

B. Wholesale Special Access Competition

24. In this section, we consider the effects of the merger of SBC and AT&T on the provisioning and pricing of wholesale special access services. The Commission has previously defined special access as a dedicated transmission link between two places.⁸⁶ As discussed below, wholesale special access service is

⁸³ A relevant product market has been defined as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "small but significant and nontransitory" increase in price." Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, (Apr. 2, 1992, revised Apr. 8, 1997) §§ 1.11, 1.12 (*DOJ/FTC Guidelines*); see also *EchoStar/DirecTV Order*, 17 FCC Rcd at 20605-6, para. 106.

⁸⁴ A relevant geographic market has been defined "as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a 'small but significant and nontransitory' increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change." *EchoStar/DirecTV Order*, 17 FCC Rcd at 20609, para. 117 (citing *DOJ/FTC Guidelines* § 1.21).

⁸⁵ *Id.* at 20619, para. 151. As the Commission explained in the *EchoStar/DirecTV Order*:

Unilateral effects arise when the merging firm finds it profitable to alter its behavior following the merger. Examples of unilateral effects include a merging firm's raising its price or reducing the quantity it supplies. Coordinated effects, in contrast, arise when competing firms, recognizing their interdependence, take actions "that are profitable for each of them only as a result of the accommodating reactions of others." Because coordinated effects generally are more likely the smaller the number of firms in a market, mergers may significantly increase the likelihood of coordinated effects by reducing the number of firms. Examples include explicit collusion, tacit collusion, and price leadership. *Id.* at 20619, para. 152 (footnotes omitted).

⁸⁶ See *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1997, para. 7 (2005) (*Special Access NPRM*). We recognize that different companies, particularly carriers that are not incumbent LECs, may use slightly different terms to refer to dedicated loop and transport links between two points. For example, AT&T uses the terms "Local Private Line" and "Domestic Private Line" to refer to services consisting of loops and transport, typically in combination that generally compete directly with SBC's special access services. See, e.g., *SBC/AT&T* (continued....)

a critical input for: competitive LECs in providing services to their retail enterprise customers, wireless and competitive LECs in connecting their networks to other carriers, long distance carriers seeking to connect customers to their long-distance networks, and entities seeking to connect with Internet backbones.⁸⁷ Firms needing dedicated transmission links essentially have three choices: to deploy their own facilities, to buy special access service from incumbent LECs, or to purchase such service from a competing special access provider. As discussed below, we find that AT&T provides special access services in competition with SBC's special access services, and that the merger, absent appropriate remedies, is likely to result in anticompetitive effects for wholesale special access services offered wholly over AT&T's own facilities to certain buildings. We conclude, however, that the consent decree, entered into between the Applicants and the DOJ, pursuant to which the Applicants agreed to certain divestitures in the form of IRUs for loops and transport necessary to reach to certain buildings where AT&T is the only competitive LEC that has a direct wireline connection, should remedy any likely anticompetitive effects. Moreover, we find further comfort in certain voluntary commitments, which the Applicants have offered. Accordingly, we adopt the proffered commitments as express conditions of our approval of the transfer of licenses and authorizations from AT&T to SBC.

1. Relevant Markets

a. Relevant Product Markets

25. As previously indicated, special access is a dedicated transmission link between two locations, most often provisioned via high-capacity circuits. Such services are used for various purposes, such as direct connection between tenants of commercial buildings and a competing carrier's network or between different facilities of the same firm. Both voice and data may be carried using special access services. The facilities used to provide special access service typically consist of three different segments: (1) an entrance facility, which connects the purchasing carrier's point of presence ("POP") to the nearest wire center, carrier hotel, or similar location ("entrance facility"); (2) local transport; and (3) a "last mile" connection or local loop, also known as a channel termination, which runs from the transport facility to the end-user customer.

26. The record demonstrates that there are at least two separate relevant product markets for special access services: "Type I" special access services, which are offered wholly over a carrier's own facilities, and "Type II" special access services, which are offered using a combination of the carrier's own facilities for two of the segments and the special access services of another carrier for the third segment.⁸⁸ The

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Carlton/Sider Reply Decl. at para. 9 n.5; *DOJ-SBC/AT&T Complaint* at para. 13. For simplicity, we will use the term "special access" to refer to all services provided by any carrier that involves such dedicated links.

⁸⁷ See *infra* Part V.C (Retail Enterprise Competition); Part V.D (Mass Market Competition); and Part V.E (Internet Backbone Competition).

⁸⁸ See, e.g., Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 8 (filed June 15, 2005) (Qwest June 15 *Ex Parte* Letter). Approximately [REDACTED] of AT&T's wholesale DS3 and lower-capacity special access services are Type II. Response of AT&T Corp. to the Commission's April 18, 2005 Information and Document Request, WC Docket No. 05-65, Exh. 5(c) II – 5(c) VI (filed May 9, 2005) (AT&T Info. Req.) (Local Private Line and Domestic Private Line wholesale special access). AT&T [REDACTED] services. See Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, App. C at 2 (filed Aug. 1, 2005) (SBC/AT&T Aug. 1 *Ex Parte* Letter).

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record evidence suggests that many purchasers of wholesale special access services view Type I services as substantially superior to Type II services, due to differences in performance, reliability, security, and price, and that these differences are sufficiently large that Type I special access services fall into a separate relevant product market from Type II.⁸⁹

27. We also recognize that the services provided over different segments of special access (*e.g.*, channel terminations and local transport) constitute separate relevant product markets, which may be subject to varying levels of competition.⁹⁰ In the competitive analysis section below, we will discuss the competitiveness of the different special access services.

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In this Order, “REDACTED” indicates that confidential or proprietary information that is subject to a Protective Order in this proceeding has been redacted from the public version of this Order. *First Protective Order*, 20 FCC Rcd at 5196; *Second Protective Order*, 20 FCC Rcd at 8876. The unredacted text is included in the confidential version of this Order, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgments of the protective orders. Qualified persons who have not yet signed the required acknowledgments may do so in order to obtain the confidential version of this Order.

Note that in some cases where both a confidential unredacted version and a redacted public version of a document were filed, the page number was inconsistent between the two documents. With respect to such documents, all citations are to the redacted version, unless otherwise specified.

⁸⁹ See, *e.g.*, Qwest June 15 *Ex Parte* Letter, Attach. at 8; Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 7 (filed July 7, 2005) (Qwest July 7 *Ex Parte* Letter); Cbeyond *et al.* Petition, Declaration of Simon Wilkie (Cbeyond *et al.* Wilkie Decl.) at para. 17 n.6 (“[O]ther things being equal, buyers have a preference to purchase Type I circuits to avoid any reliance on the ILEC who may degrade quality or be unresponsive to service problems.”); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, App. C at 2 (filed Aug. 1, 2005) (unredacted) (AT&T [REDACTED] services) (SBC/AT&T Aug. 1 *Ex Parte* Letter); AT&T Info. Req., ATT546000175-79 ([REDACTED]); ATT598003761-78 at 63 ([REDACTED]); ATT599000837-44 at 39-40 ([REDACTED]). We note that the analysis of Type II offerings as part of a distinct product market is consistent with the assertions of commenters that Type II services are significant, as well. See, *e.g.*, Letter from Brad E. Mutschelknaus, *et al.*, Counsel for Eschelon *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 6 (filed June 6, 2005) (Eschelon *et al.* June 6 *Ex Parte* Letter) (asserting that the fact that wholesale services are provisioned using Type II, rather than Type I, offerings “does not significantly diminish the competitive significance” of those offerings, and that criticisms of Type II offerings do not “account for the important role played by those facilities in the wholesale market”).

⁹⁰ We do not, however, analyze separate product markets for different capacities of special access services. See, *e.g.*, Letter from Brad E. Mutschelknaus, Counsel for Conversent *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 3 (filed Aug. 31, 2005) (Conversent *et al.* Aug. 31 *Ex Parte* Letter) (asserting that different capacity services should be different relevant product markets). While customers in certain circumstances may be able to substitute different capacity services in different combinations to meet their needs if the price of a particular capacity circuit were raised (for example, customers could substitute multiple DS1 loops for a single DS3 loop), we believe that, in general, different capacity circuits are likely to constitute separate relevant product markets. However, we find comparable competitive alternatives for varying capacities of special access circuits, and thus for administrability purposes we do not separately analyze different capacity services. Where competing carriers offer Type I service using their own facilities, the facilities can be “channelized” to provide service at all capacity levels. See, *e.g.*, Response of SBC Communications Inc. to Information and Document Request Dated April 18, 2005, WC Docket No. 05-65, Exh. 6(d)(3) at III-2 (filed May 9, 2005) (SBC Info. Req.); see also *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2585-86, para. 86 (2005), petitions for review filed (*Triennial Review Remand Order*). Where carriers seek to offer Type (continued....)

b. Relevant Geographic Markets

28. Consistent with Commission precedent and the record before us, we conclude that the relevant geographic market for wholesale special access services is a particular customer's location, since it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid a "small but significant and nontransitory" increase in the price of special access service.⁹¹ In order to simplify its analysis, however, the Commission has traditionally aggregated or grouped customers facing similar competitive choices, and we will do so in our discussion below to the extent appropriate.⁹²

29. In addition, however, we will consider the potential effect of the merger on SBC's special access prices, which are generally set on a wider geographic basis. Because SBC has gained Phase II pricing flexibility for its special access services in some metropolitan statistical areas (MSAs),⁹³ but not others, (Continued from previous page) _____
II service, they can purchase the required capacity of special access service from the incumbent or from any competitive access providers.

We note that, in prior orders addressing our section 251 unbundling rules, we conducted a capacity-based analysis. *See, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2625, para. 166 (describing the capacity-based analysis used for DS1, DS3, and dark fiber loops); *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, 17102, para. 197 (2003) (*Triennial Review Order*), corrected by Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *aff'd in part, vacated and remanded in part, and remanded in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (describing the capacity-based analysis used for DS1, DS3, OCn, and dark fiber loops). Our approach to product definitions here differs in key respects from our unbundling analysis, however. Our merger analysis focuses on special access competition generally (whether through facilities deployment or partial reliance on other carriers' special access services), whereas our high-capacity loop impairment analysis focused solely on the likelihood of competitive facilities deployment. Moreover, our location-specific analysis in the merger context focuses on those locations where AT&T offers competing special access services today, whereas the Commission applied a wire center test for high-capacity loop unbundling because a building-by-building test would not be administrable. Thus, we find no need to perform separate analyses for different capacity circuits based on the record and analytical framework here, notwithstanding our prior unbundling analyses.

⁹¹ *See, e.g., SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 69; *Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, CC Docket No. 98-24, Memorandum Opinion and Order, 13 FCC Rcd 15236, 15248, para. 21 (*AT&T/TCG Order*). Our geographic market definition is consistent with the arguments made by certain commenters. *See* Global Crossing Comments at 10-14; Global Crossing Comments, Attach. A, Statement of Joseph Farrell at paras. 117-25 (Global Crossing Farrell Decl.); *Conversent et al.* Aug. 31 *Ex Parte* Letter at 3; *cf. EchoStar/DirecTV Order*, 17 FCC Rcd at 20609-12, paras. 117-125; *AT&T/Comcast Order*, 17 FCC Rcd at 23282, para. 90 (finding that the relevant geographic market was individual customer residences but that it is reasonable to aggregate to a larger geographic area); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-19, para. 54-57 (finding that separate geographic areas were appropriately defined by the availability of similar set of services at similar prices).

⁹² *See, e.g., AT&T/Comcast Order*, 17 FCC Rcd at 23282, para. 90; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-19, paras. 54-56; *EchoStar/DirecTV Order* 17 FCC Rcd at 20610-11, para. 120; *SBC/Ameritech Order* 14 FCC Rcd at 14746, paras. 67-68.

⁹³ *SBC/AT&T Application* at 103.

SBC's rates for special access may vary from MSA to MSA.⁹⁴ Accordingly, we will also examine on an MSA basis how the merger is likely to affect SBC's special access prices.

c. Market Participants

30. SBC can access all or virtually all of the buildings and transport routes in its territory. Although the record is not clear as to what extent other competitive LECs compete in the special access market in SBC's territory, it is clear that, in addition to AT&T, [REDACTED] provide wholesale Type I, and in some cases Type II, special access services.⁹⁵ The record does not, however, clearly indicate the extent to which individual buildings are served by one or more of these competitive LECs.

2. Competitive Analysis

31. In this section, we separate our discussion of the competitive effects of the merger into the effects on the in-region special access market, both horizontal and vertical, and the effects on out-of-region special access markets.⁹⁶ We begin by considering whether the merger is likely to result in a meaningful reduction in competition or increase in price for special access services to particular locations.

32. As discussed below, we find that the elimination of AT&T as a provider of wholesale special access services is likely to result in anticompetitive effects in the provision of Type I special access services to particular buildings where AT&T is currently the sole carrier, besides SBC, with a direct wireline connection to the building, and where barriers to entry make it unlikely that other carriers will build their own facilities. Absent appropriate remedies, these building-specific effects may also lead to increases in SBC's MSA-wide special access prices.

33. With respect to Type II special access services, we conclude that the ability of remaining carriers in the market to offer competitive special access services through a combination of their own transport facilities and an incumbent LEC's special access or high-capacity unbundled loops, or a competing carrier's loop facilities, alleviates concerns about the loss of AT&T as a provider of Type II special access services to particular buildings. Further, because AT&T provides such a relatively small amount of wholesale Type II special access services within SBC's region, and because other competitive providers should be able to move in quickly to fill any void left by AT&T, we conclude that the merger is unlikely to result in an increase in the price of Type II services within SBC's region.

34. We next consider whether the merger is likely to result in anticompetitive effects in the provision of wholesale special access services in areas outside SBC's territory. In particular, we consider arguments made by certain commenters that, after the SBC/AT&T and Verizon/MCI mergers are consummated, SBC and Verizon will have an incentive to forbear from competing in the provision of wholesale special access services within each other's territories. We conclude that the merger will not

⁹⁴ We recognize that SBC also offers various volume and term discount plans which offer percentage discounts off the tariffed rate. Some discounts are based on a carrier's total spend over a larger geographic market while other discounts may vary from MSA to MSA. See, e.g., CompTel/ALTS Petition at 15 (suggesting a regional analysis is appropriate given SBC pricing strategies).

⁹⁵ SBC/AT&T Application, Reply Declaration of Anthony Fea *et al.* (SBC/AT&T Fea *et al.* Reply Decl.) at paras. 15, 47.

⁹⁶ By "in-region," we mean the franchise areas where SBC is the incumbent LEC. Thus, "out-of-region" refers to all other regions in the U.S.

result in competitive harm in Verizon's territory. We find that a variety of actual and potential competing providers will remain post-merger to fill any void left by AT&T if the merged entity does not continue to offer wholesale special access services in Verizon's territory.

35. Finally, we consider possible vertical effects of the merger. SBC is already a vertically integrated company. We conclude that the merger, as conditioned by the DOJ Consent Decree, will not increase the merged entity's ability to increase prices for or decrease quality of wholesale special access services. To the extent that SBC, prior to the merger, had any incentive or ability to raise rivals' costs or discriminate in the provision of wholesale special access services, those issues are better addressed in pending general rulemaking proceedings.

a. Horizontal Effects

36. *Unilateral Effects.* Several commenters claim that, as a result of the merger, wholesale special access prices are likely to rise at specific buildings where AT&T is currently offering either Type I or Type II special access services.⁹⁷ As discussed in greater detail below, we believe these claims are correct in part. The record suggests that the merger will result in a reduction in the number of competitors offering Type I services in buildings where AT&T is currently connected via its own facilities, and that, absent remedial measures, this is likely to lead to an increase in the price of special access service to buildings where only SBC and AT&T own or control a direct wireline connection, and where conditions make additional facilities-based entry unlikely.⁹⁸ We further find, however, that the merger is not likely to result in anticompetitive effects in the provision of Type II services. Competing carriers can use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and can purchase special access circuits or UNE loops to provide Type II services.

37. *Type I Services.* We disagree with the Applicants' assertion that "the absolute number of buildings served by AT&T is so small that AT&T's facilities cannot be considered competitively significant."⁹⁹ As discussed above, the relevant geographic market for wholesale special access services is a particular customer's location. Thus, where AT&T is the only carrier besides SBC that is directly connected to a particular building and where entry is unlikely, AT&T's elimination as a competitor may lead to an increase in the price of Type I special access services to that building. Thus, absent appropriate remedial measures, like those imposed by the DOJ Consent Decree, the proposed merger is likely to have

⁹⁷ See, e.g., ACN *et al.* Comments at 39-41; Broadwing and SAVVIS Petition at 22-29; Cbeyond *et al.* Petition at 22-25; CompTel/ALTS Petition at 13-15; Global Crossing Comments at 17-19; NASUCA Comments at 14-18; Qwest Petition at 12-17; Ad Hoc Telecom Users Reply at 20-23; BT Americas Reply at 13-15, 19-20; Letter from Richard M. Blau and Edward W. Kirsch, Counsel for CTC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 4-5 (filed Sept. 21, 2005) (CTC Sept. 21 *Ex Parte* Letter); Letter from Brad E. Mutschelknaus, Counsel for BridgeCom *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, at 2 (filed Sept. 22, 2005) (BridgeCom *et al.* Sept. 22 *Ex Parte* Letter); Letter from John T. Nakahata, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 2 (filed Sept. 23, 2005) (Level 3 Sept. 23 *Ex Parte* Letter).

⁹⁸ In the 19 in-region MSAs where AT&T has local facilities, SBC identifies over 240,000 commercial buildings with more than 10 DS0 line equivalents, and states that AT&T provides Type I service to only 1,691 buildings in SBC's region as a whole using its own facilities—only 0.7%. See SBC/AT&T Application at 105 n.347; SBC/AT&T Reply at 30-32; Letter from Christopher M. Heimann, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 2-3 (filed Sept. 6, 2005) (SBC/AT&T Sept. 6 *Ex Parte* Letter).

⁹⁹ SBC/AT&T Sept. 6 *Ex Parte* Letter at 3.

anticompetitive effects in buildings where AT&T is the only competitive LEC with a direct wireline connection and where entry appears unlikely.

38. AT&T is directly connected via its own facilities to at least 1,691 buildings in the 19 MSAs in SBC's territory where AT&T has local facilities.¹⁰⁰ AT&T has provided data indicating that AT&T is the only competitive provider to approximately [REDACTED] of those buildings.¹⁰¹

39. The record also indicates that, for many buildings, there is little potential for competitive entry, at least in the short term. As the Commission has previously recognized, carriers face substantial fixed and sunk costs, as well as operational barriers, when deploying loops, particularly where the capacity demanded is relatively limited.¹⁰² Given these barriers, it appears unlikely that a carrier would be willing to make the significant sunk investment without some assurance that it would be able to generate revenues sufficient to recover that investment.¹⁰³ Consistent with this analysis, there is evidence in the record that carriers generally are unwilling to invest in deploying their own loops unless they have a long-term retail contract that will generate sufficient revenues to allow them to recover the cost of their investment.¹⁰⁴ Moreover, even where there is adequate retail demand, the costs of constructing the loop may be sufficiently high, or there may be other operational barriers, that may deter entry.¹⁰⁵

40. This analysis is consistent with the analysis contained in the complaint that the DOJ filed in connection with this merger. In its complaint, the DOJ alleged that, in certain buildings where "SBC and AT&T are the only firms that own or control a direct wireline connection to the building," the merger was "likely to substantially reduce competition for Local Private Lines and telecommunications services that rely on Local Private Lines to those buildings."¹⁰⁶ The DOJ's complaint goes on to allege that "[a]though

¹⁰⁰ *See id.*

¹⁰¹ SBC/AT&T Sept. 6 *Ex Parte* Letter at 3; SBC/AT&T Aug. 1 *Ex Parte* Letter, App. B at 1; Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, at 2 (filed June 24, 2005) (SBC/AT&T June 24 *Ex Parte* Letter). We note that AT&T's data is likely to overestimate the number of buildings where AT&T is the sole competitive LEC with a direct connection, because the data only count competitive LECs with whom AT&T has wholesale contracts. *See, e.g.,* SBC/AT&T Sept. 6 *Ex Parte* Letter at 5; SBC/AT&T Carlton/Sider Reply Decl. at paras. 27-30.

¹⁰² *See Triennial Review Remand Order*, 20 FCC Rcd at 2615-18, paras. 149-54; *see also Triennial Review Order*, 18 FCC Rcd at 17160-62, paras. 303-306.

¹⁰³ *See, e.g.,* Cbeyond *et al.* Petition at 23; Letter from Brad E. Mutschelknaus, Counsel for Cbeyond *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 17 (filed July 14, 2005) (Cbeyond *et al.* July 14 *Ex Parte* Letter); Letter from Thomas Cohen, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at paras. 15-21 (filed Oct. 21, 2005) (XO Oct. 21 *Ex Parte* Letter).

¹⁰⁴ *See id.*

¹⁰⁵ We are not persuaded by the Applicants' argument that Commission findings that network elements need not be unbundled pursuant to the "impairment" standard of section 251(d)(2) demonstrate that the special access market has sufficiently low entry barriers to permit sufficient and timely competitive, facilities-based entry to defeat any attempted post-merger price increase. *See, e.g.,* SBC/AT&T Reply at 26-27, 32-33, 37-38, 41. 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 Rcd at 17051 at para. 109.

¹⁰⁶ *DOJ-SBC/AT&T Complaint* at para. 3.

other CLECs can, theoretically, build their own fiber connection to each building in response to a price increase by the merged firm, such entry is a difficult, time-consuming, and expensive process.”¹⁰⁷ The complaint further alleges that “[a]lthough entry may occur in response to a post-merger price increase in some of the buildings where AT&T is the only connected CLEC, the conditions for entry are unlikely to be met in hundreds of those buildings.”¹⁰⁸ To remedy this problem, the DOJ in the consent decree required that AT&T divest IRUs to those buildings where it was the sole CLEC with a direct connection to the building and where DOJ found entry unlikely.¹⁰⁹ We find that the terms of the consent decree should adequately remedy any likely anticompetitive effects in the provision of Type I wholesale special access services.

41. *Type II.* In buildings where a competitive LEC is not directly connected to a building via its own facilities and where customer demand may not justify the construction of competitive facilities (such as where demand is less than the OCn level), competing carriers can either combine competitive transport with special access loops or, where available, high-capacity loop UNEs purchased from SBC (*i.e.*, Type II offerings).¹¹⁰ Carriers can use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and can purchase special access loops or UNEs to provide Type II services.

42. Commenters claim that AT&T has three unique advantages in supplying Type II special access services to other competing carriers: (1) AT&T obtains greater special access discounts from SBC for the loop portion of the circuit;¹¹¹ (2) AT&T has more collocations than other competitive LECs so it can use the incumbent LEC special access to a greater number of buildings;¹¹² and (3) AT&T has a more extensive fiber network and therefore can reach more commercial buildings.¹¹³ We do not find these arguments persuasive.

43. First, there is no evidence that AT&T has access to a discount plan that is not available to other providers. The Applicants assert, and opponents do not rebut, that SBC’s “MVP” volume and term discount plan, under which AT&T takes SBC special access circuits, is also available to other competitive LECs,¹¹⁴ and the Applicants state that eleven carriers in addition to AT&T subscribe to the MVP plan.¹¹⁵

¹⁰⁷ *Id.* at para. 27.

¹⁰⁸ *Id.* at para. 29.

¹⁰⁹ *DOJ-SBC/AT&T Consent Decree*, App. A.

¹¹⁰ While UNEs are not available solely for the provision of long distance or mobile wireless services, they are available for the provision of local exchange and exchange access services. *Triennial Review Remand Order*, 20 FCC Rcd at 2551-58, paras. 34-40. Carriers that obtain UNEs for the provision of local exchange or exchange access services may also provide other services using those UNEs, as well. 47 C.F.R. § 51.309(d).

¹¹¹ CompTel/ALTS Petition at 14; Cbeyond *et al.* July 14 *Ex Parte* Letter at 14.

¹¹² Cox Comments at 15.

¹¹³ CompTel/ALTS Petition at 14; Cbeyond *et al.* July 14 *Ex Parte* Letter at 16-21; Letter from Teresa D. Baer, Counsel for Global Crossing, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 8 (filed June 2, 2005) (Global Crossing June 2 *Ex Parte* Letter).

¹¹⁴ SBC/AT&T Reply, Declaration of Parley C. Casto (SBC/AT&T Casto Reply Decl.) at paras. 3-8; SBC/AT&T Aug. 1 *Ex Parte* Letter, App. C at 1-3.

¹¹⁵ SBC/AT&T Casto Reply Decl. at para. 6.

Indeed, these plans are made available to others pursuant to contract tariffs or generally available tariffs. Further, the record indicates that negotiations between Qwest and SBC have led to a special access discount plan that would enable Qwest to obtain special access discounts that are double what Qwest receives under the MVP plan.¹¹⁶ Moreover, SBC provides special access discounts in a variety of ways with differing conditions in different states and regions, including discounts available even to those carriers that might not qualify for the precise discount plan used by AT&T.¹¹⁷ Indeed, the Applicants note that at least one smaller competitor receives a larger discount off the tariffed rate than does AT&T.¹¹⁸ Finally, we note that regardless of whether competitors are able to negotiate significant discounts, where competitive duplication of the last-mile facility is not economic, competing carriers will be able to rely on high-capacity loop and transport UNEs priced at Total Element Long Run Incremental Cost (TELRIC) where they are available.¹¹⁹

44. Second, existing competitive collocations and the threat of competitive entry through collocation allow for special access competition in SBC's in-region wire centers where AT&T competes today. Indeed, in the 19 MSAs in SBC's territory where AT&T currently has local facilities,¹²⁰ the Applicants indicate that AT&T only has collocations in [REDACTED] wire centers compared to the total of over [REDACTED] collocations by other competing carriers in SBC wire centers.¹²¹ Thus, other competing

¹¹⁶ Letter from Gary L. Phillips, General Attorney and Assistant General Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 2 (filed Sept. 27, 2005). Qwest states that although "[t]here were a number of areas of agreement" regarding the new special access discount plan, it has not yet finally agreed to that plan. Letter from Robert L. Connelly, Jr., Vice President – Deputy General Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 2-3, *in* Letter from Melissa Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Oct. 5, 2005).

¹¹⁷ SBC provides special access services under tariffed rates as well as through individual contracts, as SBC has gained pricing flexibility in certain MSAs. Various volume and term discounts may apply to individual purchases or for all purchases in particular regions. Other discounts are dependent on maintaining minimum purchasing levels over several years. *See, e.g.*, AT&T Info. Req., ATT551001558-84; ATT564000335-42. While it is not always clear how much each buyer pays, it is clear that the simple tariff rate sometimes used by commenters for comparing prices is not adequate for that purpose. *See, e.g.*, Letter from Thomas Cohen, Counsel for SAVVIS and XO, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 5 (filed July 29, 2005) (SAVVIS/XO July 29 *Ex Parte* Letter); XO *et al.* Oct. 3 *Ex Parte* Letter, Attach. at 2-4; *see also* Cbeyond *et al.* Wilkie Decl. at para. 15 (discussing the review of special access RFP bid data, and stating that the incumbent LEC "rarely actively underbid[s] the posted special access rates").

¹¹⁸ SBC/AT&T Casto Reply Decl. at paras. 3-8.

¹¹⁹ In addition, we note that the Commission has found that "the availability of UNEs is itself a check on special access pricing." *Triennial Review Remand Order*, 20 FCC Rcd at 2574, para. 65.

¹²⁰ The Applicants present much of their quantifiable data in this 19 MSA grouping. These MSAs are Austin, Chicago, Cleveland, Columbus, Dallas, Detroit, Dayton, Hartford, Houston, Indianapolis, Kansas City, Los Angeles, Milwaukee, Reno, Sacramento, St. Louis, San Antonio, San Diego, and San Francisco. For analysis purposes, they also include San Jose in the San Francisco MSA and Bridgeport, CT in the Hartford MSA. SBC/AT&T Reply, Declaration of Dennis W. Carlton and Hal S. Sider (SBC/AT&T Carlton/Sider Reply Decl.) at para. 17, n.10.

¹²¹ Letter from Gary L. Phillips, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, Attach. (filed Aug. 12, 2005) (SBC Aug. 12 *Ex Parte* Letter). While XO expresses concern that summaries of the collocation data in the text of SBC/AT&T's August 12 *ex parte* letter might double-count fiber-based collocators, our analysis relies on the underlying data itself. *See* XO Oct. 21 *Ex Parte* Letter at 9. Further, XO cites an order by the Michigan Public Service Commission finding that SBC's collocation data, submitted for purposes of implementing the (continued....)

carriers collectively have [REDACTED] times the number of SBC wire center collocations compared with AT&T. In addition, there are approximately [REDACTED] other competing carriers that have between [REDACTED] collocations, with an average of [REDACTED] collocations, in each of the 19 SBC MSAs where AT&T has local network facilities.¹²² Moreover, of the [REDACTED] wire centers in the 19 MSAs in SBC's territory in which AT&T has collocations,¹²³ other competing carriers are collocated in [REDACTED]. Even in those wire centers where AT&T currently is the only collocated carrier, competitors after the merger are likely to have incentives to construct substitute collocations. The extensive local fiber networks¹²⁴ already deployed by other competitors in SBC's territory indicate that these competitors are likely to find it both technically and economically feasible to construct additional collocations.¹²⁵

45. Third, the Applicants submitted maps showing the local fiber routes of AT&T and other competing carriers in the 19 MSAs where AT&T provides special access in SBC's region.¹²⁶ These maps further demonstrate that other carriers besides AT&T have fiber networks in these geographic areas. In many MSAs, some competitors appear to have more extensive networks than AT&T.¹²⁷ We conclude, therefore, that there are existing competitors with local fiber networks that reasonably could provide wholesale special access in MSAs where AT&T now operates local facilities.¹²⁸ We note that our (Continued from previous page)

Commission's unbundling rules, had overstated the number of fiber-based collocators in one wire center. *Id.* As an initial matter, XO does not explain why the Michigan commission's interpretation of "fiber-based collocation" for purposes of implementing the Commission's unbundling rules should apply to the use of collocation data for purposes of evaluating the potential to offer Type II services. Moreover, given the overall significant extent of collocation by other competitive LECs, an overstatement of the extent of fiber-based collocation in one wire center does not alter our conclusions.

¹²² SBC Aug. 12 *Ex Parte* Letter, Attach.

¹²³ *Id.*

¹²⁴ See *infra* para. 45 (discussing evidence of competitive fiber deployment).

¹²⁵ As we have found in both the special access and UNE contexts, the presence of fiber-based collocators is a good proxy for sunk investment in fiber rings, which we find competitors are able to use in conjunction with special access or, where available, UNEs in the provision of Type II offerings. See, e.g., *Triennial Review Remand Order*, 20 FCC Rcd at 2589-95, 2625-26, paras. 96-105, 167 (discussing the inferences drawn from fiber-based collocations for purposes of our UNE rules); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262, 94-1, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14265-69, paras. 81-86 (1999) (*Pricing Flexibility Order*) (describing the correlation between fiber-based collocation and sunk investment in competitive transport facilities).

¹²⁶ SBC/AT&T Sept. 6 *Ex Parte* Letter, Attach. 3.

¹²⁷ We recognize, however, that one must take care in interpreting such maps. For example, in the *Triennial Review Remand Order*, we expressed reluctance to rely on these sort of maps in the context of loop unbundling because "they fail to indicate the capacity of service being provided over the facilities described, or whether those facilities are in fact being used to provide services for which competitive LECs may use UNEs." See *Triennial Review Remand Order*, 20 FCC Rcd at 2621, para. 158 n.445. In addition, the MSA-level maps did not correspond to the wire center analysis the Commission conducted. *Id.* In the current merger context, we are simply using the maps to supplement the quantifiable collocation data and to identify the existence of competitive LEC facilities in the MSA.

¹²⁸ Competitive LECs have bought special access services from each other for some time and [REDACTED]. AT&T Info. Req., ATT551001112-54 at 52. AT&T also purchases wholesale special access service from [REDACTED] other competitive LECs in SBC territory. SBC/AT&T Fea *et al.* Reply Decl. at para. 15.

findings here are consistent with the findings underlying the Commission's high-capacity loop impairment analysis in the *Triennial Review Remand Order*.¹²⁹

46. We are also not persuaded by certain study results cited by commenters that purport to show that the removal of AT&T as a special access competitor in SBC territory would result in significant increases in bid prices for wholesale special access services.¹³⁰ Commenters have alleged that their analysis of particular carriers' special access bid data shows that AT&T and MCI were the most frequent bidders to offer competitive special access services and that regression analyses of a large sample of bids submitted in response to competitors' RFPs demonstrates that removal of AT&T from SBC territory would result in a doubling of bid prices.¹³¹ As an initial matter, Applicants have noted the difficulty in relying on these assertions since neither the majority of commenters' source data nor even the underlying methodologies used for the analyses are in the public record and have not been subject to examination by opposing parties.¹³² Further, these analyses appear to conflate Type I and Type II special access offerings, which, as we find above, are in separate relevant product markets.¹³³ Consequently, we do not accept the

¹²⁹ In the *Triennial Review Remand Order*, the Commission drew inferences that requesting carriers were not impaired without unbundled access to DS1 and DS3 loops in wire centers with a significant number of business lines and fiber-based collocators. *See Triennial Review Remand Order*, 20 FCC Rcd at 2622-23, para. 161. The Commission further noted that in those wire centers where high-capacity loop unbundling was eliminated, carriers could compete using incumbent LEC or third party special access to serve particular buildings to the extent that competitive facilities cannot economically be deployed. *See id.* at 2623-24, para. 163. For various reasons, the Commission did not directly rely on the availability of special access as precluding the need for unbundling. *See generally id.* at 2560-71, paras. 46-63. In the *Triennial Review Remand Order*, the Commission was evaluating whether a requesting carrier would be impaired without access to a UNE, whereas here we are evaluating the merger's effects on competition in the market for special access. Consequently, we find it appropriate here to rely on competing carriers' ability to use Type II special access facilities given the evidence in the record on all sides regarding successful special access competition provided by Type II service offerings. *Cf. SBC/AT&T Reply* at 27, 39 (contending that the Commission's high-capacity loop impairment analysis suggests that competitive alternatives would remain for AT&T's lit buildings).

¹³⁰ ACN *et al.* Comments at 35; Broadwing and SAVVIS Petition, Declaration of Mark Pietro (Broadwing Pietro Decl.) at para. 18; CompTel/ALTS Petition at 27; Ad Hoc Telecom Users Reply at 20-22; BT Americas Reply at 15-16; Letter from Richard M. Blau and Edward W Kirsch, Counsel for CTC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 4-5 (filed Sept. 21, 2005) (CTC Sept. 21 *Ex Parte* Letter); Letter from Brad E. Mutschelknaus, Counsel for BridgeCom *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 2 (filed Sept. 22, 2005) (BridgeCom *et al.* Sept. 22 *Ex Parte* Letter); Letter from John T. Nakahata, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 2 (filed Sept. 23, 2005) (Level 3 Sept. 23 *Ex Parte* Letter).

¹³¹ Cbeyond *et al.* Wilkie Decl. at paras. 14-16, 23-27 (“[f]or those circuits where competition is eliminated and the requesting carrier is left with the current special access tariff, prices will rise approximately 100%.”); *see also* Letter from Brad E. Mutschelknaus, *et al.*, Counsel for Eschelon *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. (filed May 10, 2005) (Eschelon *et al.* May 10 *Ex Parte* Letter); SAVVIS/XO July 29 *Ex Parte* Letter, Attach. at 5; Letter from Teresa D. Baer, Counsel for Global Crossing, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 3 (filed Sept. 7, 2005) (Global Crossing Sept. 7 *Ex Parte* Letter) (comparing certain AT&T, MCI, and BOC T-1 prices for two states); XO *et al.* Oct. 3 *Ex Parte* Letter, Attach. at 3-4.

¹³² SBC/AT&T Aug. 1 *Ex Parte* Letter, App. A at 3. It is not clear how similar the bid process was between the several companies, whether there were substantial negotiations after the bids, or whether the bids were conducted in several rounds. Understanding these, and possibly other, considerations could be important in interpreting the data.

¹³³ *See, e.g., XO et al.* Oct. 3 *Ex Parte* Letter, Attach.; SAVVIS/XO July 29 *Ex Parte* Letter, Attach. at 5.

commenters' bid data analyses as demonstrating that the merger will lead to special access price increases at particular buildings.

47. In summary, within SBC's region, we find that, collectively, other competing carriers have more fiber and many more collocations than does AT&T.¹³⁴ In the limited number of MSAs where AT&T has local facilities in the SBC region, AT&T represents less than [REDACTED] percent of the competitive collocations. Moreover, the record clearly shows that AT&T's collocations are located exclusively in MSAs with many other competitive collocations. Therefore, we conclude the elimination of AT&T as a provider of Type II wholesale special access services should not have an appreciable effect on the price or availability of Type II wholesale special access services.

48. *MSA-wide effects.* To the extent that the elimination of AT&T as a competitor in the Type I wholesale special access market causes competitive harm, this also could result in increases in the MSA-wide prices that SBC sets for its own special access services.¹³⁵ However, as discussed above, we find that the divestitures contained in the consent decree executed by the Department of Justice and the Applicants should adequately address any competitive concerns that we might have relating to this market. Thus, in light of the DOJ Consent Decree, we conclude that the merger is not likely to result in increases in the MSA-wide prices that SBC charges for special access services. Moreover, the voluntary commitments that the Applicants have offered,¹³⁶ and which we accept and make conditions of our approval of this order, provide us with further comfort that the merger is not likely to result in

¹³⁴ We reject EarthLink's assertion that the proposed merger will eliminate AT&T as a potential wholesale DSL competitor. EarthLink contends that AT&T "intended to move aggressively into the broadband space" and had the collocations, networking equipment, and other technology to do so. Letter from Jennifer L. Phurrough, Counsel for EarthLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 25 (filed Sept. 26, 2005) (EarthLink White Paper). As an initial matter, we note that EarthLink relies on statements about AT&T's intentions regarding DSL from 1999-2001, *see id.* at 24-25 nn.56-59, many years prior to its determination to discontinue pursuing its consumer DSL line of business. *See infra* Part V.D (discussing AT&T's decision to discontinue offering mass market services). Consequently, EarthLink's outdated evidence does not persuade us that AT&T was likely to begin offering wholesale DSL services in the absence of the merger. Moreover, we conclude that AT&T is not uniquely positioned to become a wholesale DSL provider. The Commission previously has found that "competitors are actively deploying their own packet switches, including routers and DSLAMs to serve both the enterprise and mass markets, and that these facilities are much cheaper to deploy than circuit switches," suggesting that AT&T likely is not unique in its ownership of DSLAMs and networking equipment. *Triennial Review Order*, 18 FCC Rcd at 17321-22, para. 538. Further, as we find above, there are numerous other competitive LECs with collocations. Given that unbundled DS0 loops are available throughout SBC's region, those other carriers also can use their collocations in conjunction with unbundled loops to offer wholesale DSL service. Indeed, AT&T itself offers DSL "by leasing wholesale services from unaffiliated DSL providers" such as Covad, New Edge, and MegaPath. AT&T Info. Req. at 54.

¹³⁵ As previously discussed, each building represents a separate relevant geographic market, and competitors frequently charge different prices for special access services to different buildings. To the extent that SBC has received Phase II pricing flexibility, but nevertheless sets special access prices that are geographically averaged over an entire MSA, we would expect that SBC would set a geographically uniform price that maximizes its profits given competitive conditions that vary from building to building. If competition is reduced to a number of buildings, this is likely to cause SBC to raise its MSA-wide price. *See, e.g.*, Global Crossing Farrell Declaration at para. 17; *see also EchoStar/DirecTV Order*, 17 FCC Rcd at 20629, para. 185 (providing a formula that describes how the profit-maximizing, uniform price that is averaged over multiple geographic markets will rise in response to a decrease in competition in particular local markets).

¹³⁶ *See generally* SBC Oct. 31 *Ex Parte* Letter, Attach.; *see also* Appendix F.

anticompetitive effects either in the building-specific markets for Type I wholesale special access services, or derivatively in the MSA-wide market for SBC's special access services.

49. We note that certain commenters have submitted special access market share and HHI calculations for selected MSAs in SBC territory to demonstrate that the merger will lead to competitive harm for those MSAs.¹³⁷ We find certain weaknesses with this analysis and data, however. First, we share some of the concerns expressed by the Applicants concerning the reliability of the underlying data.¹³⁸ In addition, it appears that the commenters' market share calculations include all capacity, regardless of whether it is used to provide wholesale special access or to support AT&T's own retail services.¹³⁹ Finally, as discussed above, we find that any increase in SBC's MSA-wide special access prices would only result from a reduction in competition in building specific markets for Type I or Type II wholesale special access services. Because we find that the consent decree adequately remedies any likely anticompetitive effects on Type I wholesale special access services and that the merger is unlikely to result in anticompetitive effects in the provision of Type II wholesale special access services, we find that no additional measures are required to protect against increases in SBC's special access prices resulting from the merger.

50. We also reject commenters' assertions that AT&T, because of its extensive local transport network, has a unique ability to handle short and intermediate haul traffic.¹⁴⁰ As shown above, AT&T faces competition from many other competitive LECs, which also possess extensive local transport facilities and collocations.¹⁴¹ As explained above, local fiber facility maps show that there are other

¹³⁷ See, e.g., SAVVIS/XO July 29 *Ex Parte* Letter, Attach. at 9-11.

¹³⁸ See, e.g., SBC/AT&T June 24 *Ex Parte* Letter at 5-6; SBC/AT&T Aug. 1 *Ex Parte* Letter, App. B at 7-8.

¹³⁹ We reject the national private line market share calculations submitted by commenters. See Letter from Thomas W. Cohen, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 13 (filed Sept. 21, 2005) (XO Sept. 21 *Ex Parte* Letter) (attached excerpts from a January 2004 Yankee Group study). As an initial matter, it is not clear what data Yankee Group used to calculate market shares. For example, SBC in its document production, supplied a Yankee Group report, which suggested that, in the SBC region SBC has [REDACTED]% of market share, with AT&T having [REDACTED]% based on revenue. SBC Info. Req., Exh. 5(b)(5) (The Yankee Group, *SBC Special Access Study: Wholesale Private Line*, Nov. 2004 at 21). However, the Applicants dispute the report's estimates, asserting that it overstates AT&T revenue. SBC/AT&T July 15 *Ex Parte* Letter at 3-5. Because we expect AT&T to be in the best position to know its revenues, we believe that the revenue submitted by AT&T in response to the Commission's information request, showing lower revenues, is more accurate than the Yankee Group's earlier estimate. Indeed, the Yankee Group study attributes private line revenues to AT&T for SBC's region that exceed AT&T's nationwide private line sales, and it attributes revenues to AT&T for MSAs where AT&T has no private line revenues. Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 1 (filed Oct. 7, 2005) (SBC/AT&T Oct. 7 *Ex Parte* Letter); SBC/AT&T July 15 *Ex Parte* Letter at 5. Second, even if the market shares reported for AT&T were accurate, the national market shares likely mask variations in market share among narrower geographic regions. The study states that other competing carriers' market shares vary among "Tier 1" to "Tier 4" metropolitan markets, for example. XO Sept. 21 *Ex Parte* Letter at 13.

¹⁴⁰ See, e.g., Cox Comments at 15; Qwest July 7 *Ex Parte* Letter, Attach. at 7.

¹⁴¹ See *supra* para. 45 (discussing evidence of competitive fiber networks); para. 44 (discussing competitive collocation in the same wire centers as AT&T within the 19 MSAs where AT&T has local facilities). The Commission has previously concluded that "fiber-based collocation is a key indicator of competitive fiber deployment, and the D.C. Circuit has affirmed this use as reasonable. Fiber-based collocation in a wire center very (continued....)

competing carriers besides AT&T in the 19 MSAs where AT&T provides special access in SBC's region. These maps demonstrate that other carriers besides AT&T have fiber networks in these geographic areas and are possible suppliers of short and intermediate haul traffic.¹⁴² Thus, we do not find that AT&T is able to provide local transport on an MSA-wide basis more efficiently than other competing carriers.¹⁴³

51. We find further comfort in certain voluntary commitments which the Applicants have made relating to unbundled network elements and special access services.¹⁴⁴ First, the Applicants commit not to seek any increase in state-approved rates for UNEs that are currently in effect, with the exception of rates that are subject to specified currently pending appeals. Second, the Applicants commit to exclude fiber-based collocation arrangements established by AT&T or its affiliates in identifying wire centers in which SBC claims there is no impairment pursuant to section 51.319(a) and (e) of the Commission's rules. Third, the Applicants commit that SBC's incumbent local operating companies will implement a performance metrics plan for interstate special access services, under which they will provide performance data on a quarterly basis. Fourth, the Applicants commit not to raise rates paid by existing

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clearly indicates the presence of competitive transport facilities in that wire center." *Triennial Review Remand Order*, 20 FCC Rcd at 2589-90, para. 96.

¹⁴² SBC/AT&T Sept. 6 *Ex Parte* Letter, Attach. 3.

¹⁴³ Based on our findings regarding the ability of other carriers with fiber networks to offer competing special access services where AT&T offered such services pre-merger, we are not persuaded by commenters' assertions that the merger is likely to result in anticompetitive effects because the remaining competitive LECs are unlikely to re-create AT&T's facilities, or replicate its ability to expand, in the near future. *See, e.g.,* Cbeyond *et al.* July 14 *Ex Parte* Letter at 12-13 (asserting that other carriers do not have the same number of enterprise customers as AT&T, and thus do not have traffic volumes to justify the same level of competitive facilities deployment); *see also* Qwest July 7 *Ex Parte* Letter at 7, 13 (contending that AT&T (and MCI) were each expected to deploy more local facilities so as to reduce their dependence on the incumbent carrier's facilities based on their unique, comparatively larger networks). We also reject CTC Communications' assertion that we should, in this proceeding, revise the unbundling rules adopted in the *Triennial Review Remand Order*. Specifically, CTC contends that the Commission should revise its unbundling rules so that AT&T fiber-based collocations are counted as "affiliated" for purposes of high-capacity loops and dedicated transport unbundling. Letter from Edward W. Kirsch, Counsel for CTC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 8 (filed Aug. 31, 2005) (CTC Aug. 31 *Ex Parte* Letter) *see also* Letter from Brad E. Mutschelknaus, Counsel for Bridgecom *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 3-4 (filed Oct. 18, 2005). This issue currently is pending before the Commission on reconsideration of the *Triennial Review Remand Order*, and we believe that is the appropriate forum to address our unbundling rules. *See, e.g.,* CTC Communications Corp. *et al.* Petition for Reconsideration, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, at 5-8 (filed Mar. 28, 2005). While we decline to revise our unbundling rules, as requested by commenters, we note that the Applicants have voluntarily committed to exclude fiber-based collocation arrangements established by AT&T or its affiliates in identifying wire centers in which SBC claims there is no impairment. *See* SBC Oct. 31 *Ex Parte* Letter, Attach. at 2; *see also* Appendix F.

Our finding above that the merger will not likely have anticompetitive effects with respect to wholesale transport services generally applies with even greater force in the context of entrance facilities. As the Commission has found in the past, entrance facilities "are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices," and no significant concerns regarding entrance facilities were raised in the record. *Triennial Review Remand Order*, 20 FCC Rcd at 2612, para. 141.

¹⁴⁴ *See* SBC Oct. 31 *Ex Parte* Letter, Attach. at 2-3; *see also* Appendix F.

customers of AT&T's DS1 and DS3 local private line services that AT&T provides in SBC's in-region territory pursuant, or referenced, to its TCG FCC Tariff No. 2. Fifth, the Applicants commit that SBC's incumbent local telephone companies will not provide special access offerings to their wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions. Sixth, the Applicants commit that, before SBC/AT&T provides a new contract tariff to its own section 272(a) affiliate(s), it will certify to the Commission that it provides service pursuant to that contract tariff to an unaffiliated customer other than Verizon or its wireline affiliates. Finally, the Applicants commit that SBC/AT&T will not increase the rates in SBC's interstate tariffs, including contract tariffs, for special access services that SBC provides in its in-region territory and that are set forth in tariffs on file at the Commission on the Merger Closing Date.¹⁴⁵ These commitments and their duration are described in greater detail in Appendix F. Because we find these commitments will serve the public interest, we accept them and adopt them as conditions of our approval of the merger.

52. *Coordinated Effects.* We also do not believe that the merger increases the likelihood of coordinated interaction. It is generally recognized that the likelihood of coordinated effects depends on a number of factors, including the ease with which firms can reach tacit agreement, the incentive of firms to cheat, and the ability of the remaining firms to detect and punish such cheating.¹⁴⁶ Carriers that purchase wholesale special access services, whether Type I or Type II, are sophisticated customers that often rely on a competitive bid process or negotiate individual contracts, and that enter into long-term contracts.¹⁴⁷ Further, by virtue of the fact that AT&T will be divesting assets pursuant to the DOJ Consent Decree, there need not be significant reduction in the number of competitive providers of Type I wholesale special access services to specific buildings. Moreover, as noted above, there will remain numerous competitors that are able to provide Type II wholesale special access services. We find that these factors make it unlikely that the merger will lead to tacit collusion or other coordinated effects in the relevant special access markets in SBC's region.¹⁴⁸

53. *Mutual Forbearance.* Commenters assert that, if their respective mergers are consummated, SBC/AT&T and Verizon/MCI are likely to "mutually forbear" from competing against each other in the provision of wholesale special access services in the other's service territory.¹⁴⁹ They claim that the revenues SBC/AT&T could earn by offering competing special access services in Verizon's region would be dwarfed by the revenues that would be lost if Verizon/MCI responded by offering competitive special access services in SBC's territory. Commenters assert that both SBC/AT&T and Verizon/MCI would recognize that it is in their mutual interest not to compete.¹⁵⁰ As support, commenters assert that SBC

¹⁴⁵ This commitment does not apply to DS0 services or to advanced services as defined in paragraph 2 of the SBC/Ameritech merger conditions. *SBC/Ameritech Order*, 14 FCC Rcd at 14969, App. C, para. 2.

¹⁴⁶ JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 239 (1988); GEORGE STIGLER, "A Theory of Oligopoly," in *THE ORGANIZATION OF INDUSTRY* 39 (1968); ALEXIS JACQUEMIN AND MARGARET E. SLADE, "Cartels, Collusion, and Horizontal Merger," in *THE HANDBOOK OF INDUSTRIAL ORGANIZATION* 415 (1989).

¹⁴⁷ See, e.g., Broadwing Pietro Decl. at paras. 12-16 (discussing the use of a bidding process for certain special access services); Cbeyond *et al.* Wilkie Decl. at para. 13 (discussing the use of a bidding process for special access); SBC/AT&T Casto Reply Decl. at para. 3 (discussing term discounts for special access).

¹⁴⁸ See *DOJ/FTC Guidelines* § 2.12.

¹⁴⁹ Cbeyond *et al.* Petition at 45-46; Qwest Petition at 30-33; Eschelon *et al.* June 6 *Ex Parte* Letter at 12; Cbeyond *et al.* July 14 *Ex Parte* Letter at 22-23.

¹⁵⁰ Cbeyond *et al.* Wilkie Decl. at para. 32, see also *id.* at paras. 28-39; Eschelon *et al.* May 10 *Ex Parte* Letter, Attach. at 29-30.

and Verizon have failed to compete significantly with each other in geographic areas where they already have adjacent network facilities, such as Southern California, Dallas and Irving, Texas and along the Connecticut/New York border.¹⁵¹

54. While we recognize that mutual forbearance is possible in theory, we reject commenters' allegations that this merger is likely to result in anticompetitive effects in Verizon's region. As an initial matter, SBC is spending billions of dollars to buy AT&T's nationwide network and global enterprise and business reach, including facilities in Verizon's region. In light of this investment, it is reasonable to expect SBC to have strong incentives to utilize fully its assets in Verizon's territory.¹⁵² More significantly, however, we find, as discussed above, that there are numerous competitors with local facilities that will remain post-merger, that can offer competing special access services to the buildings in SBC's region where AT&T offered special access services.¹⁵³ Nothing in the record suggests that the conditions would be significantly different in Verizon's territory. Thus, we conclude that, even if SBC/AT&T forbears from offering competing special access services in Verizon's region, competitive alternatives will remain for those locations where AT&T offered competing special access services.¹⁵⁴

b. Vertical Effects

55. We disagree with commenters that the merger will increase the Applicants' incentive and/or ability to raise rivals' costs or engage in a price squeeze.¹⁵⁵ As an initial matter, where UNEs are available, they provide an alternative for special access service and might serve to constrain, at least to some extent, special access price increases and other raising rivals' costs strategies.¹⁵⁶ For areas where

¹⁵¹ Eschelon *et al.* May 10 *Ex Parte* Letter, Attach. at 14-15, 30-35; Cbeyond *et al.* July 14 *Ex Parte* Letter at 22.

¹⁵² SBC/AT&T Reply at 131-140; SBC/AT&T June 24 *Ex Parte* Letter at 11.

¹⁵³ Professor Wilkie submitted a declaration that contained calculations suggesting that SBC and Verizon will have an incentive to engage in mutual forbearance. *See* Letter from Thomas Cohen, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. (filed Oct. 18, 2005) (XO Wilkie Supp. Decl.). Professor Wilkie's declaration fails to address the role of competing providers of special access, however.

¹⁵⁴ We note in this regard that, in order to address potential competitive harm from the elimination of MCI as a competitive Type I service provider in Verizon's region, the DOJ required certain divestitures. *See generally* Final Judgment, *United States v. Verizon Communications Inc.*, Civil Action No. 1:05CV02103 (D.D.C. filed Oct. 27, 2005) (*DOJ-Verizon/MCI Final Judgment*).

¹⁵⁵ *See, e.g.*, ACN *et al.* Comments at 34-36 (claiming not only that the merged entity will have the ability to impose a price squeeze, but that the mere fact that the merger combines SBC's access facilities with AT&T's enterprise customers poses competitive problems because competitors will be forced to pay SBC's prices for special access, while SBC itself will face only the actual economic cost of providing special access services to itself); Broadwing and SAVVIS Petition at 6 (expressing the concern that "SBC will provide relatively slower and poorer provisioning and repair of circuits supplied to its competitors, which along with price, are critical benchmarks customers use to select suppliers"); *see also, e.g.*, Global Crossing Farrell Decl. at paras. 37-42; Broadwing and SAVVIS Petition at 29-35; Consumer Federation of America *et al.* Petition at 24; Telscape Comments at 5-6; Ad Hoc Telecom Users Reply at 13-16; BT Americas Reply at 16-20; CompTel/ALTS Reply at 4-5; Letter from Patrick Donovan, Counsel for ACN *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 5 (filed Aug. 10, 2005) (ACN *et al.* Aug. 10 *Ex Parte* Letter).

¹⁵⁶ *See Triennial Review Remand Order*, 20 FCC Rcd at 2625-33, paras. 167-181 (discussing the general criteria used to determine whether UNE DS1 and DS3 loops must be made available); *id.* at 2570-75, paras. 62-65 (discussing the potential for UNEs to act as a constraint, to some extent, on special access prices).

UNEs are not available, we note that competing carriers have invested heavily in the 19 MSAs where AT&T has local facilities.¹⁵⁷ As described above, we have analyzed the likely impacts of this merger with regard to the provision of special access services and have determined that this merger, as conditioned by the DOJ Consent Decree, is not likely to result in anticompetitive effects in the markets for special access services. As the Applicants point out, “SBC and other incumbent LECs . . . *already* are vertically integrated participants in both input and downstream markets.”¹⁵⁸ Second, as we have found previously, “[t]o the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors” using special access inputs, “such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing.”¹⁵⁹ In fact, a voluminous record on industry-wide special access pricing issues (along with specific pricing information) has only recently been submitted to the Commission in one of these proceedings.¹⁶⁰ By addressing these issues in the context of a rulemaking, we will be able to develop a comprehensive approach based on a full record that applies to all similarly-situated incumbent LECs.¹⁶¹

¹⁵⁷ SBC Aug. 12 *Ex Parte* Letter, Attach. (fiber-based collocations); SBC/AT&T Sept. 6 *Ex Parte* Letter at 3; *id.*, Attach. (shares of CLEC lit buildings by MSA). In addition, competitive LECs have deployed substantial local fiber facilities in many MSAs. SBC Info. Req., Exh. 6(d)(2). While exact fiber route miles for the competitive LECs are not available for the 19 MSAs where AT&T has local fiber facilities, it appears that a number of competitive LECs have substantial national fiber facilities, some even greater than AT&T’s. SBC/AT&T July 15 *Ex Parte* Letter at 1-2.

¹⁵⁸ SBC/AT&T Reply at 51.

¹⁵⁹ *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21592, para. 183 (citing *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001) (inviting comment on whether the Commission should adopt metrics to prevent discrimination in the provision of special access services); *AT&T Corp., Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (filed Oct. 15, 2002)); *Special Access NPRM*, 20 FCC Rcd at 1994. Similar issues also are raised in the pending proceeding dealing with the sunset of BOC section 272 requirements. *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 (2003) (*Section 272 FNPRM*); *see also* 47 U.S.C. § 272(e)(1).

¹⁶⁰ *Special Access NPRM*, 20 FCC Rcd at 1994 (special access comments filed June 13, 2005 and reply comments filed July 29, 2005).

¹⁶¹ *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21592, para. 183; *see also Alltel/Western Wireless Order*, FCC 05-138 at paras. 104, 109 (The broad scope of concerns raised that the merger “would create the opportunity for Alltel to engage in anticompetitive roaming practices . . . are more appropriately addressed in the context of a rulemaking proceeding. . . . [The rulemaking] proceeding will afford interested parties an opportunity to comment on a variety of roaming issues, including manual and automatic roaming, technical considerations, and small and rural carrier roaming concerns.”); *AT&T/Comcast Order*, 17 FCC Rcd at 23257, para. 31 (“The Commission’s pending rulemaking on cable horizontal ownership is the more appropriate forum for consideration of the potential effects of industry-wide clustering on the distribution of programming by MVPDs to consumers.”); *cf. EchoStar/DirecTV Order*, 17 FCC Rcd at 20584, para. 48 (“[W]e find that the specific recommendations made by Consumers Union with respect to public interest set-aside issues are properly addressed in the rulemaking setting rather than a subset thereof in the context of a merger application.”); *SBC/SNET Order*, 13 FCC Rcd at 21306, para. 29 (finding that the Commission need not address in the context of the merger proceeding the allegation that SBC was not providing support necessary for a calling party pays service because the “Commission has regularly declined to consider in merger proceedings matters that are subject to other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceedings of general applicability.”); *AT&T/TCI Order*, 14 FCC Rcd at 3183, para. 43 (“We find that digital broadcast signal carriage (continued....)

C. Retail Enterprise Competition

56. In this section, we analyze the potential competitive effects of the proposed merger on enterprise services. As discussed below, we find that the Applicants compete against each other with respect to various types of enterprise services and various classes of enterprise customers, and that the merger will lead to increased concentration in certain relevant markets. We conclude, however, that the merger is not likely to result in anticompetitive effects for enterprise customers. We find that competition for medium and large enterprise customers should remain strong after the merger because medium and large enterprise customers are sophisticated, high-volume purchasers of communications services that demand high-capacity communications services, and because there will remain a significant number of carriers competing in the market. With respect to small enterprise customers, we recognize that AT&T had announced its gradual withdrawal from that market prior to the announcement of the merger, and we conclude after examining the record that it was not exerting significant competitive pressure with respect to those customers.

1. Relevant Markets

a. Relevant Product Markets

57. The record indicates that retail enterprise customers purchase a variety of different communications services, including local voice, long distance and international voice, and data services.¹⁶² In addition, enterprise customers frequently purchase high-capacity transmission services,¹⁶³

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requirements should be addressed in the Commission's pending rulemaking proceeding and not here. . . . [T]his is like other cases where the Commission has declined to consider, in merger proceedings, matters that are the subject of rulemaking proceedings before the Commission because the public interest would be better served by addressing the matter in a broader proceeding of general applicability." For these same reasons, we reject the claims of commenters seeking special access conditions or raising concerns unrelated to the merger, many of which are the subject of pending rulemaking proceedings. *See, e.g.,* ACN *et al.* Comments at 70-72; CompTel/ALTS Petition at 30-32; NASUCA Comments at 28; Texas OPC Comments at 9; Global Crossing Comments at 16-17, 20-21; Ad Hoc Telecom Users Reply at 29; BT Americas Reply at 9-17; ACN *et al.* Aug. 10 *Ex Parte* Letter, Attach. at 5; Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, Attach. at 4-8 (filed Sept. 22, 2005) (Qwest Sept. 22 *Ex Parte* Letter).

¹⁶² SBC lists [REDACTED] different enterprise services: [REDACTED]. SBC Info. Req., SBC21749-818 at 21752.

Note that documents submitted by SBC in response to the Commission's information request include numerical labeling in the following format: SBCFCC##### (where # represents a digit). For convenience in citing these documents, we do not include "FCC" or any leading 0s. Thus, a document beginning on page SBCFCC000012345 and ending on page SBCFCC000012349 would be cited as "SBC12345-49."

¹⁶³ The specific technology used by the individual enterprise customer depends on availability, needed capacity, services required, and desired service quality levels. Enterprise services could include some number of DS0 circuits or high-capacity circuits of DS1 or higher bandwidth, such as DS1, DS3, and OCn circuits. *See, e.g., Triennial Review Order*, 18 FCC Rcd at 17155-56, para. 298 (discussing services typically purchased by enterprise customers). A DS0 is a two-wire basic connection, which operates at 64,000 bps, the worldwide standard speed for digitizing voice conversation using pulse code modulation. HARRY NEWTON, NEWTON'S TELECOM DICTIONARY, 273 (20th ed., 2004) (defining "DS-0") (NEWTON'S TELECOM DICTIONARY). A DS1 is a four-wire connection equivalent to 24 DS0s. A DS3 is equivalent to 28 DS1s. These loops may be purchased by customers from state and federal tariffs. *Triennial Review Order*, 18 FCC Rcd at 17155-56, para. 298.

such as Frame Relay,¹⁶⁴ Asynchronous Transfer Mode (ATM),¹⁶⁵ Gigabit Ethernet,¹⁶⁶ and similar services provided via emerging technologies.¹⁶⁷ Retail enterprise customers also purchase other facilities and CPE.¹⁶⁸

58. The record makes clear that the services offered to enterprise customers fall into a number of separate relevant product markets. For example, it makes little sense that an enterprise customer would shift to making only long distance calls in response to a small, but significant and nontransitory increase in the price of local telephone service. Similarly, an enterprise customer would not shift to relying totally on voice services (whether local, long distance, or international) if the price of data services rose by a small, but significant and nontransitory amount. Consequently, we find that local voice, long distance voice, and data services constitute distinct product markets.

59. We have less information about the substitutability of different transmission services. While there is data in the record indicating that the number of customers taking Frame Relay is declining, while the number taking IP transmission services is increasing,¹⁶⁹ we do not have data on elasticities (and cross elasticities) of demand for any particular transmission services. Similarly, there is insufficient information about the migration time, price differences, and service quality differences that customers

¹⁶⁴ Frame Relay is a high speed data service that allows local area networks to be connected across a public network. Frame Relay remains a cost effective service option for smaller businesses that do not generate enough traffic to support a full T-1. *See* TELECOMMUNICATIONS INDUSTRY ASSOCIATION, 2005 TELECOMMUNICATIONS MARKET REVIEW AND FORECAST 121 (2005) (TIA 2005 MARKET REVIEW). A T-1 provides the same speed and capacity service as a DS1. *Triennial Review Order*, 18 FCC Rcd at 17104-05, para. 202 n.634. Similarly, a T-3 provides the same speed and capacity service as a DS3.

¹⁶⁵ ATM service, which was developed more recently than Frame Relay, has greater availability in urban areas, is currently the most widely-used carrier backbone technology, and can guarantee different quality of service levels to meet various customer needs. ATM offers higher reliability and greater capacity because it combines the advantages of circuit-switched and packet-switched networks, guaranteeing the delivery of information that is intolerant of delays, while allocating bandwidth more efficiently. TIA 2005 MARKET REVIEW at 123-125.

¹⁶⁶ Gigabit Ethernet is a local area network (LAN) connection technique that provides high-speed access to file servers and applications. It facilitates applications that use graphics, large database design, modeling (*e.g.*, engineering/medical imaging applications), and streaming video. TIA 2005 MARKET REVIEW at 99.

¹⁶⁷ Enterprises are increasing their use of IP Virtual Private Networks (IP-VPNs), and carriers are migrating to Multiprotocol Label Switching (MPLS). TIA 2005 MARKET REVIEW at 118-25. MPLS is similar to other circuit-switched ATM or Frame Relay networks, except that MPLS is not dependent on a particular technology. *See, e.g.*, MPLS Resource Center, *The MPLS FAQ*, (visited Aug. 19, 2005) available at <http://www.mplsresource.com/faq1.shtml#MPLS%20History>.

¹⁶⁸ *See* SBC/AT&T Reply, Reply Declaration of Walid Bazzi (SBC/AT&T Bazzi Reply Decl.) at paras. 8, 32. SBC explains that enterprise customers need CPE and other network infrastructure to support “enterprise-wide management applications (*e.g.* linking a network of retail stores to exchange inventory and sales information).” *Id.*

¹⁶⁹ *See, e.g.*, AT&T Info. Req., ATTFCC02991-3048 at 2996. From 1997 through 2002, the use of Frame Relay grew at a faster rate than the use of dedicated leased lines; however, in the past two years, growth in Frame Relay ports has stagnated. TIA 2005 Market Review at 120-121. From the year 2000 through the year 2004, ATM service revenues nearly tripled, from \$1.1 billion to \$2.9 billion. *Id.* at 124. The number of ATM ports in the United States rose by 10.5% in 2004 to 42,000, and it is expected to climb to 51,000 by 2008. *Id.* However, as newer technologies emerge, ATM’s role as a backbone technology is changing as enterprise customers increase their use of IP-VPNs. *Id.* at 123.

face when deciding to change from one transmission service to another. Thus, the evidence is insufficient for us to define precisely the boundaries of those transmission service markets.

60. In previous orders, the Commission also has found it appropriate to define separate relevant product markets based on the class of customer (particularly where there is “price discrimination”).¹⁷⁰ For example, the Commission previously found that small enterprise customers fall into a separate relevant product market from mid-sized to large retail enterprise customers.¹⁷¹ This distinction exists because, unlike small enterprise customers, larger businesses often contract for more sophisticated services, including Frame Relay, virtual private networks, and enhanced 800 services.¹⁷² Larger businesses also demand a greater volume of minutes, for which they often negotiate discounts.¹⁷³ Not only do smaller enterprise customers tend to purchase different services than larger business customers,¹⁷⁴ but carriers treat them differently, both in the way they market their products and in the prices they charge.¹⁷⁵

61. While the record demonstrates that service providers charge different prices to different customers for particular services, it fails to reveal any standard rules or general principles that dictate how service providers set prices for particular customers. For example, while record evidence indicates that SBC and AT&T have created classes of enterprise customers for pricing, marketing, and other purposes, it appears that the two carriers use different break-points between the customer classes.¹⁷⁶ There is

¹⁷⁰ See *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14088-89, para. 102 (finding that it is appropriate to define the product market by aggregating customers with similar demand patterns); see also *WorldCom/MCI Order*, 13 FCC Rcd at 18040-42, paras. 24-29; *SBC/Ameritech Order*, 14 FCC Rcd at 14760, para. 100; *SBC/SNET Order*, 13 FCC Rcd at 21301, para. 20; *DOJ/FTC Guidelines* § 1.12. Economists define “price discrimination” as “charging different customers prices that are not in proportion to marginal cost.” W. KIP VISCUSI *et al.*, *ECONOMICS OF REGULATION AND ANTITRUST* 284-85 (3d ed. 2000). Economists have distinguished various types of price discrimination. Under second degree price discrimination, all purchasers confront the same price schedule, but pay different prices depending on their demands. *Id.* Volume and term discounts are examples of second degree price discrimination.

¹⁷¹ See *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14088-89, para. 102. A study produced for the United States Small Business Administration states that “large businesses may be more likely than small ones to use alternatives like Public Branch-Exchange (PBX) systems, local area networks (LANs) and dedicated high-speed data services, like T-1 and T-3 lines.” Stephen B. Pociask, *A Survey of Small Businesses’ Telecommunications Use and Spending* at 2 (Mar. 2004) available at <http://www.sba.gov/advo/research/rs236tot.pdf> (*SBA Telecom Report*).

¹⁷² *WorldCom/MCI Order*, 13 FCC Rcd at 18040-41, para. 26.

¹⁷³ *Id.*

¹⁷⁴ According to one study, for data services, 38% of small business users subscribe to Internet dial-up services, 26% use cable modem, 21% use DSL, and only 4% of small businesses subscribe to T-1 services. *SBA Telecom Report* at 44.

¹⁷⁵ AT&T Info. Req., ATT509000105-47 at 107 ([REDACTED]); see also *infra* note 176 (discussing how both AT&T and SBC adopt different marketing approaches for different classes of customers).

¹⁷⁶ Indeed, both SBC and AT&T use the term “enterprise” differently in the ordinary course of business. SBC explains that it breaks down its business customers into two categories: Global and Enterprise Markets, and Business Communications Services (BCS). Within the Global and Enterprise Markets category, there are the following sub-categories: Global; Enterprise; Entertainment/Hospitality; Service Providers; and Federal. “Global” includes customers that are expected to spend at least \$1 million per year on communications services, and that generally have locations in multiple regions of SBC’s franchised territory. “Enterprise” includes customers that are expected to spend over \$48,000, but less than \$1 million on communications services on an annual basis.
(continued....)

evidence in the record, however, suggesting that a number of factors influence how carriers price their services to particular types of customers.¹⁷⁷ These factors include the customer's total telecom spend; the types of services and technologies ordered; the customer's total employee count; the customer's total annual revenues; and whether the customer obtains customized services.¹⁷⁸ Further, it appears that carriers place varying degrees of importance on each of these factors, and consequently, carriers' pricing to particular enterprise customers may vary. Thus, although we find that there are separate product markets for the different enterprise customer groups, there does not appear to be industry-wide consensus as to how to differentiate one class from another.¹⁷⁹

b. Relevant Geographic Markets

62. In prior merger orders, the Commission has recognized that, because a customer is unlikely to physically move its location in response to a small, but significant and nontransitory increase in the price of a communications service, each customer location constitutes a separate relevant geographic market.¹⁸⁰ For reasons of administrative practicality, however, the Commission has aggregated customers facing similar competitive choices to create larger relevant geographic markets.¹⁸¹ We believe this traditional approach is appropriate for enterprise customers with single locations in SBC's region. Unfortunately, the data in the record is not sufficiently detailed to define localized relevant geographic markets in which all enterprise customers face the same competitive choices. Rather, the most disaggregated market share

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"Entertainment/Hospitality" includes customers that are simply customers that are in these types of business. Similarly, "Service Providers" includes simply those customers that provide wireline and wireless services. "Federal" includes all federal government agencies. Within the BCS category, there are the following submarkets: GEM; Signature; and Valued. "GEM" includes state and local governments, educational institutions, and medical institutions. "Signature" customers are expected to spend between \$7,000 and \$48,000 on communications services per year. "Valued" customers are expected to spend less than \$7,000. SBC Info. Request at 3-7.

AT&T breaks down its business customers into the following categories: Signature; Enterprise; Select; Global; Government; and Wholesale. "Signature" comprise a defined list of approximately 300 customers that are typically AT&T's largest. "Enterprise" customers order more than \$1 million annually and include qualifying local governments and all state government customers except Hawaii and Alaska. "Select" customers generally order more than \$6,000 annually, have 85 employees on average, and order at least some degree of managed or data services. The "Gold" class of Select have an annual spend of at least \$18,000 (or total sales in excess of \$10 million with potential purchases of AT&T services of \$60,000), data and related service requirements in multiple locations, and significant IT requirements. The "Silver" class of Select are those Select customers that fail to meet the Gold criteria. "Global" customers include multinational accounts headquartered in non-U.S. locations with annual spend of \$100,000 for international services (or potential purchases of services provided by AT&T in excess of \$500,000) and operations in more than one AT&T international region. It also includes Japanese domestic customers with potential purchases of \$100,000. "Government" consists of federal government departments and agencies, including both defense/security and non-defense. "Wholesale" consists of common carriers and systems integrators. AT&T Info. Request at 3-4.

¹⁷⁷ See AT&T Info. Req., ATT509000105-47 at 107 ([REDACTED]).

¹⁷⁸ See *supra* note 176.

¹⁷⁹ Cf. *WorldCom/MCI Order*, 13 FCC Rcd at 18041, para. 27 (finding that it is unnecessary to define narrow product markets where there is insufficient data in the record on cross elasticities of demand).

¹⁸⁰ See, e.g., *EchoStar/DirectTV Order*, 17 FCC Rcd at 20610, para. 119.

¹⁸¹ *Id.*; see also *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-17, para. 54.

data that is available is presented at the state level. Accordingly, we will use the most disaggregated data possible in performing our structural analysis for different types of business services and for certain broad classes of business customers, where such data is available. In most cases, the data will be presented at the state level.¹⁸²

63. For larger, multi-location enterprise customers, we reach a slightly different conclusion. We find that these customers typically seek service from a provider that can serve all their locations, and generally only a few carriers serving a particular location have such capabilities. In light of the fact that there are relatively few providers that can offer a high level of ubiquitous service, we conclude that this geographic market should encompass all the geographic locations where these multi-location business customers may have a presence. Thus, we consider it appropriate to consider SBC's various states and regions as the relevant geographic market for regional, multi-location customers, while for business customers with locations throughout the United States, we will perform a structural analysis based upon available data at the national level that focuses on carriers that have the capability of serving customers throughout the country.

c. Market Participants

64. We find, based on the record, that there are numerous categories of competitors providing services to enterprise customers. These include interexchange carriers, competitive LECs, cable companies, other incumbent LECs, systems integrators, and equipment vendors.¹⁸³

2. Competitive Analysis

a. Horizontal Effects

65. *Unilateral Effects.* The lack of precise demand data notwithstanding, there is documentary evidence in the record that allows us to examine the Applicants' assertions regarding the degree to which they compete for enterprise customers.¹⁸⁴ Moreover, there are some data that permit us to identify (with some level of disaggregation) market participants, as well as to calculate current market shares, and to estimate changes in market share that are likely to result from the merger. Specifically, the Applicants have provided internal documents about their business operations, as well as limited, internal studies that provide market share data about the carriers serving certain markets. In this section, we use this documentary evidence and data to discuss the horizontal concerns raised in the record. We conclude that, although there is evidence that horizontal concentration will increase as a result of the merger, this increase is not likely to result in anticompetitive effects, given the large number of competitors already

¹⁸² Cf. *In the Matter Of 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13724, para. 273 (2003) (finding that the use of a broader geographic area still serves as a rational basis when defining relevant geographic markets), *aff'd in part, remanded in part on other grounds, Prometheus Radio Project v. FCC*, 373 F.3d 372 (D.C. Cir. 2003). We also note that this approach is consistent with SBC's competitive reports and assessments, which are generally conducted on a state wide basis. See, e.g., SBC Info. Req., SBC156307-10.

¹⁸³ See SBC/AT&T Application at 72.

¹⁸⁴ ACN *et al.* claim that the application provides neither data about how many small or mid-sized business customers AT&T actually serves in SBC's region, nor data about how many national customers SBC serves. See ACN *et al.* Comments at 9. As discussed below, however, SBC has provided some data regarding these markets.

participating in this market and the high level of customer sophistication for mid-sized and large enterprise customers. For small enterprise customers, we similarly conclude that the merger is not likely to result in anticompetitive effects, based upon AT&T's official departure from this segment of the market, as well as likely increased competition from cable and VoIP providers.

66. Commenters claim that the merger will have adverse competitive effects because SBC and AT&T already compete to a significant degree for the same customers, and thus the merger will cause an increase in the merged entity's market share and in market concentration.¹⁸⁵ Commenters further assert that, if the Commission finds that little current competition exists between the two companies, the merger nonetheless eliminates SBC as a potential competitor in the large enterprise market.¹⁸⁶ Moreover, commenters assert that, after the merger, SBC and AT&T together will have about a 75 percent market share for medium and large enterprise customers.¹⁸⁷ CompTel/ALTS argue that the merger will increase concentration in this market by 800 points from a pre-merger HHI of 2500 to a post-merger HHI of more than 3300.¹⁸⁸

67. The Applicants contend that they generally compete at opposite ends of the retail enterprise market.¹⁸⁹ SBC argues that it provides its local network services to primarily small and medium sized enterprise customers,¹⁹⁰ whereas AT&T operates a global network that serves mainly large businesses.¹⁹¹ SBC states that it is "acquiring AT&T in order to become a major provider of communications services to national and global enterprise customers with sophisticated needs."¹⁹² According to the Applicants, their

¹⁸⁵ ACN *et al.* Comments at 3, 8-9; CompTel/ALTS Petition at 24-26; Qwest Petition at 15; Consumer Federation *et al.* Petition at 22; Cbeyond *et al.* Petition at 1-2. Specifically, commenters generally assert that, because AT&T is SBC's biggest competitor, there will be too much market concentration in the hands of the merged entity.

¹⁸⁶ ACN *et al.* argue that, even if SBC serves only a few large enterprise customers today, a merger with AT&T is not its only possible means of entry into this market. They assert that SBC has not shown an inability to compete, but rather, only that it has never attempted to do so. ACN *et al.* Comments at 9-10.

¹⁸⁷ Consumer Federation *et al.* Petition at 22. According to these groups, "the HHI in the large business segment is just under 4900. A dominant firm with a market share of 70% would cause the HHI to be at least 4900. The merger would raise the HHI in the California large business market to over 5800." *Id.*; see also ACN *et al.* Comments at 27 n.71.

¹⁸⁸ CompTel/ALTS Petition at 25; see also ACN *et al.* Comments at 27.

¹⁸⁹ See SBC/AT&T Application at 96-97 (explaining that AT&T focus on the largest enterprise customers with the most sophisticated needs, and that SBC focuses on customers with a predominance of locations within the SBC 13-state region (plus the 30 out-of region markets) and that generally require less complex voice and data solutions.).

¹⁹⁰ SBC/AT&T Application at iii, 6, 96-97; SBC/AT&T Reply at v, 107. SBC explains that its strength among small and medium-sized businesses is largely due to these companies having only local or regional operations and the fact that they require less sophisticated products and services. SBC/AT&T Application, Declaration of James S. Kahan (SBC/AT&T Kahan Decl.) at para. 26.

¹⁹¹ AT&T asserts that its ABS division provides a broad array of voice, data, and IP-based services to customers in more than 50 countries, allowing AT&T to compete for the business of the largest global enterprises. SBC/AT&T Application at iv, 98; SBC/AT&T Reply at 123-25. Given its ability to compete for large businesses, AT&T contends that it focuses primarily on serving "national and global enterprise customers with sophisticated needs." SBC/AT&T Application at 6, 96, 98.

¹⁹² SBC/AT&T Reply at 134. SBC explains that it has been unsuccessful in attracting larger enterprise customers despite its investment of over \$1 billion in an interconnecting backbone network, which expands SBC's presence to (continued....)

respective enterprise businesses are largely complementary, and thus, the merger will have little competitive impact upon the enterprise market.¹⁹³ They assert, therefore, that the merger will not significantly increase their respective shares of these markets. SBC acknowledges that there are instances in its region where SBC and AT&T were both finalists for a customer's bid, but it maintains that in those cases there are a large number of other firms competing for these same customers.¹⁹⁴

68. Based upon review of internally produced documents, we find that the two companies in fact compete for a range of customers in the enterprise market.¹⁹⁵ Specifically, contrary to the Applicants' description of their respective enterprise operations, we find that SBC competes to a certain extent with AT&T for large enterprise customers and that conversely, AT&T competes with SBC for small and mid-sized enterprise customers. With respect to the level of competition between the Applicants in the large enterprise market, we agree with ACN *et al.* that it would be extraordinary for SBC already to have a large share of this market given that it only had region-wide, section 271 authority for 15 months at the time of the merger's announcement; and indeed, SBC's revenues in this market are smaller than AT&T's.¹⁹⁶ Documents clearly show, however, that SBC has achieved some degree of success with its

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30 out-of-region cities. SBC/AT&T Reply at 138; SBC/AT&T Kahan Decl. at para. 24. In addition to the backbone network, SBC states that it has entered into agreements to use third-party networks for transport and local access in areas where it lacks its own network facilities. SBC/AT&T Kahan Decl. at para. 25. SBC attributes its difficulties in attracting larger, out-of-region business customers to the fact that its network lacks "feature-rich, cost-effective, flexible, reliable, and secure communications services." *Id.* at para. 26. According to SBC, large business customers hesitate to use SBC because it does not directly control the management of many of the networks that it uses to provide service. *Id.* Similarly, SBC explains that it frequently cannot meet the high service levels that large companies often require of their providers. *Id.* SBC concludes that it lacks the "necessary array of enterprise services, and out of region lacks the dense ubiquitous network needed to support a broad array of services" required by larger businesses. SBC/AT&T Application, Declaration of Christopher Rice (SBC/AT&T Rice Decl.) at para. 32.

¹⁹³ SBC/AT&T Reply at 125. While SBC acknowledges that its "Global and Enterprise" sales have grown marginally, it argues that they are a "small fraction of AT&T's and other significant national competitors' sales." SBC/AT&T Application at 100-01. In support of this statement, the Applicants cite a Deloitte Consulting report, which provides that in the "twenty-one procurements for which Deloitte has data, SBC and AT&T bid against each other only three times and were both finalists in only one procurement." SBC/AT&T Reply at 124; *see also* SBC/AT&T Bazzi Reply Decl. at paras. 19-24.

¹⁹⁴ SBC/AT&T Reply at 124.

¹⁹⁵ Given this finding, we find inapposite the assertions of some commenters that SBC is a potential competitor to AT&T for large enterprise customers. *See, e.g.,* ACN *et al.* Comments at 9. We discuss below commenters' contention that SBC was a potential competitor for global telecommunications service (GTS) customers. *See infra* Part V.G.3.c (U.S. International Services Competition – Global Telecommunications Services).

¹⁹⁶ ACN *et al.* Comments at 9, 28; *cf.* BT Americas Reply at 5-7 (claiming that SBC is a potential competitor for GTS customers). SBC reports that for 2004, its revenues for the largest enterprise customers (\$1 million or more in annual spend for communications services) amounted to [REDACTED] or [REDACTED]% of its total annual revenue. SBC Info. Req. at 9 (unredacted). For the same class of customers, AT&T reports that it generated [REDACTED], or [REDACTED]% of its total annual revenue. Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, Specification 1(c) Attach. (filed June 13, 2005) *in* Letter from Nirali Patel, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed July 21, 2005) (AT&T June 13 *Ex Parte* Letter). For enterprise customers spending less than \$1 million annually, SBC reports that in 2004, it generated [REDACTED] or [REDACTED]% of its total annual revenue from these customers. Letter from Thomas F. Hughes, Vice President-Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 2 (filed June 24, 2005) (SBC June 24 *Ex Parte* Letter). AT&T reports (continued....)

entry into the large enterprise market, especially in its own region.¹⁹⁷ Documents in the record further show that AT&T has a presence in the small and mid-sized enterprise market, and that it competes for a wide range of customers.¹⁹⁸

69. Using data submitted by the Applicants, staff calculated Herfindahl-Hirschman Indices (HHIs)¹⁹⁹ at the state level for local voice, long distance voice, and data enterprise services. In keeping with our conclusions about the relevant geographic markets, this analysis is conducted by examining the competitive alternatives of enterprise customers with single or multiple operations within the SBC franchise area, and also conducting a separate examination of the competitive choices for enterprise customers having multiple operations throughout the country.

70. In general, the market share calculations indicate a high level of concentration in most franchise areas for all relevant services for both *mid-sized* and *large* enterprise customers with significant operations in SBC's region after the merger.²⁰⁰ SBC's median statewide share of local voice services²⁰¹

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that for the same class of enterprise customers, it generated [REDACTED] or [REDACTED]% of its total revenue. AT&T June 13 *Ex Parte* Letter, Specification 1(c) Attach. In sum, SBC's business enterprise operations generated [REDACTED], whereas AT&T's generated [REDACTED].

¹⁹⁷ SBC Info. Req., SBC255592-621 at 255598 [REDACTED]. An AT&T study found that [REDACTED].” AT&T Info. Req., ATT532007204-305 at 220. One SBC report explains that SBC enterprise operations captured [REDACTED].” SBC Info. Req., SBC257440-545 at 257458. During the second quarter of 2004, SBC stated that it had responded to 57% more bid requests compared to the previous year. In addition, contracts won in this space have increased 34% from the fourth quarter of 2003. SBC, *Investor Briefing*, No. 243 at 6 (July 22, 2004) available at http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_04_IB-FINAL.pdf. An AT&T study also found that SBC [REDACTED]. AT&T Info. Req., ATT532007204-305 at 232.

¹⁹⁸ An SBC report finds that in April 2004, [REDACTED]% of SBC's business access line competitive losses were in the [REDACTED] line space, and most of these lines fell in the [REDACTED] line space. SBC Info. Req., SBC259046-63 at 259047. Thus, almost [REDACTED] of its enterprise losses were from small businesses, and the report found that [REDACTED]% of customers left SBC for AT&T. SBC Info. Req., SBC21465-525 at 21479. Another SBC document explains that this exodus occurred because [REDACTED]. SBC Info. Req., SBC259046-63 at 259047. It states that [REDACTED]. *Id.* In response, SBC developed an initiative beginning in [REDACTED].” *Id.* at 48.

¹⁹⁹ The HHI is calculated as the sum of the squares of the market shares of each firm participating in a relevant market. The HHI can range from nearly zero in the case of an atomistic market to 10,000 in the case of a pure monopoly. Because the HHI is based on the squares of the market shares of the participants, it gives proportionately greater weight to carriers with larger market shares. Changes in market concentration are measured by the change in the HHI. See *DOJ/FTC Guidelines* § 1.5.

²⁰⁰ Our analysis of SBC's position in the mid-size and large enterprise service market both before and after the acquisition is based upon data reported in an SBC internal report that was submitted in response to our data request. See SBC Info. Req., Exhs. 3(d)(2), 3(d)(3). Subsequently, SBC provided the underlying data which served as the basis for this internal report. See Letter from Robert M. Halperin, Counsel for SBC, to Marlene H. Dortch, Secretary, FCC, Exhs. 2004 Data Survey, 2004 Voice Survey (filed Aug. 31, 2005) (SBC Aug. 31 *Ex Parte* Letter). Specifically, SBC provided 2004 state and regional market share data for primary provider voice and data services; basic business lines; local voice services; intraLATA voice services; interLATA voice services; DSL and cable modem broadband services; retail T-1; and retail Hi-Cap services. SBC explains that for voice service surveys, it polled via telephone up to 4,000 customers that spent more than \$500 per month on these services. It explains that the results are weighted to represent the overall population of both medium and large business customers. For data services, SBC explains that it surveyed via written questionnaire 4,283 businesses that qualified. See SBC Aug. 31 *Ex Parte* Letter at 2-3. Market share calculations pre- and post-merger are provided in Confidential Appendix C, (continued....)

increases from [REDACTED] percent to [REDACTED] percent within the states in its region.²⁰² The median pre-merger HHI for these services²⁰³ in SBC's entire region is [REDACTED], and it increases to [REDACTED] post-merger.²⁰⁴ SBC's median statewide share of interLATA voice services²⁰⁵ increases from [REDACTED] percent before the merger to [REDACTED] percent after the merger for states within its region. The median pre-merger HHI for these services in SBC's region is [REDACTED], and it increases to [REDACTED] after the merger.²⁰⁶ For high-cap data services,²⁰⁷ SBC's median statewide market share increases from [REDACTED] percent to [REDACTED] percent for its in-region states. The median pre-merger HHI for these services in SBC's entire region is [REDACTED], and it increases to [REDACTED] post-merger.²⁰⁸

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Tables 1-4. *See* SBC Aug. 31 *Ex Parte* Letter, Exhs. (providing enterprise data for voice and data services used to calculate market shares).

²⁰¹ The SBC survey does not provide a definition for these services, but it is generally accepted that local voice services encompass calls placed to a location within the local service area. *See* NEWTON'S TELECOM DICTIONARY at 488 (defining "local call").

²⁰² The market share data summarized in the text are based on revenues. The market share data for all the relevant geographic areas are presented in Confidential Appendix C. The percentages shown reflect the share of customer expenditures captured by the named provider. In addition, it should be observed that the sample data provided was not statistically sufficient for the state of Nevada, and thus, the data results are provided only for SBC's other 12 states. Appendix C also presents market share data based on customer accounts for basic business lines.

²⁰³ In the text, we present the median pre-merger HHI and median post-merger HHI over the entire SBC in-region territory for each product where data, which were presented at the state level, are available. The pre-merger and post-merger HHIs for each state in this region, as well as the accompanying changes in HHI, are presented in Appendix C, Tables 1, 2, and 3.

²⁰⁴ The minimum post-merger HHI for these services is [REDACTED], and the maximum is [REDACTED]. BT Americas also cites HHIs calculated for large enterprise customers filed in the California commission's merger proceeding. BT Americas Reply at 7. However, as BT Americas itself notes, the underlying data is not available in this record, nor is it even clear what product market was used to calculate these market shares. *Id.* at 7 n.15. We thus do not rely on those HHIs in our analysis.

²⁰⁵ The SBC survey does not provide a definition for these services, but it is generally accepted that interLATA voice services are carried by long distance companies, and include calls that are placed within one LATA and received in a different LATA. *See* NEWTON'S TELECOM DICTIONARY at 430 (defining "InterLATA call").

²⁰⁶ The minimum post-merger HHI for these services is [REDACTED], and the maximum is [REDACTED]. It should be noted that we exclude Indiana, which actually had the highest HHI, with [REDACTED], because of an anomaly caused by the fact that Sprint is a major incumbent LEC in Indiana and the survey combined Sprint's incumbent LEC operations and its interexchange operations.

²⁰⁷ SBC explains that this category represents "the combined shares of Fractional T-1, T-1, Fractional T-3, and DS-3/T-3 services . . . Both T-1 and High-Cap shares are for retail data services only, and therefore do not include circuits used for voice or wholesale special access services." *See* SBC Aug. 31 *Ex Parte* Letter at 5 n.12. We note that medium and large enterprise customers can use these high-speed transmission services for voice or data transmission, or to connect to an Internet service provider or Internet backbone provider for purposes of obtaining Internet access. While we perform a competitive analysis for high-speed transmission services above, we have no market share data to separately analyze high-speed services used specifically for Internet access.

²⁰⁸ The minimum post-merger HHI for these services is [REDACTED], and the maximum is [REDACTED].

71. Market share data pertaining to *small* enterprise customers within SBC's franchise area also indicate a high level of concentration for certain services in particular markets.²⁰⁹ Specifically, we consider data pertaining to local, long distance, and to Internet access services for small enterprise customers.²¹⁰ SBC's median share of local access services²¹¹ increases from [REDACTED] percent to [REDACTED] percent for states within its region. The pre-merger median HHI across SBC's states for these services is [REDACTED], and increases to [REDACTED] post-merger.²¹² SBC's median share of long distance voice services increases from [REDACTED] percent to [REDACTED] percent for states within its region. The pre-merger median HHI for these services across SBC's states is [REDACTED] and increases to [REDACTED] post-merger.²¹³ For Internet access services, SBC's median share within its region increases slightly from [REDACTED] percent pre-merger to [REDACTED] percent post-merger for the states within its region. The pre-merger median HHI for these services across SBC's states is [REDACTED] and increases to [REDACTED] post-merger.²¹⁴

72. The data indicate that the merger will result in a smaller increase in market concentration for enterprise customers having multiple operations located both inside and outside of SBC's region.²¹⁵ For example, for long distance voice services provided to these multi-location customers,²¹⁶ SBC's national

²⁰⁹ Our analysis of SBC's position in the small enterprise market both before and after the acquisition is based upon data reported in an SBC internal report on small business market shares. SBC Info. Req., Exh. 3(d)(1). The carrier market share data detailed in this report are also presented at the state level and based upon revenue. HHI calculations pre- and post-merger are provided in Confidential Appendix C, Tables 5-7. We note that although this study does not specifically define small business customers, SBC, in response to the Commission's information request, explained that it considers a business that generates less than \$7,000 in annual communications services to be a small enterprise customer.

²¹⁰ Given the difficulty in obtaining accurate data about the various customer groups, it is likely that there is an overlap of data between consumer groups. For example, as noted above, SBC explains that it considers a business that generates less than \$7,000 in annual communications services to be a small enterprise customer. SBC Info. Req. at 7. In light of this consideration, however, SBC's data about small enterprise customers are likely to contain data from small business customers, which are discussed in our section on mass market customers.

²¹¹ In the text, we present the median pre-merger HHI and median post-merger HHI over the entire SBC in-region territory for each product where data, which were presented at the state level, are available. The pre-merger and post-merger HHIs for each state in this region, as well as the accompanying changes in HHI, are presented in Appendix C, Tables 5, 6, and 7.

²¹² The minimum post-merger HHI for local access services is [REDACTED], and the maximum HHI is [REDACTED].

²¹³ The minimum post-merger HHI for these services is [REDACTED], and the maximum is [REDACTED].

²¹⁴ The minimum post-merger HHI for these services is [REDACTED], and the maximum is [REDACTED].

²¹⁵ Our analysis of SBC's market position for mid-sized and large enterprise customers with operations both in and out of its region is based upon data reported in AT&T internal reports on the retail data services market (4Q 2004) and the business long distance voice market (4Q 2004). See AT&T Info. Request, ATT516000531-49; ATT517000001-57. The carrier market share data detailed in this report are presented at the national level, and shares are based upon revenue. HHI calculations pre- and post-merger are provided in Confidential Appendix C, Tables 8-9.

²¹⁶ The study does not precisely define what it means by "long distance service." See *supra* note 205. We note that we have examined the revenue shares in AT&T's [REDACTED] segment because we find that customers in this class are most likely to have multiple locations nationally. See AT&T Info. Req., ATT517000001-57 at 23.

share increases from [REDACTED] percent to [REDACTED] percent based on fourth-quarter 2004 data. However, the pre-merger HHI for these services is [REDACTED] and rises to only [REDACTED] post-merger. Similarly, although SBC's national share of long distance data services²¹⁷ increases from an average of [REDACTED] percent to [REDACTED] percent based on fourth-quarter 2004 data, the HHI for these services increases from [REDACTED] pre-merger to [REDACTED] post-merger.

73. For enterprise customers with locations predominantly in SBC's region, we find that myriad providers are prepared to make competitive offers.²¹⁸ We further find that available market share data does not reflect the rise in data services, cable and VoIP competition, and the dramatic increase in wireless usage.²¹⁹ Foreign-based companies, competitive LECs, cable companies, systems integrators, and equipment vendors and value-added resellers are also providing services in this market.²²⁰ Similarly, we find that market shares may misstate the competitive significance of existing firms and new entrants.²²¹ Large interexchange carriers and the BOCs currently have the biggest share of the market, but they are not the only providers competing for these customers. We find that a large number of carriers compete in this market (even though the market shares of some may be small), and that these multiple competitors ensure that there is sufficient competition.²²² For example, in the state of Illinois, although the combined market share of the merged entity with respect to the mid-sized and large enterprise customers will be [REDACTED] percent of interLATA voice services, five competitors each individually capture from [REDACTED] to [REDACTED] percent of the market, with the rest of the other competitors capturing the remaining [REDACTED] percent.²²³ Similarly, in California, the merged

²¹⁷ Data services include [REDACTED]. AT&T Info. Req., ATT516000531-49.

²¹⁸ The Applicants include statements from a representative from Illinois-based Servicemaster, stating that it recently released an RFP to six carriers, but it could have gone out to 15-20 more, including Broadwing, Global Crossing and Level 3. See SBC/AT&T Reply at 117. SBC also explains that VoIP and VPN providers are emerging threats to traditional communications carriers. Additionally, within the past two years, equipment providers such as Nortel, Avaya and Cisco have been invited to bid on enterprise service contracts. SBC/AT&T Bazzi Reply Decl. at para. 26. SBC asserts that "enterprises are beginning to test the approach of relying on traditional telecommunications carriers for basic IP connections and turning to equipment providers to supply them with premise equipment and installation and maintenance services necessary to obtain their voice and data services more cheaply." *Id.*

²¹⁹ SBC/AT&T Reply at 110.

²²⁰ SBC/AT&T Application at 72; *id.*, App. B, ("Description of Competitors"). As discussed in prior Commission orders, there are numerous types of business models supporting competition for enterprise customers. Some competitive LECs market integrated voice and data services to enterprise customers, primarily through leasing high-capacity loops from the BOCs as UNEs or special access and then using the loops to provide a bundled offering including voice, data and Internet access. See *Triennial Review Order*, 18 FCC Rcd at 17014, para. 48 n.159 (observing that companies such as ITC^Deltacom, NewSouth and Cbeyond have focused on providing integrated services to the business market).

²²¹ SBC/AT&T Reply at 110. According to the Applicants, "[h]istorical and current market shares obviously overstate SBC's local 'market power' because they reflect its historical position in local market prior to the 1996 Act." *Id.*

²²² See Confidential Appendix C.

²²³ See Confidential Appendix C, Table 2 (citing Illinois interLATA market shares of [REDACTED]). The Applicants explain that MCI, Qwest, and Sprint will still have a large presence. In addition, Time Warner, Comcast, and other cable companies with new capabilities not dependent on the copper-based telephone network will compete, along with systems integrators like EDS and IBM. The Applicants also note that "shares may (continued....)

entity's combined market share of high-cap data services for mid-sized and large enterprise customers will be [REDACTED] percent, but five competitors each individually capture from [REDACTED] to [REDACTED] percent of the market, with the rest of the carriers capturing the remaining [REDACTED] percent.²²⁴ Thus, we find that sufficient enterprise competition remains within SBC's region to ensure that the merger is not likely to result in anticompetitive effects for medium and large in-region enterprise customers.

74. Although we find that medium-sized and large enterprise customers with national, multi-location operations do not have as many competitive options, we nevertheless conclude that this merger is unlikely to cause competitive harm to this market. First, SBC's pre-merger presence in this market is nascent, and thus, the post-merger market will have virtually as many competitors as before.²²⁵ Second, as further discussed below, given their size and geographically-dispersed operations, these customers are highly sophisticated and negotiate for significant discounts.²²⁶ We find that systems integrators and the use of emerging technologies are likely to make this market more competitive, and that this trend is likely to continue in the future.²²⁷ Further, we note that the merger could bring even more competition for these customers because the merged company will offer a true end-to-end solution to businesses, which in turn, will likely improve quality and could create cost savings.²²⁸

75. As noted above, we find, consistent with the Commission's prior conclusions, that mid-sized and large enterprise customers tend to be sophisticated purchasers of communications services, whether they are located solely within SBC's region, or have locations both inside and outside SBC territory.²²⁹ These

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misstate the competitive significance of existing firms and new entrants." SBC/AT&T Reply at 110. Accordingly, contrary to commenters' assertions, we find that competition in the enterprise market is robust.

²²⁴ See Confidential Appendix C, Table 3 (citing California high-cap data service market shares of [REDACTED]).

²²⁵ See *supra* note 192; see also SBC/AT&T Bazzi Reply Decl. at paras. 19-24. We discuss below claims that SBC is a potential competitor in the GTS market. See *infra* Part V.G.3.c (U.S. International Services Competition – Global Telecommunications Services).

²²⁶ See also AT&T/SBC Bazzi Reply Decl. at paras. 3, 7-12. SBC explains that larger enterprise customers typically use "strategic sourcing" in order to exert greater control, lower costs, and increase quality. *Id.* at para. 11. SBC also explains that the "the suppliers in this marketplace recognize the intense level of competition and have a strong business imperative to maintain revenue from their existing customers. The very process of competitive bidding and contract renegotiation is often sufficient to create the perception with a vendor of a credible threat of losing an existing customer, compelling the supplier to offer lower prices and improved service to retain the customer." *Id.* at para. 17.

²²⁷ For example, systems integrators acquire and combine telecommunications equipment and various wholesale transmission services to provide and manage complex voice and data services for enterprise customers. See, e.g., SBC/AT&T Application at 83-85; see also *supra* note 218. In addition, SBC cites an InStat/MDR study that forecasts that emerging services will grow at a greater than 30% annual rate over the next several years. SBC/AT&T Bazzi Reply Decl. at para. 27.

²²⁸ See SBC/AT&T Application at iii, 35-36, 39-44; SBC/AT&T Reply at 126, 129-30; SBC/AT&T Application, Declaration of Hossein Eslambolchi (SBC/AT&T Eslambolchi Decl.) at paras. 18-20; SBC/AT&T Kahan Decl. at paras. 33-37; SBC/AT&T Rice Decl. at paras. 8, 14, 18.

²²⁹ *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5887, para. 39 (1991) (*Interexchange Competition Order*); see also *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14096, para. 120; *SBC/SNET Order*, 13 FCC Rcd at 21301, para. 20; *AT&T/TCG Order*, 13 FCC Rcd at 15250, para. 27; *WorldCom/MCI Order*, 13 FCC Rcd at 18073-74, paras. 84-87. ACN *et al.* argue that no degree of sophistication (continued....)

users tend to make their decisions about communications services by using either communications consultants or employing in-house communications experts.²³⁰ This is significant not only because it demonstrates that these users are aware of the multitude of choices available to them, but also because they show that these users are likely to make informed choices based on expert advice about service offerings and prices.²³¹ Thus, so long as competitive choices remain in this market, these classes of customers should seek out best-priced alternatives, and the merged entity should not be able to raise and maintain prices above competitive levels.

76. Finally, although small enterprise customers may not possess the same level of sophistication as their larger counterparts, we nonetheless find that the merger is not likely to result in anticompetitive effects for this group of customers. We base our conclusion largely on the fact that AT&T has ceased to market to these customers and has reduced its small enterprise business operations. As discussed elsewhere in this Order, evidence in this proceeding clearly indicates that AT&T determined that these types of services no longer presented a viable business opportunity, and that it has taken steps to close down its operations.²³² Thus, AT&T's gradual withdrawal from this market is due to its own internal decisions and would have occurred notwithstanding SBC's offer to acquire it. Moreover, we find that intermodal competition from cable telephony and mobile wireless service providers, and providers of certain VoIP services will likely continue to provide these customers with viable alternatives.²³³

77. In conclusion, although we find overlap between the Applicants' enterprise operations, we do not find that the increase in concentration resulting from the merger is likely to result in anticompetitive

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can alleviate the problems caused by market concentration when there are no competitive alternatives. ACN *et al.* Comments at 11. We reject this argument in this context because, as discussed above, we find that there are adequate numbers of competitors in the enterprise market.

²³⁰ *Interexchange Competition Order*, 6 FCC Rcd at 5887, para. 39; *see also Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3306, para. 65 (1995) (*AT&T Non-Dominance Order*) (finding that business customers have highly elastic demands, and that business customers routinely request proposals from carriers other than AT&T and accord full consideration to these proposals); *WorldCom/MCI Order*, 13 FCC Rcd at 18064, para. 65 (finding that larger business customers are knowledgeable consumers that will have competitive alternatives to the largest three incumbents).

²³¹ *Interexchange Competition Order*, 6 FCC Rcd at 5887, para. 39. Moreover, the Commission found that name recognition and goodwill are less significant in markets where customers tend to be sophisticated and aware of the choices available to them. *Id.* at para. 41. Evidence in the record indicates that there are at least 20 consulting firms that provide communications sourcing services, and when engaged, customers are able to achieve an annual average reduction of 27% (relative to their pre-engagement annual spend) in the cost of the communications services within the scope of the procurement process, with savings ranging from 2% to 63%. SBC/AT&T Bazzi Reply Decl. at paras. 13, 15.

²³² *See infra* Part V.D (Mass Market Competition).

²³³ SBC/AT&T Reply at 122 n.383. Applicants report that small and medium businesses are proving to be a lucrative market for IP telephony growth opportunities in the long run. *Id.* (citing Frost & Sullivan, North American Enterprise IP Telephony Systems Markets, 5-1 (2005)). Applicants also state that several manufacturers, including Avaya, Cisco, Siemens, Mitel, Alcatel, and Alitgen have recently introduced products aimed specifically at small and medium businesses. *Id.* One study find that 73% of small businesses use wireless services, and that 25% of all small businesses spend more on wireless services than on local and long distance services combined. *SBA Telecom Report* at ii, 43.

effects in this market. As discussed above, the record shows that, for all groups of business customers, there are multiple services and multiple providers that can meet their demand.²³⁴

78. *Coordinated Effects.* We find that the merger will not increase the likelihood of tacit collusion or other coordinated behavior in relevant markets. On the contrary, we find that, even if competitors reached tacit agreements in the enterprise market, there are strong incentives to cheat and scant ability to detect and punish such cheating. Specifically, the high value of enterprise contracts will create significant incentives for many competitors – particularly those with smaller market shares – to cheat on tacit agreements. Moreover, detection and punishment would be significantly frustrated by the facts that enterprise customers tend to be sophisticated and knowledgeable (often with the assistance of consultants), that contracts are typically the result of RFPs and are individually-negotiated (and frequently subject to non-disclosure clauses), that contracts are generally for customized service packages, and that the contracts usually remain in effect for a number of years. Accordingly, we find no basis to conclude that the merger increases the likelihood of tacit collusion or other coordinated effect in the relevant markets in SBC's region.²³⁵

79. *Mutual Forbearance.* We reject commenters' assertions that this merger would reinforce the BOCs' historical reluctance to compete with each other.²³⁶ First, we find it highly unlikely that the companies would engage in mutual forbearance with respect to large national enterprise customers, given the significant revenue opportunities associated with serving those customers. For example, SBC already provides service to such large customers as the American Red Cross, which has its headquarters in the Verizon region.²³⁷ Second, even if commenters are correct with respect to medium and large in-region

²³⁴ We note that filings in this proceeding offer the opinions of various enterprise customers expressing either support for, or concern about, the proposed merger. See, e.g., SBC/AT&T Reply, Attach. Customer Statements (providing the statements of a number of enterprise customers supporting the merger); Letter from Thomas Cohen, Counsel for Alliance for Competition in Telecommunications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, Attach. (filed Sept. 13, 2005) (citing survey of 100 Fortune 1000 businesses regarding whether they have concerns about the SBC/AT&T and Verizon/MCI proposed mergers). We conclude that none of these filings provide representative or reliable evidence regarding enterprise competition for any particular class or classes of enterprise customers nor do they provide clear evidence regarding particular services offered in particular geographic markets. Thus, we do not rely on any of these filings in our analysis.

²³⁵ See SBC/AT&T Application at 7-8. While some commenters express concern that the merged company will use its role as a wholesale provider to obtain information to aid tacit collusion, we find such coordination to be unlikely given the characteristics of enterprise customers discussed above. Moreover, we find that even without the merger with AT&T, SBC is a major supplier of special access services, and thus it already has the ability to engage in such anticompetitive conduct. Accordingly, this concern is not merger specific. See CompTel/ALTS Petition at 25.

²³⁶ ACN *et al.* Comments at 29, 37-38, 47-48; Broadwing and SAVVIS Petition at 18-26; Cbeyond *et al.* Petition at 4, 18, 44-46, 54-57; CompTel/ALTS Petition at 6; New Jersey Ratepayer Advocate Comments at 16; Qwest Petition at 39-44. For example, Cbeyond *et al.* argue that, if SBC were to compete in another BOC's market, the other BOC would likely react by reducing its retail prices and increasing its wholesale rates. Consequently, SBC would react in-kind in its region. "The result is a net loss to both firms, as prices are forced down while average costs increase." Cbeyond *et al.* Petition at 44.

²³⁷ SBC/AT&T Reply at 138. In addition, the record indicates that SBC has invested over \$1 billion in improvements to its out-of-region network which can be used to serve out-of-region customers; it has at least [REDACTED] out-of-region customers; and it provides enterprise service to 30 out-of-region MSAs, with collocation facilities in at least 10 central offices in each MSA. SBC/AT&T Reply at 136-38; SBC Info. Req., SBC255592-621 at 255598.

enterprise customers, we find, as discussed above, that there will be sufficient competition based on the competitors that remain in the market. Finally, with respect to small enterprise customers, we have already discussed AT&T's announced gradual withdrawal from this market, and we conclude, based on the record, that it was not exerting significant competitive pressure with respect to those customers prior to the announcement of the merger. In those markets, as discussed above, we find that intermodal competition from cable telephony service providers, mobile wireless service providers, and VoIP service providers will likely continue to provide these customers with viable alternatives.²³⁸

b. Vertical Effects

80. We reject commenters' concerns about their continued ability to serve enterprise customers in SBC's franchise region because the merger will make them more reliant on SBC's facilities.²³⁹ We address these arguments in our analysis of the wholesale special access market, and in other sections of this Order.²⁴⁰ In addition, we reject commenters' assertions that SBC's acquisition of AT&T's interexchange network will lead the merged entity to discriminate against its rivals who rely upon this network for essential inputs used to serve their own enterprise customers.²⁴¹ We find, as discussed below, that the merged entity would be unable to increase rivals' costs due to the presence of extensive competitive national wholesale interexchange networks with excess capacity.²⁴² Thus, we find that the merger is not likely to result in anticompetitive effects for wholesale inputs used to serve enterprise customers.

D. Mass Market Competition

81. In this section, we consider the effects of the proposed merger on local service; long distance service; and bundled local and long distance service provided to mass market customers. As discussed below, we find that SBC's acquisition of AT&T is not likely to result in anticompetitive effects for mass market services.

²³⁸ See *supra* note 233.

²³⁹ See, e.g., ACN *et al.* Comments at 39-40; Broadwing and SAVVIS Petition at 28-29; Cbeyond *et al.* Petition at 24-30; CompTel/ALTS Petition at 21-35; Cox Comments at 13-17; United States Cellular Comments at 2-4; Global Crossing Comments at 15-16; T-Mobile Reply at 7-14.

²⁴⁰ See *supra* Part V.B (Wholesale Special Access Competition); *infra* Part V.E (Internet Backbone Competition).

²⁴¹ Qwest Petition, Declaration of B. Douglas Bernheim (Qwest Bernheim Decl.) at paras. 90-91 (arguing that after the merger, SBC will control access to AT&T's network and have increased incentives and ability to discriminate and increase rivals' costs).

²⁴² See *infra* Part V.F (Wholesale Interexchange Competition); cf. *Qwest Communications International Inc., and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 99-272, Memorandum Opinion and Order, 15 FCC Rcd 5376, 5398, para. 42 (2000) (*Qwest/U S West Order*) (finding, in the context of the *Qwest/U S West* merger, that an incumbent LEC has no more incentive to degrade the "access it provides to competing interexchange carriers whether the incumbent LEC is providing . . . [interexchange] service over facilities it constructed or [whether] it purchased [them] from another carrier").

1. Relevant Markets

a. Relevant Product Markets

82. Based on the record in this proceeding, we identify three relevant product markets for our mass market analysis: (1) local service; (2) long distance service; and (3) bundled local and long distance service.²⁴³ In previous wireline mergers, the Commission focused on local and long distance services.²⁴⁴ Based on recent market and technological developments, including increased subscription to mobile wireless service and VoIP services that provide a bundle of local and long distance services, we find it appropriate to refine our market analysis, including defining a separate relevant product market for bundled local and long distance service.

83. The Commission defines product markets from the perspective of customer demand.²⁴⁵ We thus begin our analysis by recognizing two types of consumer demand for communications services: (1) demand for “access” and (2) demand for “usage.” The consumer demands “access” from a provider so as to be able to connect to a communications network.²⁴⁶ Depending upon the type of access chosen by the consumer, the consumer will be able to connect to a wireline telephone network, a mobile wireless network, or the Internet.²⁴⁷

84. Because a consumer can choose multiple access providers, his demand for usage, *i.e.*, how much of a service he consumes, will be determined by his particular set of access provider(s) as well as the terms of service associated with the consumer’s chosen access provider(s). For example, consider a consumer’s options for long distance service.²⁴⁸ For expositional purposes, we assume that consumer subscribes to a wireline long distance service and a mobile wireless service. This consumer could choose to place a long distance call using a presubscribed long distance carrier, a dial-around alternative such as a prepaid calling card, or his mobile wireless service, but, how he views the alternatives would be affected

²⁴³ The Commission has defined mass market customers as residential and small business customers that purchase standardized offerings of communications services. *See, e.g., WorldCom/MCI Order*, 13 FCC Rcd at 18040, para. 24; *SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 68. The Commission addresses international mass market voice services, along with other international services in Part V.G of this Order.

²⁴⁴ *See, e.g., WorldCom/MCI Order*, 13 FCC Rcd at 18040, para. 25; *SBC/Ameritech Order*, 14 FCC Rcd at 14745, para. 66.

²⁴⁵ *See, e.g., EchoStar/DirectTV Order*, 17 FCC Rcd at 20605-06, para. 106.

²⁴⁶ The access provider usually charges a recurring monthly fee, and it frequently offers various communications services in combination with this access service.

²⁴⁷ Mass market customers can purchase access to communications services from a single provider, such as a local telephone company, a mobile wireless provider, or cable provider; or from multiple providers. For example, approximately 52% of U.S. households subscribe to both a wireline provider and a mobile wireless provider, and an increasing percentage of consumers are choosing to subscribe to a broadband Internet access service. *See* Clyde Tucker, J. Michael Brick, Brian Meekins, and David Morganstein, Household Telephone Service and Usage Patterns in the United States in 2004, page 4, available at <http://www.bls.gov/ore/pdf/st040130.pdf> (Household Telephone Survey). About 20% of households subscribed to a broadband service in 2003. Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service* at 2-11 (Apr. 2005) (*Trends in Telephone Service*) (citing *A Nation Online: Entering the Broadband Age*, U.S. Department of Commerce (Sept. 2004)).

²⁴⁸ A consumer desiring to place an international call would have similar options.

by the terms of the particular service plans he has chosen. If he subscribes to a wireline long distance plan that charges a flat monthly fee for unlimited calling, he may be less likely to use an alternative service (such as a prepaid calling card or mobile wireless) because the marginal cost of each long distance minute for his wireline service is zero. In contrast, if he subscribes to a wireline long distance plan that charges a low monthly fee and a relatively high per-minute charge, the marginal cost of each long distance minute is the per-minute charge, and he might be more willing to consider alternative usage options (such as prepaid calling cards or mobile wireless) when placing long distance calls. For example, he could allocate calls among different service providers based on the terms of service plans by using the wireline phone for long distance calls made during peak hours (*e.g.*, week days) and the mobile wireless phone for long distance calls made during off-peak hours (*e.g.*, evenings and weekend days) when the price per minute may be zero. Accordingly, we consider both access demand and usage demand in defining our relevant product markets of local service, long distance service, and bundled local and long distance service because these decisions play a role in whether consumers view products as reasonable substitutes (meaning that those services are in the same product market for purposes of our analysis).²⁴⁹

(i) Local Service

85. Based on record evidence, we define the market for local service to include not only wireline local service, but also certain types of VoIP service to the extent that consumers view them as close substitutes for wireline local service. In addition, the record evidence suggests that for certain categories of customers, mobile wireless service is viewed as a close substitute to wireline local service.²⁵⁰

86. *VoIP*. VoIP services are being provided to consumers in a variety of ways today. The degree to which particular VoIP services are viewed as close substitutes to other local services varies depending upon the characteristics of the VoIP offering. For purposes of our analysis we find it useful to divide VoIP providers into two general types: (1) facilities-based VoIP providers and (2) “over-the-top” VoIP providers. For purposes of this proceeding, we define facilities-based VoIP providers, such as certain cable VoIP providers, as providers that own and control the last mile facility. These providers may own or lease the switching and transmission networks that are used to carry VoIP calls.²⁵¹ Other kinds of VoIP

²⁴⁹ See, *e.g.*, *EchoStar/DirectTV Order*, 17 FCC Rcd at 20606, para. 106 (“In other words, when one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical.”) We note that the evidence in the record is insufficient for us to perform a quantitative demand analysis to estimate the likely consumer response to a small but significant change in the price of a particular service. Instead, we consider indicia of demand substitution between possible services, including: (1) the attributes and relative prices of possible competing services; (2) evidence that consumers view the possible competing services similarly, and have shifted or have considered shifting purchases between these services in response to relative changes in price or other competitive variables; (3) evidence that service providers consider the prospect of buyer substitution between services in response to relative changes in price or other competitive variables; and (4) the costs a consumer could incur to substitute between traditional services and services provided on an alternative platform. See *DOJ/FTC Guidelines* at § 1.11.

²⁵⁰ Circuit-switched cable telephony service traditionally has been included within the Commission’s assessment of local services competition, and the record here gives us no reason to change that approach.

²⁵¹ These VoIP providers typically have dedicated facilities, transport calls over their own or a private network, and may have a backup power source in the event of a service disruption. See, *e.g.*, John K. Billock, Vice Chairman and Chief Operating Officer, Time Warner Cable, Testimony before the Federal Communications Commission at 3 (Dec. 1, 2003) available at <http://www.fcc.gov/voip/presentations/billock.doc>; *Long Distance Calling Plan: Local, Regional and Long Distance Calling Plans from Optimum Voice* (visited Sept. 14, 2005) available at http://www.optimumvoice.com/index.jhtml?pageType=what_is_it; *Phone Services – Optimum Voice* (visited Sept. 20, 2005) available at <http://optimumvoice.custhelp.com/cgi-> (continued....)

providers not meeting this definition are referred to as “over-the-top” VoIP providers. This type includes those providers that require the end user to obtain broadband transmission from a third-party provider, and such VoIP providers can vary in terms of the extent to which they rely on their own facilities. As discussed below, the record indicates that mass market consumers view facilities-based VoIP services as sufficiently close substitutes for local service to include them in the relevant product market. The record is insufficient to determine which over-the-top VoIP services should be included in the relevant product market, however. We thus reject the Applicants’ assertion that all VoIP offerings should be included in the relevant product market.²⁵²

87. Based upon the information in this record, we find that facilities-based VoIP services clearly fall within the relevant service market for local services. Facilities-based VoIP services have many similar characteristics to traditional wireline local service.²⁵³ There is also significant evidence in the record indicating that mass market subscription to cable-based VoIP continues to increase nationwide²⁵⁴ as cable operators continue to roll out these services throughout their footprints.²⁵⁵ In addition, there is documentary evidence that SBC views cable-based VoIP as its primary competitive threat in the mass market, and considers the prospect of consumer substitution to cable-based VoIP when devising its strategies and service offers.²⁵⁶ While we recognize that facilities-based VoIP services may not be available ubiquitously in SBC’s territory, our product market analysis does not require that all mass market consumers would be willing or able to substitute VoIP service for wireline local service, or even

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bin/optimumvoice.cfg/php/enduser/std_adp.php?p_faqid=261; National Cable and Telecommunications Association, *Cable Telephony: Offering Consumers Competitive Choice* at 5-7 (July 2001) available at http://www.ncta.com/pdf_files/Telephony_ReportComplete.pdf; Cox Communications, *Whitepaper: Preparing for the Promise of Voice-over Internet Protocol (VoIP)* at 5-8 (Feb. 2003) available at <http://www.cox.com/PressRoom/supportdocuments/VOIDwhitepaper.pdf> (Cox White Paper).

²⁵² See, e.g., SBC/AT&T Carlton/Sider Decl. at paras. 26-29 (asserting that all VoIP services should be included in the relevant product market).

²⁵³ These similar characteristics include: installation by the provider; the lack of a requirement for a broadband subscription; and connection to the consumer’s home inside wiring, which permits use of all of the household’s traditional wireline and cordless handsets. See, e.g., Consumer information provided by Cablevision (visited Sept. 14, 2005) available at http://www.optimumvoice.com/index.jhtml?pageType=what_is_it; <http://www.optimumvoice.com/index.jhtml?pageType=wiring>; http://optimumvoice.custhelp.com/cgi-bin/optimumvoice.cfg/php/enduser/std_adp.php?p_faqid=258; http://optimumvoice.custhelp.com/cgi-bin/optimumvoice.cfg/php/enduser/std_adp.php?p_faqid=262.

²⁵⁴ For example, between June 2004 and June 2005, Cablevision’s subscriber base grew from 115,048 to 475,357 and its penetration rate increased from 3% to 11%. Similarly, between March 2005 and June 2005, Time Warner’s subscriber base grew to 614,000 customers (a 60% increase). Cablevision Systems Corporation Reports Second Quarter 2005 Results, Aug. 9, 2005; Time Warner Second Quarter 2005 Results, Aug. 3, 2005.

²⁵⁵ For example, in December 2004, Time Warner completed its launch of residential IP telephony service in all of its divisions across the country, while by the end of 2005 Cox will have completed its rollout of digital telephone service to 70% of its footprint. “Highlights: A Quarterly Overview of Key Developments at Time Warner and its Businesses,” Time Warner Release, Feb. 3, 2005; “Cox Names New 2005 Telephony Markets,” Cox Press Release, Aug. 1, 2005; SBC Info. Req., SBC232290-306.

²⁵⁶ See, e.g., SBC/AT&T Application at 46, 58-61; SBC/AT&T Reply at 95-96; SBC Info. Req., SBC223687-716; SBC420677-420703; SBC224397 at 224400 ([REDACTED]); SBC39337 at 39338 ([REDACTED]); SBC22807-42 at 22813-15 ([REDACTED]); see also SBC Info. Req., SBC218651 at 218720-22 ([REDACTED]); SBC76809-76856; SBC122201-03; SBC148115-187; SBC22807-842.

that it be widely available for it to be included in the relevant product market.²⁵⁷ Rather, our product market definition analysis only requires evidence of sufficient demand substitutability in those geographic markets where facilities-based VoIP service is available.

88. The record is inconclusive regarding the extent to which various over-the-top VoIP services should be included in the relevant product market for local services. The record indicates that there are a wide variety of methods by which over-the-top VoIP providers offer service. The varieties of over-the-top VoIP differ significantly in their service characteristics,²⁵⁸ including quality of service²⁵⁹ and price.²⁶⁰ The extent to which consumers view these services as substitutes for traditional wireline local service may vary based on these differences.²⁶¹ In addition, the requirement that a customer have broadband access to be able to use certain over-the-top VoIP services affects the substitutability of those services with wireline local service. Specifically, for customers that do not already have broadband access service, the subscription fee to obtain broadband access must be added to the subscription price for the over-the-top VoIP service when weighing it against the price of traditional wireline local service, and the extra fee could make substitution uneconomical.²⁶² Even for consumers that have broadband service, however,

²⁵⁷ See, e.g., NASUCA Comments at 11-12; Cbeyond *et al.* Wilkie Decl. at para. 45; Nevada DOJ Comments at 6-7.

²⁵⁸ Some over-the-top VoIP services require a consumer to have a computer and to install the software on his computer; others may require the purchase of specialized telephone handsets; and some require specialized equipment such as terminal adapters. See, e.g., *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22407-08, paras. 8-9 (2004) (*Vonage Order*); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion, 19 FCC Rcd 3307, 3309-10, paras. 5-6 (2004) (*Pulver Order*).

²⁵⁹ For example, an over-the-top VoIP provider's ability to assure a particular quality of service could vary depending upon whether it has its own IP switches and long-haul fiber (or a virtual private network (VPN)), or whether it relies on the public Internet to carry subscribers' communications.

²⁶⁰ The pricing for over-the-top VoIP services varies with the service's attributes, such as whether the service permits the consumer to connect to the PSTN. In addition, VoIP providers offer different rate structures: some charge on a per-minute basis for long distance calls; some charge a fixed monthly fee for unlimited local and long distance calling; some offer multipart plans with baskets of minutes; and others offer their service for free. For example, for calling anywhere in the U.S., Canada, or Puerto Rico, Vonage offers a basic 500 minute plan for \$14.99 and an unlimited calling plan for \$24.99. See <http://www.vonage.com> (visited Sept. 1, 2005). Skype offers unlimited free PC to PC calling and a pay-per-call PC to phone service on a per-minute basis. See <http://www.skype.com> (visited Sept. 1, 2005); see also <http://www.ordervoip.com> (visited Sept. 1, 2005).

²⁶¹ See, e.g., Texas OPC Comments at 6; Nevada DOJ Comments at 6-7; Missouri OPC Reply at 14-15; NASUCA Comments at 11-12; Cbeyond *et al.* Wilkie Decl. at para. 45; ACN *et al.* Petition at 16-18; Consumer Federation *et al.* Petition at 16-17; Qwest Bernheim Decl. at paras. 82-83.

²⁶² About 20% of households subscribed to a broadband service in 2003. *Trends in Telephone Service* at 2-11 (April 2005) (citing *A Nation Online: Entering the Broadband Age*, U.S. Department of Commerce (September 2004)). These consumers or others that have decided to subscribe to a broadband service for other reasons may be more willing to consider over-the-top VoIP services than consumers without broadband service. Where a consumer has already subscribed to broadband, the cost of the broadband subscription would not be viewed as part of the incremental cost of subsequently subscribing to the VoIP service. SBC Info. Req., SBC224397 at 224400 ([REDACTED]); "Forrester Research: The State of Consumer Technology Adoption: Survey of More Than 68,000 Households Reveal How Consumers Adopt and Use Technology," Business Wire, Aug. 2, 2005; Stephanie Kirchgassner and Paul Taylor, "The Americas: FCC's Easing of Internet Service Rules Welcomed," Financial Times USA, Aug. 6, 2005. Time Warner reports a 22% penetration rate for their own residential high-speed data (continued....)

their willingness to subscribe to over-the-top VoIP service in lieu of wireline local service will vary with the attributes of the service and the consumer's willingness to trade off service characteristics for lower prices. Thus, while it is likely that some proportion of mass market consumers may view certain over-the-top VoIP services as substitutes for wireline local service, there is insufficient information in the record to determine which types of over-the-top VoIP service should be included in the product market. Consequently, in order to be conservative in our structural analysis, we exclude these services from the relevant product market in our structural analysis.²⁶³

89. *Mobile Wireless Service.* We find that mobile wireless service should be included in the local services product market when it is used as a complete substitute for all of a consumer's voice communications needs.²⁶⁴ On the one hand, increasing numbers of mass market customers are subscribing to mobile wireless services,²⁶⁵ thus providing an additional access option for making local telephone calls.²⁶⁶ On the other hand, we recognize that the average cost for mobile wireless service appears to be higher than for wireline local service.²⁶⁷ In addition, while most customers making wireline local calls face a per-minute cost of zero (because they can make unlimited local calls for a flat monthly

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service. The corresponding figures for Cox and Comcast are respectively, 27% and 19%. "Time Warner Reports Second Quarter 2005 Results," Time Warner Press Release, Aug. 3, 2005, at 1; Comcast Second Quarter 2005 Results, Financial Tables, Aug. 2, 2005; Cox Second Quarter 2005 Results, Suppl. Tables, Aug. 9, 2005. Texas OPC Comments at 5.

²⁶³ We are not persuaded by commenters' claims concerning the importance of AT&T's over-the-top VoIP offering to this market. *See, e.g.*, Cox Comments at 12-13; Missouri OPC Reply at 6-7; Consumer Federation *et al.* Petition at 10-11. AT&T has few VoIP subscribers ([REDACTED] nationwide); thus we cannot find that AT&T is a significant provider of this service. SBC/AT&T Reply, Declaration of Cathy Martine (SBC/AT&T Martine Reply Decl.) at para. 9. Given the limited significance of AT&T's provision of mass market VoIP services, we reject the concerns of commenters that the merger increases SBC's incentive or ability to discriminate against competitive VoIP offerings using its wireline and wireless facilities and operations. *See, e.g.*, Vonage Comments at 6-8, 12-13 (expressing concern about VoIP providers' access to tandem switches, E911 facilities, white pages listings, and wireless Internet platforms); Global Crossing Comments at 22-24 (expressing concern about VoIP providers' interconnection, intercarrier compensation, and switched access rights and obligations).

²⁶⁴ The Commission previously found that, although wireline services do not have a price constraining effect on mobile wireless services, some consumers may find that mobile wireless services are a good substitute for wireline services. *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21558, paras. 73-74. As we discuss below, we include mobile wireless services in the long distance service market to some extent as well.

²⁶⁵ *See, e.g.*, Household Telephone Survey at Figures 1, 2.

²⁶⁶ *See id.* at Table B.

²⁶⁷ The Commission reports that the average monthly household expenditure for billed wireline local telephone service is \$37. Leap Wireless is the largest provider of wireline replacement plans. It offers unlimited local calling for \$35-\$40 per month, but it only offers service in portions of 20 states. The price of a mobile wireless plan with sufficient anytime minutes to accommodate the typical calling needs of a wireline consumer generally costs between \$50-\$60, which may make it not price competitive for consumers. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 04-111, Ninth Report, 19 FCC Rcd 20597, 20685, para. 215 (2004) (*Ninth CMRS Competition Report*); *Tenth CMRS Competition Report*, WT Docket No. 05-71, Tenth Report, FCC 05-173 at paras. 198-200 (rel. Sept. 30, 2005) (*Tenth CMRS Competition Report*); *Trends in Telephone Service* at 3-4 (April 2005); Texas OPC Comments at 5; NASUCA Comments at 12.

fee), many wireless customers must pay per-minute fees when making local calls with their wireless phones.²⁶⁸

90. Considering consumer behavior more closely, the record reveals that growing numbers of subscribers in particular segments of the mass market are choosing mobile wireless service in lieu of wireline local services. Evidence indicates that, overall, approximately 6 percent of households have chosen to rely upon mobile wireless services for all of their communications needs.²⁶⁹ Recent research sponsored by the Bureau of Labor Statistics reveals that for certain segments of the U.S. population, a significantly higher percentage of households rely solely on mobile wireless services (e.g., single person households (8.1 percent), adults between the ages of twenty-five and thirty-four (10.3 percent), and single individuals (11.1 percent)).²⁷⁰ We also find that SBC considers this growing substitution in developing its marketing, research and development, and corporate strategies for its local service offerings.²⁷¹ Finally, we base our finding on the Commission's determination in the *Sprint/Nextel Order* that Sprint/Nextel, after the merger, would likely take actions that would increase intermodal competition between wireline and mobile wireless services,²⁷² as well as Sprint's plans to focus its efforts on encouraging consumers to "cut the cord."²⁷³ Accordingly, our expectation is that intermodal competition between mobile wireless and wireline service will likely increase in the near term.²⁷⁴ Even if most segments of the mass market are unlikely to rely upon mobile wireless services in lieu of wireline local services today,²⁷⁵ as discussed above, our product market analysis only requires that there be evidence of sufficient substitution for significant segments of the mass market to consider it in our analysis.²⁷⁶ Based on the factors discussed in this section, we conclude that mobile wireless services should be included within the product market for

²⁶⁸ Many consumers have mobile wireless plans in which they are assessed a per-minute charge for each incoming and outgoing call (e.g., prepaid calling plans). Other consumers subscribe to mobile wireless plans with a limited number of anytime minutes with the result that they may incur overage charges for minutes in excess of their allotted anytime minutes. See, e.g., *Tenth CMRS Competition Report* at paras. 99-100; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21613-14, para. 240.

²⁶⁹ Household Telephone Survey at Table A.

²⁷⁰ *Id.* at Tables A, B.

²⁷¹ In the *Cingular/AT&T Wireless Order*, the Commission determined that SBC considered the prospect of consumers' subscription to wireless services in lieu of wireline services when engaging in research and development of corporate strategies and market offerings. *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21614, para. 241. We find similar evidence in this proceeding. See, e.g., SBC Info. Req. SBC223687 at 223689, 223697, 223699; SBC224397 at 224399, 224401-02.

²⁷² *Sprint/Nextel Order*, FCC 05-148 at paras. 141-43.

²⁷³ *Sprint Prepares to Cut the Cord*, WASHINGTON POST, June 6, 2005; SBC Info. Req., SBC88998 at 89002-03 ([REDACTED]).

²⁷⁴ See, e.g., SBC Info. Req., SBC223687-716, SBC88998-89061, SBC120798-814.

²⁷⁵ See, e.g., Texas OPC Comments at 5 (wireless is expensive compared to wireline and does not provide reliable 911 access); Nevada DOJ Comments at 6-7; Missouri OPC Reply at 13-14; NASUCA Comments at 11-12; Cbeyond *et al.* Petition at 31; ACN *et al.* Petition at 18-20; Consumer Federation *et al.* Petition at 17-18; Household Telephone Survey at Tables A, B; SBC Info. Req., SBC77525 at 77598.

²⁷⁶ See, e.g., SBC Info. Req., SBC223687 at 223689, 223699 ([REDACTED]); SBC224397 at 224400.

local services to the extent that customers rely on mobile wireless service as a complete substitute for, rather than complement to, wireline service.²⁷⁷

(ii) Long Distance Services

91. There is significant evidence in the record that long distance service purchased on a stand-alone basis is becoming a fringe market, including the decision by AT&T to cease marketing long distance services,²⁷⁸ the declining proportion of consumers choosing a long distance provider different from their local service provider,²⁷⁹ and other documentary evidence.²⁸⁰ Nonetheless, because equal access requirements permit a consumer to choose to subscribe to an alternative carrier's long distance service,²⁸¹ we follow Commission precedent and consider long distance services as a separate relevant product market.²⁸² As discussed below, we find that this market includes not only presubscribed wireline long distance providers, but also mobile wireless service and transaction services, such as prepaid calling cards and dial-around services.²⁸³

92. *Mobile Wireless.* Although the precise extent to which a mobile wireless service is in the long distance market is unclear from the record, we find it appropriate to include mobile wireless services in the relevant market at least to some extent based upon usage substitution between wireless and wireline long distance service. The Commission previously has noted mobile wireless providers' increased offering of wide-area pricing plans,²⁸⁴ and the migration of minutes from wireline to mobile wireless

²⁷⁷ In addition, we agree with commenters who note that the record does not present credible evidence that mobile wireless services have a price constraining effect on all consumers' demand for primary line wireline services. Cbeyond *et al.* Wilkie Decl. at paras. 41, 44.

²⁷⁸ AT&T Info. Req., ATT560000524 at 527, 538-548, 558-563; ATT551002844-51; ATT500001377-1402.

²⁷⁹ Between March 2004 and March 2005, the percentage of SBC's residential lines with a presubscribed interexchange carrier increased from [REDACTED]% to [REDACTED]%, while the percentage of its residential lines with a presubscribed interexchange carrier other than SBC declined from [REDACTED]% to [REDACTED]%. Calculated from data contained in SBC Info. Req., Exh. 16b(1&4).

²⁸⁰ AT&T Info. Req., AT&T543010157 at 10164-73; SBC Info. Req., SBC144309 at 144342-43.

²⁸¹ The likelihood that consumers subscribing to bundled service plans consider the price and characteristics of the bundle as a whole, rather than individual components of the bundle, decreases the likelihood that an increase in the price of stand-alone long distance services (or the long distance component of the bundle) would lead a consumer to switch to an alternative service provider for its bundle of services. Thus, the relevant group of consumers for this analysis may only be those consumers that currently purchase a wireline long distance service (whether as a stand-alone offering or bundled) and have a significant demand for long distance services.

²⁸² We reject the Applicants' assertions that we should include e-mail and instant messaging in the relevant service markets for services provided to mass market consumers. SBC/AT&T Carlton/Sider Decl. at para. 25. In light of the qualitative differences between these options and voice communications, the Applicants have not demonstrated that they belong in the same relevant product market.

²⁸³ There is insufficient information in this record to assess the extent to which mass market consumers use over-the-top VoIP services specifically for domestic long distance calls.

²⁸⁴ See, e.g., *Tenth CMRS Competition Report*, para. 97.

services.²⁸⁵ However, the long distance usage data in the record are for mass market and all business customers combined,²⁸⁶ and thus cannot be used to infer the calling patterns for mass market consumers alone.

93. In evaluating the substitutability of wireless service for stand-alone long distance service, our analysis focuses on the behavior of those consumers that currently subscribe to both a wireline long distance service and a mobile wireless service.²⁸⁷ There is evidence suggesting that consumers are increasingly using their mobile wireless service for long distance calls,²⁸⁸ and there is evidence suggesting that SBC and AT&T consider minute substitution in their business strategies.²⁸⁹ As a general matter, we expect that a consumer who subscribes to both a mobile wireless service and a wireline long distance service will allocate minutes between these services in an optimal manner, *i.e.*, the consumer will seek the lowest possible charge, consider service quality, and consider the time the call is placed. While we have insufficient information in this record to determine the precise extent of wireless long distance minute substitution, we acknowledge that mobile wireless services are in the relevant product market at least to some extent.

94. *Transaction Services.* As with mobile wireless service, we find that certain segments of mass market consumers use these services (prepaid calling cards and dial-around services) as a substitute for long distance services. SBC maintains that prepaid cards are used by consumers who cannot otherwise afford traditional long distance, wireless service, or a home phone; who travel frequently; or who have very targeted calling needs.²⁹⁰ We have insufficient information to determine the precise extent of consumer substitution between transaction services and presubscribed wireline long distance services, however. In the absence of more precise information, we include these services in the relevant market definition to the extent that consumers view these services as substitutes for presubscribed wireline long distance service. In any event, to the extent that these services are part of the relevant market, they appear to be of declining significance. Publicly available information²⁹¹ as well as the evidence in this record

²⁸⁵ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24966, para. 22 (2002) (*Contribution Methodology Order and FNPRM*).

²⁸⁶ SBC/AT&T Reply at 112.

²⁸⁷ Our market definition exercise does not consider the purchasing behavior of consumers who do not have a presubscribed interexchange carrier or who rely upon mobile wireless service for all of their communications needs, because they would be unaffected by a theoretical price increase for wireline long distance services as a result of the merger. In addition, our market definition exercise does not consider the purchasing behavior of consumers who do not currently subscribe to a mobile wireless service because it would most likely be more costly for these consumers to subscribe to a mobile wireless service in order to migrate wireline long distance minutes to a mobile wireless service than it would be to pay a higher price for wireline long distance service.

²⁸⁸ From 2000 to 2003, the Commission reports that the percentage of all wireless calls that are interstate calls increased from 10% to 15%, and the percentage of all minutes that are interstate grew from 16% to 26%. *Trends in Telephone Service* at 11-2 (April 2005); *see also* SBC/AT&T Reply at 112 (reporting the results of a Yankee Group survey finding that, in U.S. households, more than 60% of long distance calls have been replaced by wireless).

²⁸⁹ AT&T Info. Req., ATT543010157 at 63-69; ATT560000524 at 533, 562; SBC Info. Req., SBC144309 at 144327, 144354; SBC218651 at 218693-94.

²⁹⁰ SBC/AT&T Application at 65 n.212.

²⁹¹ AT&T 2004 Annual Report at 45; AT&T 2003 Annual Report at 21-22; MCI 2004 Annual Report at 49-50.

indicates consumer demand for these services has declined significantly in the last two years,²⁹² possibly due to reductions in long distance pricing as well as substitution to mobile wireless services.²⁹³

(iii) Bundled Local and Long Distance Services

95. We agree with the commenters that bundled local and long distance services should be treated as a separate relevant product market.²⁹⁴ The economics literature generally discusses two types of bundles: a pure bundle, where the bundled services are only sold together and are not sold individually; and a mixed bundle, where the bundled services are sold individually, as well as in a package.²⁹⁵ There is significant variation across providers as to whether they offer a pure bundle or a mixed bundle. Because of the varied marketing strategies and limitations in the data, we define a local and long distance service bundle, for purposes of this proceeding only, as a customer's purchase of local and long distance services from the same carrier, regardless of whether these services are purchased together as part of an advertised bundle from a single carrier or whether the consumer creates the bundle by selecting separately-offered local and long distance service plans from the same provider. The evidence indicates that: consumers predominantly purchase local and long distance services from a single provider today; this trend is likely to continue; and the stand-alone wireline long distance market is steadily declining in size relative to the bundled services market.²⁹⁶

96. Several other factors also convince us that it is appropriate to define bundled local and long distance services as a separate relevant product market. First, we find that SBC's marketing and pricing

²⁹² Between December 2002 and December 2004, the percentage of households within SBC's region reporting use of dial-around service declined from [REDACTED]% to [REDACTED]%; the corresponding figures for the nation as a whole are [REDACTED]% and [REDACTED]%. SBC Info. Req., SBC77525 at 77585; SBC144309 at 144344; SBC218651 at 218695, 218703-04; AT&T June 13 *Ex Parte* Letter, Specification 18 Attach. at 8 (*Atlantic ACM Excerpt*).

²⁹³ SBC Info. Req., SBC144309 at 144344, 144353; AT&T Info. Req., ATT543010157 at 543010163-73.

²⁹⁴ See, e.g., New Jersey Ratepayer Advocate Reply at 6-7; Telecom Consumers' Coalition Reply at 8; Cbeyond *et al.* Wilkie Decl. at paras. 42-43; Cbeyond *et al.* Petition at 30-31. The Commission has previously noted the increased subscription to bundled telecommunications service offerings. See, e.g., Section 272 Sunset FNPRM, 18 FCC Rcd at 10919, para. 9. While the Applicants do not specifically address the issue of a bundled service market, they assert that they face significant competition from intermodal and VoIP providers, who offer a bundled service. SBC/AT&T Application at 56-67; SBC/AT&T Reply at 106-114.

²⁹⁵ In a mixed bundle, the package generally is sold at a discount relative to the sum of the individual service component prices. See, e.g., Barry Nalebuff, *Bundling, Tying and Portfolio Effects*, DTI Economics Paper No. 1 (2001) at 13-14, available at <http://www.dti.gov.uk/ccp/topics2/pdf2/bundle1.pdf>.

²⁹⁶ As of June 2005, 61% of SBC's retail local consumer lines have SBC as a presubscribed interexchange carrier. SBC Investor Briefing, July 21, 2005, at 5. The proportion of SBC's residential consumer lines that have SBC as the interexchange long distance carrier increased from [REDACTED]% to [REDACTED]% between March 2004 and March 2005. See SBC Info. Req., Exh. 16b(1&4). Within SBC's region, TNS reports that the proportion of households purchasing local and long distance from a single provider increased from [REDACTED]% to [REDACTED]% between December 2002 and December 2004. Nationally, the proportion has increased from [REDACTED]% to [REDACTED]%. SBC Info. Req., SBC77525 at 77566-567; see also SBC Info. Req., SBC144309 at 144342 ([REDACTED]). We note that the Commission anticipated that a bundled product market might become a relevant product market sometime after the BOCs completed the section 271 process. See, e.g., *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20010-11, paras. 39-42; *WorldCom/MCI Order*, 13 FCC Rcd at 18038-39, para. 22 n.60. SBC completed the section 271 process in October 2003.

strategies are designed to encourage subscription to a bundled service package.²⁹⁷ Second, the evidence in the record indicates increasing intermodal competition is likely between wireline services and services provided on alternative service platforms such as facilities-based VoIP and mobile wireless. These intermodal services tend to be offered as a bundle of local and long distance services, which further supports the use of a bundled local and long distance services market.²⁹⁸ These findings suggest that competition tends to occur between bundled offerings rather than between a bundle and stand-alone local and long distance services offered by separate providers.

b. Relevant Geographic Market

97. As with special access and enterprise services, we conclude that the relevant geographic market for mass market local, long distance, and bundled local and long distance services is the customer's location.²⁹⁹ We then aggregate customers facing similar competitive choices. As explained below, because of limitations in the data in the record, we analyze local, long distance, and bundled local and long distance service for SBC's franchise area within each state.

98. This approach is consistent with the way we have defined the relevant geographic market in previous mergers of incumbent LECs.³⁰⁰ We acknowledge that, in the *LEC Classification Order*, the Commission adopted a national geographic market based on the section 254(g) requirement that interexchange carriers adopt geographically averaged prices across the United States.³⁰¹ Importantly, however, the Commission also found that, while a long distance calling plan may be "ubiquitous" in that it offers nationwide coverage, the market to purchase the plan is a localized market, not a national one.³⁰² The Commission went on to state that it would consider a smaller relevant geographic market if it found evidence that there is, or could be, a lack of competition in a particular market.³⁰³ Because we are examining here whether the proposed merger involving SBC and AT&T is likely to lead to a lessening of

²⁹⁷ SBC's documents reveal that its research and development, marketing, and corporate strategies focus upon service offerings designed to encourage consumers to subscribe to a local and long distance service bundle. SBC's incentive is to drive consumers to purchase all telephone services from SBC to reduce its marketing costs and churn, as well as to increase its average revenue per user. SBC/AT&T Reply at 89-91; SBC Investor Briefing, April 21, 2004 at 5; SBC Investor Update, SBC 2004 First Quarter Earnings Conference Call, Apr. 21, 2004 at 6, 16, 18; SBC Info. Req., SBC24705-22. Moreover, these strategies are revealed by the marketing of its bundled service offerings, as well as its policy of requiring consumers to subscribe to its local service as a prerequisite to subscribing to its long distance service. See, e.g., *SBC Residential Solutions* (visited Aug. 19, 2005) available at http://www02.sbc.com/Products_Services/Residential/Catalog/1,,13--1-3-13,00.html; see also, e.g., SBC Info. Req., SBC57075 at 57089; SBC218651 at 218693; SBC121379 at 121381, 121388; SBC39089 at 39098, 39140-41.

²⁹⁸ NASUCA Comments at 11-12; Cbeyond *et al.* Wilkie Decl. at paras. 40-43. We note that SBC's concerns about the loss of customers to bundled local and long distance service offered by alternative platforms is an important influence on its strategies. SBC/AT&T Reply at 103-04.

²⁹⁹ See *supra* Parts V.B (Wholesale Special Access Competition), V.C (Retail Enterprise Competition).

³⁰⁰ See, e.g., *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 54; *SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 69.

³⁰¹ *LEC Classification Order*, 12 FCC Rcd at 15794, para. 66; *WorldCom/MCI Order*, 13 FCC Rcd at 18119-20, para. 166.

³⁰² *LEC Classification Order*, 12 FCC Rcd at 15793, para. 65.

³⁰³ *Id.* at 15794, para. 66.

competition for long distance services, and because SBC's (and to some extent AT&T's) market shares in the long distance and bundled local and long distance markets vary significantly from state to state,³⁰⁴ we find it appropriate to consider a narrower relevant geographic market.

99. We recognize that the competitive choices customers face may vary within a state (*e.g.*, in some areas of a state, cable companies may provide cable VoIP, while in other areas they may not). This suggests that we should define the relevant geographic market to be an area smaller than the state. The data in the record is not sufficiently detailed, however, for us to perform a structural analysis at a more disaggregated level than that of the state. Accordingly, in performing our structural analysis, we calculate market shares and changes in market share at the state level. While we recognize that, in theory, using a state-level analysis may mask some variations in smaller geographic areas, we find it a reasonable approach to our analysis, particularly given that SBC's pricing for local, long distance, and bundled local and long distance services is generally advertised on a statewide basis.³⁰⁵ Accordingly, we analyze mass market local, long distance, and bundled local and long distance services in SBC's franchise area within each state.

c. Market Participants

100. As the foregoing indicates, SBC faces competition from a variety of providers of retail mass market services. These competitors include not only wireline competitive LECs and long distance service providers but also, to at least some extent, facilities-based and over-the-top VoIP providers, and wireless carriers.

2. Competitive Analysis

a. Horizontal Effects

101. *Unilateral Effects.* As discussed below, we find that SBC's acquisition of AT&T is not likely to result in anticompetitive effects for mass market services due to AT&T's actions to cease marketing and gradually withdraw from providing local service, long distance service and bundled local and long distance service to the mass market. We also conclude that competition from intermodal competitors is growing quickly, and we expect it to become increasingly significant in the years to come.³⁰⁶

³⁰⁴ The variation in market share from state to state for long distance and bundled local and long distance services is due in large part to the fact that SBC obtained section 271 authority in a particular state to provide such services at different times and therefore has been competing in those markets for varying periods of time.

³⁰⁵ See, *e.g.*, *SBC – Residential Products and Services* (visited Sept. 9, 2005) available at http://www.sbc.com/gen/general?pid=1080&cdvn=localize&prod-snip=res_long_distance; *SBC Selector* (visited Sept. 9, 2005) available at http://configurator.sbc.com/acct_cfg/SBCSelector/AppUI/BMSFrontAppUI/content/residential/splash_files/splash.jsp.

³⁰⁶ Although the Applicants allude to regulatory safeguards, which they claim would constrain the post-merger firm's prices, we are not persuaded that this would adequately address competitive concerns. SBC Application at 45. For example, local services are subject to only limited price regulation in some states (*e.g.*, Oklahoma, Arkansas, and Ohio). Currently there is limited regulatory oversight for SBC's retail service offerings provided through its section 272 separate affiliate. In many states, SBC's bundled offerings either have no price regulation (*e.g.*, Arkansas, Missouri, Michigan) or they can be priced no lower than a price floor (*e.g.*, Texas, California, Nevada). SBC Info. Req. at 134-169.

102. Following Commission precedent, we begin our analysis by examining SBC's and AT&T's market share, and supply and demand factors. In general, the market share calculations indicate a high level of concentration in most franchise areas in SBC's states for all relevant services.³⁰⁷ Within SBC's franchise areas, its median market share for local services increases from [REDACTED] percent to [REDACTED] percent,³⁰⁸ with a post-merger market share range of [REDACTED] percent to [REDACTED] percent. Similarly, within SBC's franchise areas, its median market share of long distance services will increase from [REDACTED] percent to [REDACTED] percent, with a post-acquisition market share range from [REDACTED] percent to [REDACTED] percent.³⁰⁹ Finally, within SBC's franchise areas, its median market share for bundled local and long distance services will increase from [REDACTED] percent to [REDACTED] percent, with a post-acquisition market share range of [REDACTED] percent to [REDACTED] percent.³¹⁰ Because these market shares suggest potentially problematic levels of concentration, we must next evaluate other aspects of the market.

³⁰⁷ We discuss the Applicants' market shares before and after the merger instead of HHIs for each geographic market because we do not have sufficient market share information for all of the significant competitors in these markets. Market share calculations for each of SBC's franchise areas are provided in Confidential Appendix D. Our analysis of concentration in the mass market relies upon data for residential customers because of the administrative difficulty of distinguishing small business data from data for other classes of businesses. The Commission has previously found that residential and very small businesses have similar patterns of demand, are served primarily through mass marketing techniques, purchase similar volumes and communications services, and would likely face the same competitive alternatives within a geographic market. Thus, we conclude that an analysis of market share of residential consumers is likely to accurately represent SBC's position in the mass market. *Cf. Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53 (discussing similarities between residential and small business customers); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3829, para. 293 (1999) (discussing similarities between residential and small business customers in the context of unbundling rules); *SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 68 (including residential and small business customers in the same market).

³⁰⁸ We estimate total residential local access lines in each relevant geographic market by summing the number of wireline local access lines (*i.e.*, residential resold lines, residential UNE-P lines, non-SBC residential E-911 listings, and SBC's residential access lines) and an estimate of the number of residential wireless-only lines. We estimate residential wireless-only lines in two steps. First, we assume that the total number of all local access lines is the number of landline residential lines in SBC's franchise areas divided by 94% (100% minus that 6% of residential customers that rely solely on wireless). Second, we estimate the number of wireless-only lines by taking the difference between the estimate of the total number of local access lines and the total number of wireline local access lines. We estimate SBC's share of the residential wireless-only lines by multiplying the estimate of residential wireless-only lines by an estimate of Cingular's share of mobile wireless based upon mobile wireless lines in the NRUF database. Facilities-based VoIP lines will be captured in the E-911 listings. We note that, although we do not intend to include over-the-top VoIP subscribers in our market share calculations (because we are unable to determine which services fall within our relevant product market), subscribers to some of these services may be included in the E-911 listings, and thus included in our market share calculations.

³⁰⁹ Our calculations for the long distance market include only those consumers with a wireline long distance presubscribed carrier. We have no information to estimate the extent to which consumers may be able to migrate long distance minutes to their mobile wireless service or prepaid calling cards. Thus, we recognize that these market shares are likely to overstate SBC's share of the long distance market.

³¹⁰ With respect to bundled local and long distance market shares, we follow a methodology similar to that employed in calculating SBC's share of local services, described above. *See supra* note 308. In this case, however, we exclude consumers who do not have a PIC or who subscribe to an interexchange carrier other than their local service provider. Post-merger, we assume SBC's local customers who have AT&T as their presubscribed (continued....)

103. Although we agree with commenters that the Applicants' post-merger market shares for the relevant products are high,³¹¹ we nonetheless find, for the reasons given below, that these numbers significantly overstate the likely competitive impact of the merger. Regardless of what role AT&T played in the past, we conclude that AT&T's actions to cease marketing and gradually withdraw from the mass market mean it is no longer a significant provider (or potential provider) of local service, long distance service, or bundled local and long distance service to mass market consumers.³¹² We base this conclusion on AT&T's cessation of marketing, its reductions in consumer operations, its retirement of infrastructure used to support mass market marketing and consumer care for mass market services, and its decision to "harvest" its mass market business by raising prices, resulting in a declining mass market customer base.³¹³ The record indicates that AT&T's decision was the result of its own internal deliberations after determining that it would be uneconomical for it to continue to offer mass market services.³¹⁴ We reject as speculative and unrealistic commenters' suggestion that AT&T could readily and easily reverse its decision.³¹⁵ The record demonstrates that once AT&T determined that mass market services were no longer a viable business opportunity, it implemented steps to close down its mass market operations in an orderly fashion, and there is no indication that, absent the merger, AT&T would reverse this decision.³¹⁶ (Continued from previous page) _____

interexchange carrier will migrate to SBC. Thus, our estimate overstates SBC's relative position post-acquisition to the extent that SBC local/AT&T long distance consumers switch to an alternative interexchange carrier or AT&T's local customers switch to a competitive provider.

³¹¹ See, e.g., Cbeyond *et al.* Petition at 34-35; Consumer Federation *et al.* Petition at 19-22; Nevada DOJ Comments at 5-6; Texas OPC Comments at 4.

³¹² AT&T states that it found it difficult to compete for mass market local exchange customers for a variety of reasons, including competition from facilities-based intermodal providers, such as cable companies and wireless carriers; competition from other VoIP providers; competition from other wireline carriers; and the D.C. Circuit's vacatur of the unbundling rules set forth in the *Triennial Review Order*, to which the Commission responded by phasing out competitive LEC access to UNE-P at TELRIC prices. See, e.g., SBC/AT&T Application at 50-52; Pumbo Declaration at paras. 6-10; SBC/AT&T Application, Declaration of Thomas Horton (SBC/AT&T Horton Decl.) at para. 7.

³¹³ See SBC/AT&T Application, Declaration of John Pumbo (SBC/AT&T Pumbo Decl.) at paras. 3-40; AT&T Info. Req., Exhs. 16(b)-I, 16(b)-IV; see also AT&T Info. Req., ATT551002844-51, ATT5600000524-90. "Harvesting" refers to AT&T's increasing prices to encourage customers to discontinue service. "Harvesting" refers to AT&T's steps to manage the decline in its mass market business. See, e.g., *Q4 2004 AT&T Earnings Conference Call on Jan. 20, 2005* at 9 (Jan. 20, 2005) available at http://www.att.com/ir/pdf/4q04_transcript.pdf ("in our consumer business the revenue decline will accelerate from '04 as we've moved to harvest that business as a result of the regulatory changes effective middle of last year").

³¹⁴ See SBC/AT&T Pumbo Decl. at paras. 3-9; see also AT&T Info. Req., ATT551002844-51, ATT5600000524-90. The record does not indicate whether AT&T was continuing to offer mass market prepaid calling cards. Because we find that prepaid calling cards are of diminishing importance for domestic long distance services, we conclude that, even if AT&T continued to have a role in that market, it is of limited significance. AT&T's significance is diminished further by the ability of other competitors to provide such services, given continued competition and excess capacity for wholesale interexchange services. See *infra* Part V.F (Wholesale Interexchange Competition). In addition, we note that the record indicates that IDT is a leading provider of prepaid calling card services, and that other carriers and resellers operate in this market. SBC/AT&T Application at 65 n.212.

³¹⁵ See, e.g., ACN *et al.* Petition at 25; Cbeyond *et al.* Petition at 31; Qwest Bernheim Decl. at para. 77; EarthLink White Paper at 10.

³¹⁶ See SBC/AT&T Horton Decl. at paras. 2-7; SBC/AT&T Pumbo Decl. at paras. 3-40; AT&T Info. Req., ATT551002844-51, ATT5600000524-90.

Thus, we agree with the Applicants that AT&T ceased being a significant participant in this market.³¹⁷ We note that the record evidence further indicates that SBC's current and future pricing incentives are based more on likely competition from intermodal competitors and the remaining competitive LECs.³¹⁸

104. Finally, we reject commenters' arguments that consumers will be worse off after the merger. Qwest argues that AT&T's customers would be better off if SBC had to compete for their business.³¹⁹ First, as stated above, AT&T ceased to act as a significant competitive presence in the market a year ago when it began to implement its strategy to harvest its customer base. Second, AT&T's customers will not necessarily be worse off after the merger because SBC (or other incumbent LECs outside of SBC's region) and the remaining competitive providers will continue to compete for customers (AT&T's former customers as well as each other's customers).³²⁰ Third, AT&T's customers are free to seek service from whichever providers are present in the market.³²¹ As noted, we find that intermodal competitors, including facilities-based VoIP and mobile wireless providers, are likely to capture an increasing share of mass market local and long distance services. In addition, we take further comfort from the Applicants' voluntary commitment to offer stand-alone DSL.³²²

³¹⁷ For the same reasons, we conclude that AT&T has ceased to operate as a significant competitor for mass market broadband services. AT&T Info. Req. at 52-53. Further, the record indicates that AT&T has only a limited consumer DSL customer base, with [REDACTED] customers nationwide. AT&T June 17 *Ex Parte* Letter, Suppl. Exh. 1; *see also* EarthLink White Paper at 27 n.65 (stating that AT&T "has not yet achieved significant *actual* competition with a critical mass of DSL customers"). We also note that AT&T provides its DSL service "by leasing wholesale services from unaffiliated DSL providers" such as Covad, New Edge, and MegaPath. AT&T Info. Req. at 54. Given that AT&T offers DSL through such wholesale arrangements, we conclude that other competitors will be equally able to do so post-merger. Thus, as with mass market voice services, we find that the merger is not likely to result in anticompetitive effects for mass market broadband services through either unilateral or coordinated effects. *See, e.g.*, Consumer Federation *et al.* Petition at 3-9 (expressing concern about competitive effects with respect to broadband services).

³¹⁸ AT&T's decision to shut down its mass market operations indicates it was not a potential purchaser of third party UNE-P substitute products, as some commenters claim. The elimination of UNE-P was a significant factor in AT&T's decision, but we reject commenters' suggestion that this implies other wireline competitive LECs would also find it unprofitable to serve this market. *See, e.g.*, Qwest Petition at 34. While certain commenters express concern about their ability to offering competing service based on current TELRIC rates for unbundled DSO loops, such concerns are not merger specific. Telscape Comments at 5-6; Letter from Ross A. Buntrock, Counsel for Fones4All, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 2-3 (filed Sept. 7, 2005); Letter from Richard M. Rindler, Counsel for TDS Metrocom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 1-2 (filed Sept. 30, 2005).

³¹⁹ Qwest Bernheim Decl. at paras. 76-77.

³²⁰ *See, e.g.*, SBC/AT&T Reply at 104. We note that Cbeyond *et al.*'s claims of a likely price increase for residential long distance and bundled services are flawed because their analysis does not consider competition from intermodal competitors. Moreover, this analysis incorrectly assumes AT&T is a competitive force in the market because of its legacy market share and thus overstates AT&T's significance in the market by failing to account for the fact that AT&T no longer is a significant market participant. Cbeyond *et al.* Wilkie Decl. at paras. 41-48.

³²¹ SBC/AT&T Reply at 102.

³²² Because we find this commitment will serve the public interest, we accept it and adopt it as a condition of our approval of the merger, as discussed below. *See infra* Part VII (Process and Enforcement).

105. *Coordinated Effects.* We also find that SBC's acquisition of AT&T is unlikely to result in anticompetitive effects through coordinated interaction among remaining competitors. Given our finding that AT&T is not a significant market participant, we find no indication that the proposed acquisition increases the likelihood of coordinated interaction for the relevant products. Moreover, the increasing trend toward bundled service offerings likely decreases the possibility of coordinated interaction. Because of the complexity and variety of the bundled local and long distance service offers, competitors will find it difficult to coordinate on prices.³²³

106. *Mutual Forbearance.* For the same reasons as discussed above with respect to claims of possible coordinated effects, we do not believe that the merger is likely to result in anticompetitive effects for mass market services in Verizon's region. While some commenters claim that the merged company will have the incentive to forbear from mass market competition in Verizon territories, as stated above, we note that AT&T had already had decided to cease marketing and to harvest its customers nationwide.³²⁴

b. Vertical Effects

107. We are also not persuaded by commenters' claims that the merger will increase the merged entity's incentive and ability to raise the costs of mass market rivals.³²⁵ We discussed these vertical concerns in our analyses of the wholesale special access market and other sections of this Order.³²⁶

E. Internet Backbone Competition

108. We next turn to the potential competitive effects of the proposed merger on Internet backbone services. We find that the proposed merger of SBC and AT&T is not likely to result in anticompetitive effects in the Internet backbone market. We also conclude that, while the merger may result in the loss of a potential Tier 1 backbone competitor and in significant vertical integration, the record does not support commenters' conclusions that the merger will "tip" the backbone market to duopoly, increase transit prices to supra-competitive levels, or lower service quality. In addition, we find insufficient evidence in the record to conclude that the merged firm will engage in packet discrimination or degradation against rivals' VoIP, video over IP, and other IP-enabled services. Although we find no likely anticompetitive effects for Internet backbone and related services as a result of the merger, we note that the Applicants

³²³ The difficulties in coordinating actions may be exacerbated not only by the bundling of local and long distance services but also by the offering of discounts to consumers that purchase additional services from the providers. *See, e.g., DOJ/FTC Guidelines* § 2.1.1 ("Reaching terms of coordination may be limited or impeded by product heterogeneity or by firms having substantially incomplete information about the conditions and prospects of their rivals' businesses, perhaps because of important differences among their current business operations. In addition, reaching terms of coordination may be limited or impeded by firm heterogeneity, for example, differences in vertical integration or the production of another product that tends to be used together with the relevant product.").

³²⁴ *See supra* para. 103.

³²⁵ *See, e.g.,* Cox Comments at 13-17 (expressing concern that the merged company would have increased incentive and/or ability to raise rivals' costs with respect to Internet backbone and transport wholesale inputs); United States Cellular Comments at 2-4 (expressing concerns about discrimination against competing wireless carriers in the pricing and/or provisioning of wholesale inputs); T-Mobile Reply at 7-14 (expressing concern about the merger's effects with respect to special access and wholesale interexchange services).

³²⁶ *See supra* Part V.B (Wholesale Special Access Competition); *infra* Part V.E (Internet Backbone Competition); *see also supra* Part V.C.2.b (dismissing concerns about vertical effects relating to the wholesale interexchange market).

have put forward on the record of this proceeding several commitments, which we find to be in the public interest. As described further in this section, the commitments relate to maintaining settlement-free peering arrangements after the merger, publicly posting peering policies, and complying with the principles of the Commission's September 23, 2005 Policy Statement³²⁷ designed to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers. Because we find these commitments will serve the public interest, we accept them and adopt them as conditions of our approval of the merger.

1. Background

109. The Internet is an interconnected network of packet-switched networks. End users (individuals, enterprise customers, and content providers) typically, though not always, obtain access to the Internet through Internet service providers (ISPs) using a "dial-up" modem, cable modem, DSL, wireless network, or a dedicated high-speed facility (which the companies often call "Dedicated Internet Access" (DIA)).³²⁸ ISPs provide access to the Internet on a local, regional, or national basis, and most have limited network facilities. In order to provide Internet service to end users, ISPs and owners of other smaller networks interconnect with Internet backbone providers (IBPs)—larger Internet backbone networks.³²⁹ The backbone networks operate high-capacity long-haul transmission facilities and are interconnected with each other. Typically, a representative Internet communication consists of an ISP sending data from one of its customers to the IBP that the ISP uses for backbone services. The IBP, in turn, routes the data to another backbone network, which delivers the data to the ISP serving the end user to whom the data is addressed.³³⁰

110. IBPs may exchange traffic either through "peering" or "transit" arrangements. Under a peering arrangement each IBP "peer" will accept and deliver, without charge, traffic destined either for its own network or for one of its own backbone customers.³³¹ Transit arrangements, by contrast, permit an ISP,

³²⁷ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, FCC No. 05-151 (rel. Sept. 23, 2005).

³²⁸ See, e.g., SBC/AT&T Reply, Declaration of Marius Schwartz (SBC/AT&T Schwartz Reply Decl.) at para. 23. IBPs often offer DIA services that include both transit service and a high-capacity connection to their backbone. See, e.g., *id.*

³²⁹ An ISP's traffic connects to a backbone provider's network at a facility called a "point of presence" or "POP." Backbone providers have POPs in many locations, usually concentrated in more densely-populated areas where Internet end users' demands for access are highest. An ISP or end user relies on telecommunications lines to reach distant POPs. We note that large businesses often purchase dedicated lines that connect directly to Internet backbone networks. See GAO Report, *Characteristics and Competitiveness of the Internet Backbone Market* at 4 (Oct. 2001) available at <http://www.gao.gov/new.items/d0216.pdf> (GAO Internet Backbone Report).

³³⁰ Once on an Internet backbone network, digital data signals that were split into separate pieces or "packets" at the transmission point are separately routed over the most efficient available pathway and reassembled at their destination point. The Internet Protocol (IP) Suite is the standard that governs the routing and transfer of data packets on the Internet. GAO Internet Backbone Report, at 6.

³³¹ For example, if IBP A only has a peering arrangement with IBP B, and IBP B also has a peering arrangement with IBP C, then IBP B will not allow customers of IBP A to send traffic to or receive traffic from customers of IBP C. In order to provide access to customers of IBP C, IBP A must either peer with IBP C or enter a transit agreement, *i.e.*, pay for a connection, with IBP B or IBP C. Decisions about peering are not regulated, but are the product of negotiations in the marketplace.

small or regional IBP, or other corporate business, to reach the entire Internet using dedicated access lines linking it directly to the transit provider's Internet backbone network.³³² An IBP providing transit service enables the customer to send and receive traffic through the purchaser's IBP to any other network or destination on the Internet.³³³ Frequently, IBP customers obtain transit packaged with a dedicated high-speed facility as part of a DIA service,³³⁴ with the transit customers paying fees for both the connection and the transit service.³³⁵

111. IBPs generally can be categorized into tiers based on their size, geographic scope, and interconnections. "Tier 1" IBPs are a small group of the largest IBPs that sell transit and/or dedicated Internet access to substantial numbers of ISPs and corporate customers or other enterprise customers. These Tier 1 IBPs peer with all other Tier 1 IBPs on a settlement-free basis. Lower tier IBPs may peer with each other, but generally must purchase transit from a higher tier IBP to reach end users that are not customers of the networks of their peers.³³⁶

2. Relevant Markets

a. Relevant Product Markets

112. We find that Tier 1 backbone services—the transporting and routing of packets between ISPs and large enterprise customers and Internet backbone networks – constitutes a separate relevant product market.³³⁷ In this regard, we note key differences in quality and price between the transit and DIA services offered by Tier 1 and lower tier IBPs. For example, lower tier IBPs, ISPs, and multi-location enterprise customers typically seek service from a provider that can serve all their locations, and not all IBPs with POPs in a particular location will have such reach to all other locations. Only Tier 1 providers

³³² That is, in a transit arrangement, an IBP agrees to deliver all Internet traffic that originates or terminates on the paying IBP's backbone regardless of the destination or source of that traffic. If IBP A becomes a transit customer of IBP B, then as a paying customer of IBP B, IBP A is able to send traffic to and receive traffic from IBP C via IBP B's network.

³³³ See *WorldCom/MCI Order*, 13 FCC Rcd at 18106, para. 146.

³³⁴ See, e.g., Broadwing and SAVVIS Comments, Declaration of Gary Zimmerman (SAVVIS Zimmerman Decl.) at para. 5; Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC at 2-3 (filed June 17, 2005) (AT&T June 17 *Ex Parte* Letter).

³³⁵ Some IBPs also offer "paid peering," where the "paid peer" pays on a volume basis to exchange traffic, but the quality of interconnection is similar to settlement-free peering. By contrast, traffic exchanges involving a transit provider may experience up to nine inter-network connections, or "hops," over the originating, transiting, and terminating networks, reducing efficiency and reliability and increasing latency and potential packet loss. SBC/AT&T Rice Decl. at para. 11.

³³⁶ IBPs establish a variety of peering criteria that are used when deciding whether to begin peering with, or to continue peering with, other IBPs. These criteria generally specify factors such as ratios of traffic exchanged between the backbones, the geographic scope and capacity of the peering network's backbone facilities, and the number of interconnection points, among other things. See, e.g., Letter from A. Sheba Chacko, Chief Regulatory Counsel, BT Americas, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 15 (filed June 13, 2005) (BT Americas/SAVVIS June 13 *Ex Parte* Letter); SBC/AT&T Reply, Declaration of Susan Martens (SBC/AT&T Martens Reply Decl.) at para. 7.

³³⁷ See, e.g., SBC/AT&T Application, Declaration of Marius Schwartz (SBC/AT&T Schwartz Decl.) at para. 8; Broadwing and SAVVIS Petition at 36; see also *WorldCom/MCI Order*, 13 FCC Rcd at 18106, para. 148.

can offer such a high level of ubiquitous service. We find that there are no substitutes for these Tier 1 connectivity services sufficiently close to defeat or discipline a small but significant nontransitory increase in price.³³⁸

113. We decline to adopt EarthLink's suggestion that we define an additional product market of "end-to-end connectivity" to reflect the fact that the merged company, after the merger, will be the first IBP to own and operate a network that is fully vertically integrated from the end user's premises to the termination facility that connects the user with his or her destination on the Internet.³³⁹ First, it is not clear how such a market differs from the retail ISP market.³⁴⁰ From the perspective of end users, the purchase of Internet access, whether broadband, narrowband, or DIA, is the purchase of access to the world, *i.e.*, the purchase of end-to-end service. To the extent that EarthLink's real concern is the vertical integration created by the merger, we need not define an "end-to-end connectivity" market to analyze these effects.

b. Relevant Geographic Markets

114. Consistent with Commission precedent and the DOJ's previous findings, we analyze the market for Tier 1 IBPs using a national geographic market.³⁴¹ As with special access, enterprise, and mass market services, we conclude that the relevant geographic market for Tier 1 IBP services is the customer's location.³⁴² We then aggregate locations where customers face similar competitive choices. Since all Tier 1 IBPs have extensive nationwide networks, we can aggregate Tier 1 customers throughout the United States since they effectively face the same choice of Tier 1 IBPs anywhere in the United States. Moreover, purchasers of Tier 1 Internet backbone service generally need the ability to connect at multiple locations throughout the United States. Consequently, we find it appropriate to aggregate customer locations and evaluate Tier 1 backbone services at the national level.

c. Market Participants

115. Based on the record evidence, we find that there likely are between six and eight Tier 1 Internet backbone providers based on the definition of Tier 1 backbones that has been used in the past:³⁴³ AT&T, MCI, Sprint, Level 3, Qwest, Global Crossing, and likely SAVVIS and Cogent.³⁴⁴ These eight providers offer dedicated Internet access and transit services primarily to ISPs and enterprise customers, and they

³³⁸ See *DOJ-WorldCom/Sprint Complaint* at para. 31.

³³⁹ See, e.g., EarthLink Petition at 8-9, 11.

³⁴⁰ Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Gary Remondino, Wireline Competition Bureau, FCC, WC Docket No. 05-65 at 5-7 (filed July 6, 2005) (SBC/AT&T July 6 *Ex Parte* Letter).

³⁴¹ *WorldCom/MCI Order*, 13 FCC Rcd at 18106, para. 148; *DOJ-WorldCom/Sprint Complaint* at para. 31.

³⁴² See *supra* Parts V.B (Wholesale Special Access Competition), V.C (Retail Enterprise Competition), V.D (Mass Market Competition).

³⁴³ The DOJ defines a Tier 1 provider as a provider that (i) has high-capacity networks nationwide or internationally and (ii) settlement-free interconnection arrangements with all other Tier 1 providers. See *DOJ-WorldCom/Sprint Complaint* at para. 27.

³⁴⁴ See SBC/AT&T Schwartz Decl. at para. 20. [REDACTED] When identifying Tier 1 IBPs, we focus on Internet backbone providers with significant domestic operations because Tier 1 backbone customers are unlikely to turn to any foreign providers that lack these domestic operations in response to a small but significant and nontransitory increase in price by domestic Tier 1 IBPs. *DOJ-WorldCom/Sprint Complaint* at para. 31.

generated [REDACTED] in revenues in 2003, the most recent year for which data is available.³⁴⁵ In choosing an IBP, ISP and enterprise customers seek the lowest price, highest quality, and broadest geographic reach consistent with their needs, and these Tier 1 backbone providers compete vigorously on these bases.

3. Competitive Analysis

116. For the reasons given below, we find that the merger is not likely to result in anticompetitive effects either through unilateral action by the merged entity or possible tipping of the Tier 1 Internet backbone market to a monopoly or duopoly. We also find it unlikely that the remaining Tier 1 IBPs would engage in coordinated interaction as a result of the merger. Finally, we are not persuaded that the vertical aspects of the proposed merger would increase the merged firm's incentive and ability to raise rivals' costs by discriminating against the IP traffic of its broadband competitors or by raising the price of special access services to its backbone competitors.

117. The Internet backbone market is characterized by "direct network effects," where the value of the network increases with each additional user who joins it.³⁴⁶ So long as there is "rough equality" among backbone providers, each has an incentive to peer with the others to provide universal connectivity to the Internet.³⁴⁷ In the proposed *WorldCom/Sprint* merger, the DOJ concluded, however, that the incentives of the peering backbones would change if one backbone provider were to become significantly larger than the others, or if it were to develop greater negotiating power.³⁴⁸ This dominant provider might be able to "tip" the Internet backbone market into monopoly and then raise prices for all transit services.³⁴⁹ Once the market begins to "tip," connecting to the dominant network becomes even more important to competitors, enabling the dominant network to further raise its rivals' costs.³⁵⁰ By contrast, in a market where each backbone provider derives roughly equal benefit from settlement-free access to the other backbone providers' customers, the incentive to cooperate will predominate and the market participants will peer with each other. If terminating a peering relationship would hurt one backbone provider significantly less than the others, however, then the first backbone provider could credibly demand payment.³⁵¹ Thus, because of these strong network effects, the Commission and the DOJ have

³⁴⁵ See Letter from Thomas F. Hughes, Vice President-Federal Regulatory, SBC, to Gary Remondino, Wireline Competition Bureau, FCC, WC Docket No. 05-65, Attach. (filed July 22, 2005) (SBC July 22 *Ex Parte* Letter) (providing DIA revenues and upstream transit revenues).

³⁴⁶ See *DOJ-WorldCom/Sprint Complaint* at para. 36; Jacques Cr mer *et al.*, *Connectivity in the Commercial Internet*, 48 J. IND. ECON. 433, 458-60 (2000).

³⁴⁷ See *DOJ-WorldCom Sprint Complaint* at para. 41.

³⁴⁸ See *id.* at paras. 40-41.

³⁴⁹ See *id.*; see also *WorldCom/MCI Order*, 13 FCC Rcd at 18108-09, para. 150.

³⁵⁰ *DOJ-WorldCom/Sprint Complaint* at para. 41 ("As a result of an increase in their costs, rivals may not be able to compete on a long-term basis and may exit the market. If rivals decide to pass on these costs, users of connectivity will respond by selecting the dominant network as their provider. Ultimately, once rivals have been eliminated or reduced to customer status, the dominant network can raise prices to users of its own network beyond competitive levels. Once this occurs, restoring the market to a competitive state often requires extraordinary means, including some form of government regulation.").

³⁵¹ See *id.* at paras. 33-41.

focused on whether a merger between two Tier 1 IBPs is likely to lead the Internet backbone market to tip into a situation in which one or two backbones dominate.

118. We begin our horizontal analysis by examining the relative market shares of the Tier 1 IBPs and conclude that the proposed merger would not create a backbone provider of sufficient size to cause tipping. We next consider and reject various arguments raised by commenters suggesting that, as a result of the merger, SBC/AT&T would have a unique incentive and ability to engage in a strategy of targeted de-peering, leading eventually to its dominating the backbone market.

a. Horizontal Effects of the Merger

119. *Unilateral Effects – Traditional Analysis of Tipping.* In the proposed *WorldCom/MCI* merger, the Commission and the DOJ concluded that the merged entities, absent divestiture, would have been so large relative to other Tier 1 IBPs as to raise a significant danger of tipping.³⁵² In contrast, as discussed below, we find here that the Tier 1 market has since become less concentrated such that the proposed merger will not create a dominant backbone provider. Accordingly, we agree with the Applicants that, based on current market shares, the proposed merger is not likely to cause tipping into monopoly or other competitive effects.

120. Various commenters contend that the proposed merger would create a dominant Tier 1 backbone monopoly or duopoly, threatening the currently competitive market for Internet backbone services.³⁵³ Commenters claim that the merger will result in an increase in the merged firm's market share with a corresponding reduction of the Internet backbone market shares of competing Tier 1 providers.³⁵⁴

121. The Applicants respond that the proposed merger will not reduce competition in the Internet backbone market, because SBC is not a Tier 1 backbone provider, and the combination of SBC's backbone with AT&T's backbone will not significantly increase AT&T's market share.³⁵⁵ The Applicants further contend that the Tier 1 Internet backbone market has become significantly less concentrated and more competitive in the years since the Commission last addressed a merger involving the Internet backbone.³⁵⁶ The Applicants maintain that this characterization of the market holds true, regardless of whether market shares are calculated using traffic,³⁵⁷ revenues,³⁵⁸ or autonomous systems

³⁵² The DOJ also reached this conclusion with respect to the *WorldCom/Sprint* merger. *DOJ-WorldCom/Sprint Complaint* at para. 35.

³⁵³ See, e.g., EarthLink Petition at 3-7; Earthlink Reply at 3; BT Americas Reply at 24-29; CompTel/ALTS Petition at 32-36; Broadwing and SAVVIS Petition, Declaration of Dr. Mathew P. Dovens (SAVVIS Dovens Decl.) at paras. 16-17.

³⁵⁴ EarthLink Petition at 4-5 (contending that SBC/AT&T's backbone market share would be 20%, three times larger than that of its nearest competitors (except MCI and Sprint) and this could enable SBC/AT&T to discriminate against rival backbone providers).

³⁵⁵ SBC/AT&T Schwartz Decl. at paras. 20, 30.

³⁵⁶ SBC/AT&T Application at 107-08; SBC/AT&T Schwartz Decl. at para. 22, Table 2.

³⁵⁷ SBC/AT&T Schwartz Decl. at paras. 21-23.

³⁵⁸ *Id.* at para. 26, Table 3; see also *id.* at para. 31.

(AS) connections.³⁵⁹ They also emphasize that the backbone market is characterized by considerable volatility, which is demonstrated by the fact that the identity of the top-ranked firm changed twice between January 2003 and May 2004.³⁶⁰

122. As a preliminary matter, we note that no complete and reliable data sources are available to measure relative shares of Internet backbone providers. Nor does it appear that any single measure uniquely captures the relative size and importance of competing Internet backbone providers. As noted, the Applicants present data on relative shares in three ways: revenues, AS connections, and traffic flows. We do not agree, however, with the way that the Applicants calculated key revenue and traffic share percentages. Among other things, the Applicants appear to define the market to include non-Tier 1 and non-U.S. firms, which has the effect of diluting their estimated market shares.³⁶¹ In addition, the Applicants' methodology for calculating market share double counts the traffic and revenue of lower tier providers and does not appear to account fully for SBC's current DIA and backbone revenues. The traffic data submitted by the Applicants do not permit us to correct for the market definition and double counting errors and to recalculate market shares based on traffic and, as the Applicants acknowledge, there are problems with using AS connections.³⁶² Therefore, using available revenue data, and using revenue shares as a proxy for firm size, we recalculated the market shares of the top eight Tier 1 backbone providers.³⁶³ In calculating these shares, we adjusted the revenues for Sprint, Level 3, and Qwest to reflect that SBC and Verizon will not continue to pay transit to such providers; we also estimated SBC's and Verizon's 2003 transit payments based on 2004 actual payments.

123. We are satisfied that the proposed merger will not increase horizontal concentration to such an extent that it is likely to result in anticompetitive effects in the Internet backbone market. As noted above, there are at least six, but potentially as many as eight, Tier 1 backbone providers – AT&T, MCI, Sprint, Qwest, Level 3, Global Crossing, and by some measures, SAVVIS and Cogent. Based on the 2003 revenue data submitted by the Applicants, the merged entity's revenue share would increase by a modest [REDACTED] to approximately [REDACTED] even accounting for the market share changes

³⁵⁹ An Autonomous System (AS) "is either a single network or group of networks controlled by a common administrator on behalf of a single organizational entity (such as a university, business, or an IBP). An AS is assigned a globally unique number, sometimes referred to as an Autonomous System Number, or ASN. The number of 'AS connections' refers to the number of other [Autonomous Systems] to which a given AS is connected." SBC/AT&T Schwartz Decl. at para. 28 n.17.

³⁶⁰ SBC/AT&T Schwartz Decl. at para. 24.

³⁶¹ See, e.g., SBC/AT&T Schwartz Decl. at para. 22, App. 2. For similar reasons, we reject the market share calculations proposed by BT Americas. See Letter from A. Sheba Chacko, Chief Regulatory Counsel, BT Americas, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 9-11 (filed Oct. 7, 2005) (BT Americas White Paper) (utilizing "extrapolation technique" employed by the Applicants to calculate market shares).

³⁶² SBC/AT&T Schwartz Decl. at paras. 27-29.

³⁶³ Although we use revenues, because it is the best evidence in the record, we are not suggesting that this is the only way or most appropriate or accurate way to measure market share.

associated with the proposed Verizon/MCI merger.³⁶⁴ The post-merger HHI is [REDACTED] and the change in HHI would be [REDACTED]³⁶⁵

124. We further find that the merger does not change the market ranking of the Tier 1 backbones, and several Tier 1 competitors with significant market shares would remain in the market post-merger. Further, the merger does not remove an existing Tier 1 provider, as SBC does not appear to have yet attained that status.³⁶⁶ In addition, we note that some backbone providers appear to have higher shares of traffic than of revenue.³⁶⁷ In particular, we note that 2004 data submitted by the Applicants confirm that Level 3's share of Internet traffic had surpassed AT&T's.³⁶⁸ Finally, we observe that the market shares for Tier 1 backbones have fluctuated over time, suggesting that the market is both competitive and dynamic. Therefore, we agree with the Applicants that the proposed merger is unlikely to create a single dominant Tier 1 Internet backbone provider with a market share that is overwhelmingly disproportionate to its rivals, which was the key concern in prior backbone mergers.

125. *Unilateral Effects – Other Factors that Might Lead to Tipping.* We next consider whether there are other factors that could lead the merged company to engage in targeted de-peering or to degrade the quality of backbone interconnection.³⁶⁹ We examine commenters' claims first by assessing the merged firm's incentives to pursue de-peering strategies, and then by exploring whether adverse competitive effects are likely to arise from traffic imbalances or relative market shares. As explained below, we conclude that the merged firm is unlikely to have the incentive and ability to de-peer a sufficient number of its backbone rivals to "tip" the market to monopoly or duopoly. Moreover, we conclude that, while certain smaller Tier 1 backbone providers might be de-peered (with or without the proposed merger), it is unlikely that the merger will result in anticompetitive effects. In addition, as discussed below, we take further comfort from certain commitments the Applicants have made relating to their peering practices.

126. *"Eyeballs" vs. Content.* We are not persuaded by commenters' argument that AT&T's acquisition of SBC's residential broadband, voice, and wireless customers will alter the merged company's incentives to maintain AT&T's peering relationships.³⁷⁰ These commenters argue that AT&T's acquisition of these SBC "eyeball" customers will give the merged entity significant negotiating

³⁶⁴ See Confidential Appendix E, Table 1.

³⁶⁵ Commenters express concern about relying on 2003 revenue data, asserting that the data are outdated and do not reflect possible growth in IP-enabled services. Broadwing and SAVVIS Petition at 17; CompTel/ALTS Petition at 29; EarthLink Reply at 8; Letter from Christopher J. Wright *et al.*, Counsel for Broadwing and SAVVIS, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 4 n.10 (filed Aug. 12, 2005) (Broadwing and SAVVIS Aug. 12 *Ex Parte* Letter). We believe that the 2003 data provide a reasonable basis for our decision. The Applicants have also submitted more recent evidence on relative size and significance as measured by peering capacity that appears consistent with the above conclusions. See SBC/AT&T Martens Reply Decl. at paras. 17-19.

³⁶⁶ As we discuss below, we also find that the merger is not likely to adversely affect Tier 1 backbone competition through the loss of SBC as a potential Tier 1 IBP.

³⁶⁷ See Letter from David L. Lawson, Counsel for AT&T, to Gary Remondino, Wireline Competition Bureau, FCC, Attach. (filed Apr. 22, 2005) (SBC/AT&T Apr. 22 *Ex Parte* Letter).

³⁶⁸ SBC/AT&T Schwartz Reply Decl. at para. 12.

³⁶⁹ See, e.g., SAVVIS Dovens Decl. at paras. 19-24; BT Americas Reply at 24.

³⁷⁰ See, e.g., SAVVIS Dovens Decl. at paras. 19-24.

leverage over other Tier 1 backbones that have more “content” customers than “eyeball” customers.³⁷¹ Ultimately, commenters claim that the proposed merger will give the merged company new incentives and/or an increased ability to serially de-peer its rivals, degrade the quality of interconnection among backbones, and increase transit prices to disadvantage its backbone rivals and/or retail competitors served by competing Internet backbones (even at the expense of its wholesale backbone business).³⁷²

127. We are not persuaded by opponents’ argument that peering incentives may change because AT&T’s backbone will acquire more “eyeballs” as a result of the merger. First, as to possible global de-peering of all other Tier 1 IBPs (or all others except Verizon/MCI) the percentage of “eyeballs” currently associated with SBC DSL customers is relatively small compared with the total number of broadband “eyeballs” nationwide, and, as the Applicants point out, SBC only has approximately 16 percent of all broadband “eyeballs.”³⁷³ In addition, there are other Tier 1 backbones with access to significant numbers of their own “eyeball” customers that plan to expand that customer base (*e.g.*, by offering broadband and 3G wireless services).³⁷⁴ Thus, even if “eyeballs” confer additional leverage in peering negotiations as commenters claim, other Tier 1 backbones besides SBC/AT&T and Verizon/MCI either currently have, or have the potential to acquire, significant numbers of broadband “eyeballs” to rival SBC and Verizon. Second, if SBC/AT&T were to de-peer a backbone that served a major cable company or ISP with broadband “eyeballs,” it seems unlikely that the cable company or ISP would switch to a vertically

³⁷¹ Commenters assert that when certain customers (“eyeball” customers), such as residential DSL customers, access the Internet, they typically receive much more traffic than they transmit because, for example, a residential customer’s query for a Web page generates little outgoing traffic, but could generate significant incoming traffic when the Web page downloads. Conversely, commenters claim that certain Internet backbone customers, such as Internet content providers, transmit much more content than they receive (“content” customers). *See, e.g.*, SAVVIS Dovens Decl. at paras. 19, 21-24.

³⁷² *See, e.g.*, Broadwing and SAVVIS Petition at 51-54; Cox Comments at 14; CompTel/ALTS Petition at 33; EarthLink Petition at 6-9; EarthLink July 15 *Ex Parte* Letter at 3-19; Consumer Federation *et al.* Petition at 23-24.

³⁷³ SBC/AT&T Schwartz Reply Decl. at Table 4. Moreover, cable companies collectively control more broadband eyeballs than do all the incumbent LECs combined. Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of December 31, 2004*, at 6 (rel. July 7, 2005). Some commenters note that “eyeballs” come from SBC’s dial-up Internet access customers as well. However there likewise are many more customers that subscribe to competing dial-up ISPs nationwide than subscribe to SBC’s service. SBC Info. Req., Exh. 13(b)(1). While EarthLink asserts that certain competing dial-up Internet access providers purchase service from SBC that includes both last-mile service and transport on SBC’s backbone, *see* Letter from John W. Butler, Counsel for EarthLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at para. 14 (EarthLink Collins Decl.) (filed Aug. 26, 2005) (EarthLink Aug. 26 *Ex Parte* Letter), we note that competing ISPs also can purchase wholesale offerings that include only the last-mile service, and purchase backbone services from other providers. To the extent that EarthLink has concerns about how these various wholesale products are priced today, that is not a merger-specific concern. EarthLink Collins Decl. at para. 15 (stating that “Layer 3” services that include both last-mile service and transport on SBC’s backbone are priced lower than “Layer 2” services that include only last-mile service).

³⁷⁴ For example, as we discuss in greater detail below, the Sprint/Nextel merger creates a backbone with access to significant “eyeball” customers, and Comcast and Google are considering deploying national fiber networks. *See infra* para. 135 & note 405. Further, instant messaging providers, including Microsoft, Yahoo, and Google, as well as other web companies such as eBay, are adding VoIP features to their offerings, and may add additional IM services, as well. In so doing, these IM service providers might attract significant numbers of “eyeball” customers. *See, e.g.*, *EBay’s Skype Risk Is a Calculated One*, WASHINGTON POST, Sept. 22, 2005; *MSN Buys Into Net-Calling Future*, CNET News.com, Aug. 30, 2005, available at http://news.com.com/MSN+buys+into+Net-calling+future/2100-1032_3-5844873.

integrated backbone provider that competes against it for broadband and VoIP customers, such as SBC or Verizon.³⁷⁵

128. Nor are we convinced by opponents' claims that the "stickiness" of "eyeball" customers would largely insulate the merged firm from the "mutual pain" associated with a strategy of degradation and de-peering.³⁷⁶ Given the widespread availability of competing broadband and narrowband ISP alternatives, it is not clear that SBC/AT&T's "eyeball" customers would prove "sticky" in practice and, in any case, the merged entity would have to weigh carefully the potential for customer churn as a result of degradation strategies.³⁷⁷ Further, the record indicates that AT&T has been gaining more content customers for its

³⁷⁵ We also reject claims that the SBC/AT&T Internet backbone ultimately will gain the vast majority of content customers. *See, e.g.*, Broadwing and SAVVIS Petition at 48. As preconditions to that occurring, commenters rely on the assertion that the merger will lead to monopoly or duopoly, or that it will result in the SBC/AT&T backbone having a disproportionate share of "eyeballs" and thus engaging in targeted de-peering. *Id.* at 48-51. As discussed above, we find those preconditions unlikely to occur as a result of the merger.

In addition, commenters allege that, because of "inbuilt traffic imbalances," the merged SBC/AT&T would have the ability ultimately to monopolize Internet content because of a possible "hold-up" problem. *See, e.g.*, Letter from Christopher J. Wright, Counsel for Broadwing and SAVVIS, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at para. 17 (Broadwing and SAVVIS Wilkie Decl.). They reason that the merged firm would be particularly likely to end settlement-free peering with relatively content-heavy networks. In the context of such targeted de-peering, commenters assert that other backbone providers would factor the risk of de-peering into their bids for the content customers. Commenters claim that as a result, competition for such customers will diminish, creating disincentives for content customers to generate high bandwidth content and applications because the merged companies would increase prices to appropriate the rent from the development of such content. *Id.* We disagree. Given our conclusions above that the merged entity lacks incentives to engage in a strategy of targeted de-peering, we find this result unlikely.

Further, we are not persuaded by BT Americas' claim that the financial condition of other Tier 1 IBPs will lead SBC/AT&T and/or Verizon/MCI to increase their share of the Internet backbone market. *See* BT Americas White Paper at 23-25, 29-30. In any event, even if certain other Tier 1 IBPs are not as financially strong as others, when such situations have arisen in the past, the IBPs have been acquired by other firms and continued to be operated as Tier 1 backbones, or, in the case of MCI, have gone through bankruptcy and still maintained its status as a significant Tier 1 backbone. *See, e.g.*, BT Americas White Paper at 29 (noting SAVVIS' purchase of Cable & Wireless' backbone); *Level 3 to Acquire Genuity Assets and Operations*, (Nov. 27, 2002) (discussing Level 3's acquisition of Genuity) available at <http://www.level3.com/press/3053.html>; *Bankruptcy Judge Approves MCI's Plan of Reorganization*, (Oct. 31, 2003) (discussing MCI's exit from bankruptcy) available at <http://global.mci.com/about/news/releases/2003/>.

³⁷⁶ *See, e.g.*, Broadwing and SAVVIS Aug. 12 *Ex Parte* at 3, 8-9.

³⁷⁷ While commenters note that certain contracts with DSL or 3G wireless customers might include early termination fees, *see* Broadwing and SAVVIS Aug. 12 *Ex Parte* Letter at 8, we note that there nonetheless appears to be significant competition for broadband and wireless customers. *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, FCC 05-150 at paras. 47-64 (rel. Sept. 23, (continued....))

backbone.³⁷⁸ Accordingly, we do not find it likely that the merged entity's share of "eyeballs" will create a significant incentive for it to engage in either targeted de-peering or degradation of backbone interconnection.

129. More generally, we are not convinced that the merged firm would gain enough by disadvantaging its Internet access and retail competitors to alter the pre-merger calculus that led to the current peering equilibrium. If the merged SBC/AT&T were to de-peer one or more of its Tier 1 peers, it could not be certain that the targeted backbone would become a transit customer of AT&T or that the customers of the former peer would switch to the SBC/AT&T backbone. The backbone might instead choose to purchase transit from a competing Tier 1 backbone, which would tend to increase the rival's market significance relative to AT&T,³⁷⁹ and thus, a decision to de-peer could end up primarily benefiting one of AT&T's rivals.³⁸⁰ We also find that disaffected Internet access providers or retail competitors that were customers of the former peer could choose from a wide range of competing IBPs.³⁸¹ Peering and de-

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 2005) (*Wireline Broadband Order*) (discussing current and emerging broadband competition); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition For Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21508, para. 26 (2004) (*Section 271 Broadband Forbearance Order*) (discussing competition for broadband services); *Tenth CMRS Competition Report*, FCC 05-173 at paras. 2-5 (discussing wireless competition); *see also* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Div., *High-Speed Services for Internet Access: Status as of December 31, 2004* at 6 (rel. July 7, 2005) (specifying relative market shares of cable and DSL); Letter from Brian J. Benison, Associate Director – Federal Regulatory, SBC, to Gary Remondino, Wireline Competition Bureau, FCC, WC Docket No. 05-65, Exh. 13(b)(7) (providing broadband market shares in SBC's region); SBC Info. Req., Exh. 13(b)(1) (providing market shares for numerous dial-up ISP competitors to SBC).

³⁷⁸ AT&T Apr. 22 *Ex Parte* Letter, Attach. at 4.

³⁷⁹ *See* SBC/AT&T Reply at 60; SBC/AT&T Schwartz Reply Decl. at paras. 30-31.

³⁸⁰ Commenters have some difficulty specifying when targeted de-peering, and its effects, might occur. Broadwing and SAVVIS claim that "[a]ny IBP that failed to reach settlement-free peering arrangements would *quickly* lose all its customers to a competitor that could provide universal connectivity." SAVVIS Dovens Decl. at para. 15 (emphasis added). The record indicates, however, that SBC obtained, and retained, Internet backbone customers utilizing the very transit arrangements that commenters decry. *See, e.g.*, SBC/AT&T Schwartz Decl. at paras. 20, 30.

³⁸¹ *See, e.g.*, SBC/AT&T July 26 *Ex Parte* Letter at 5. While opponents claim that switching backbone providers is costly and time-consuming, the Applicants assert that major purchasers of backbone services, including cable companies and other large ISPs, could easily switch to competing backbones. *Compare* Cox Comments at 14 (asserting that Cox and other AT&T transit customers could not readily switch backbone providers without loss of significant time, money, and resources) *with* SBC/AT&T Schwartz Reply Decl. at para. 20 (stating that cable operators could shift IBPs, giving those rival backbones a significant share of "eyeballs"). As an example, EarthLink states that it has engineered its network to be in close proximity to its current transit provider, Level 3, and that switching to an alternative backbone provider would require it to purchase special access service to link the EarthLink network to the new backbone provider at multiple locations. EarthLink Collins Decl. at para. 22. EarthLink estimates that the cost to do so initially would involve \$2 million for fiber build-out and additional recurring charges of \$1 million per year. *Id.* We are persuaded that Internet backbone customers have sufficient ability to switch backbones to provide a check on any potential strategy of targeted de-peering. Particularly given the sophistication of many Internet backbone customers, we find it unlikely that they would allow themselves to be "locked in" to a particular provider. *See, e.g.*, SBC/AT&T Martens Reply Decl. at para. 14 (noting that cable (continued....))

peering decisions are driven by a backbone's incentives to maximize network efficiency and lower interconnection costs, and we do not see how the proposed merger would materially alter this calculus.

130. *Traffic Imbalances.* Commenters also claim that significant traffic imbalances would flow directly from the proposed merger because “eyeball-heavy” networks generate asymmetric traffic flows with content networks, and because the Applicants have plans to increase the deployment of broadband, video over IP, and 3G wireless products and services.³⁸² Thus, commenters express concern that current Tier 1 peers (other than similar “eyeball-heavy” networks like the merged Verizon/MCI) would suddenly fail to qualify for peering under current criteria (which generally require a 2:1 traffic ratio).³⁸³ Based on the pre-merger traffic flows it is possible that AT&T, absent the merger, would have had the ability to de-peer some of the smaller Tier 1 backbone providers pursuant to the traffic ratio requirements in its existing peering policy.³⁸⁴ We note, as a general matter, however, that peering decisions are based on a range of factors,³⁸⁵ and AT&T explains that it “has not in the past generally enforced the 2 to 1 traffic ratio requirement against carriers that only temporarily or sporadically fall out of balance.”³⁸⁶ While AT&T's traffic ratios with its peers appear to fluctuate considerably, several backbones are close to

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operators seek bids from Internet backbone providers for their services, or self-provide backbone services using leased facilities). EarthLink's hypothetical example does not convince us otherwise with respect to IBP customers as a whole, regardless of its accuracy for EarthLink itself. Other commenters' concerns regarding the Internet backbone market are predicated on the ease with which customers can switch IBPs. *See, e.g.*, Broadwing and SAVVIS Aug. 12 *Ex Parte* Letter at 8-9 & nn.24-25 (stating that larger IBP customers generally are multi-homed and more readily able to switch IBPs than small IBP customers); BT Americas White Paper at 26-31 (claiming that customers will not be able to prevent anticompetitive behavior by the jointly dominant AT&T and MCI Internet backbones). Indeed, AT&T experiences about [REDACTED] churn per month in its DIA customer base, demonstrating customers' ability to switch providers. SBC/AT&T Schwartz Reply Decl. at para. 25. We are persuaded by the record that most backbone customers can readily switch IBPs, even if there are particular customers for which the cost of switching IBPs might be significant.

³⁸² *See, e.g.*, Broadwing and SAVVIS Petition at 48-51; CompTel/ALTS Petition at 33; Consumer Federation *et al.* Petition at 24; SAVVIS Dovens Decl. at paras. 19, 21-24; Broadwing and SAVVIS Wilkie Decl. at para. 16; BT Americas White Paper at 15-23.

³⁸³ *See id.*

³⁸⁴ *See* Confidential Appendix E, Table 2 (AT&T pre-merger traffic ratios). Given our conclusions that the merged entity would not have incentives to engage in a strategy of de-peering, we thus reject the concerns of commenters that SBC/AT&T would change AT&T's peering policy as a pretext to de-peer competitors. *See, e.g.*, SAVVIS Dovens Decl. at para. 24.

³⁸⁵ *See, e.g.*, Michael Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbones* (Sept. 2000) at 8 (“There is no accepted convention that governs when two backbones will or should decide to peer with one another, nor is it an easy matter to devise one. . . . However, there are many measures of backbone size, such as geographic spread, capacity, traffic volume, or number of customers. It is unlikely that two backbones will be similar along many or all dimensions. . . . The question then becomes, how the backbones weigh one variable against another. . . . In sum, peering agreements are the result of commercial negotiations; each backbone bases its decisions on whether, how, and where to peer by weighing the benefits and costs of entering into a particular interconnection agreement with another backbone.”) *available at* http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf.

³⁸⁶ Letter from Peter J. Schildkraut, Counsel for SBC, and David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 4 (filed Sept. 7, 2005) (SBC/AT&T Sept. 7 *Ex Parte* Letter).

violating the required 2:1 ratio currently, such that small increases in traffic flows from the addition of SBC's IP traffic could put them further out of balance or cause them to fail the traffic ratio criterion.³⁸⁷

131. Nevertheless, we disagree with commenters that the proposed merger presents a real danger that *most* settlement-free peering arrangements will dissolve, even under the commenters' traffic imbalance theory.³⁸⁸ Several competing backbones, [REDACTED] have traffic ratios that are well within the required 2:1 threshold and are unlikely to be de-peered based on a failure to meet the balanced traffic ratio requirement. Therefore, even if certain backbones were de-peered, sufficient competition would remain in the Tier 1 backbone market such that transit prices would not be affected.³⁸⁹ While commenters point to [REDACTED]³⁹⁰ it is not clear that this resulted from the proposed merger.³⁹¹ In addition, it does not appear that less significant traffic ratio disparities have led AT&T to request interconnection payments from the several other carriers whose traffic ratios periodically exceeded the required balance.

132. Because we conclude that the Internet backbone market is sufficiently competitive and will remain so post-merger, it follows that the prices and terms of interconnection in the market will also be competitive.³⁹² We recognize that AT&T's peering policy is not public and that, like all Internet backbone providers, its decisions about the terms of interconnection with other backbone providers are based on prevailing market conditions, including incentives to maximize profits and increase efficiency.³⁹³

³⁸⁷ See Confidential Appendix E, Table 2 (AT&T pre-merger traffic ratios).

³⁸⁸ See Broadwing and SAVVIS Petition at 49-50. Because we conclude that a sufficient number of settlement-free peers will remain post-merger, we therefore need not address factual disputes related to the costs associated with carrying traffic, including whether traffic imbalances impose costs sufficient to justify de-peering. Compare Broadwing and SAVVIS Petition at 50 (asserting that the costs associated with carrying traffic are not sufficient to warrant de-peering based on traffic imbalances); Broadwing and SAVVIS Aug. 12 *Ex Parte* Letter at 11 (contending that the traffic ratio requirement has no basis in economic cost) and Wilkie Decl. at para. 9 (asserting that the marginal cost of transporting IP packets is nearly zero) with SBC/AT&T Sept. 7 *Ex Parte* Letter at 6 (asserting that the costs associated with traffic imbalances can justify decisions to de-peer other backbones); SBC/AT&T Schwartz Reply Decl. at para. 34 (same).

³⁸⁹ In this regard, we note that there has been a general downward trend of transit prices in recent years. See AT&T Apr. 22 *Ex Parte* Letter, Attach. at 13 ([REDACTED]).

³⁹⁰ Broadwing and SAVVIS Aug. 12 *Ex Parte* Letter at 10 ([REDACTED]). SAVVIS also contends [REDACTED]. SBC/AT&T Sept. 7 *Ex Parte* Letter at 4-5.

³⁹¹ See Confidential Appendix E, Table 2 (AT&T pre-merger traffic ratios).

³⁹² We also find that commenters' concerns related to inefficiencies in the current system of "hot potato" routing and recommendations for reallocating interconnection costs between "eyeball" and "content" backbones based on relative benefits to each backbone's customers are not merger-specific. See, e.g., Cox Comments at 13-14; Cox Reply at 2-3. Moreover, we find that their proposed remedies are beyond the scope of this proceeding as they would reconfigure the routing pattern of the public Internet. See Broadwing and SAVVIS Wilkie Decl. at paras. 5-10.

³⁹³ See AT&T Info. Req., Exh. 9(a), AT&T Global IP Network Peering Policy, at 1 [REDACTED] Many Tier 1 backbone providers publish their peering policies, a practice which we acknowledge has provided some useful transparency in these essentially private business negotiations over interconnection. See, e.g., SAVVIS *Settlement-Free Peering Policy USA* (May 13, 2005) available at http://www.savvis.net/NR/rdonlyres/16A6C413-5D9F-405D-B157-BC6DC9A01B52/8264/peering_usa2.doc; Qwest: *International IP Network Peering Policy* (Sept. 14, 2005) available at www.qwest.com/legal/peering_int.html; MCI *Policy for Settlement-Free Interconnection with Internet* (continued....)

In addition, interconnection between Internet backbone providers has never been subject to direct government regulation, and settlement-free peering and degradation-free transit arrangements have thrived. We see no evidence that the merger will alter this dynamic.

133. While we conclude that the merger is unlikely to result in anticompetitive effects with respect to Tier 1 peering arrangements, we nonetheless find that certain commitments made by the Applicants are in the public interest. First, they commit that they will maintain at least as many settlement-free U.S. peering arrangements for Internet backbone services with domestic operating entities as they did in combination on the Merger Closing Date. Second, they will post their peering policy on a publicly accessible website, and will post any revisions on a timely basis.³⁹⁴ Because we find these commitments will serve the public interest, we accept them and adopt them as conditions of our approval of the merger.

134. We recognize the unique concerns of rural carriers expressed by Great Plains, the Rural Alliance, NTCA, and others concerning a potential lack of options for access to Internet backbones at reasonable rates, terms, and conditions.³⁹⁵ We believe that the Applicants' voluntary commitments will reduce this concern.³⁹⁶ Nonetheless, we commit to monitor vigilantly the competitive conditions unique to rural areas and will take action, as necessary, to ensure that the benefits of the Internet are extended throughout the United States. We also commit to addressing these concerns in other on-going rulemakings, including the *IP-Enabled Services* proceeding.³⁹⁷

135. *Relative Market Share.* Finally, we disagree with commenters who allege that, separate and apart from whether the merger creates a single dominant Tier 1 IBP, the merged entity will have sufficient market share and negotiating leverage to engage in targeted de-peering of rival Tier 1 IBPs.³⁹⁸ We are persuaded that the Applicants' moderate combined market share (by our calculations 40 percent, based on backbone revenues) sufficiently rebuts commenters' claims that they will have the ability to engage in targeted de-peering of rival Internet backbones, particularly when viewed in light of the significant market shares of other Tier 1 backbones.³⁹⁹ While the merged entity may have some increased

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Networks (visited Sept. 14, 2005) available at <http://global.mci.com/uunet/peering/>; *Level 3 Settlement-Free Interconnection Principles* (visited Sept. 14, 2005) available at <http://www.level3.com/1511.html>.

³⁹⁴ See SBC Oct. 31 *Ex Parte* Letter, Attach. at 3-4; see also Appendix F.

³⁹⁵ See, e.g., NTCA Comments at 3 (expressing concerns about possible discrimination by the merged company against other backbones and ISPs); Letter from Ken Pfister, Vice President-Strategic Policy, Great Plains Communications, to Ms. Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65 & 05-75 (filed Oct. 20, 2005) (raising concerns on behalf of the Rural Alliance about Internet backbone connections and discrimination against smaller ISPs).

³⁹⁶ See SBC Oct. 31 *Ex Parte* Letter, Attach. at 3-4; see also Appendix F. Further, as discussed above, we find that sufficient competition should remain in the Tier 1 backbone market such that transit prices would not be affected. Indeed, as previously noted, there has been a general downward trend of transit prices in recent years. See AT&T Apr. 22 *Ex Parte* Letter, Attach. at 3 (noting that [REDACTED]).

³⁹⁷ See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

³⁹⁸ See, e.g., EarthLink July 15 *Ex Parte* at 6-8; Broadwing and SAVVIS Aug. 12 *Ex Parte* at 2-3, 9-10.

³⁹⁹ See *supra* paras. 122-123 (discussing Tier 1 IBP market shares); see also BT Americas White Paper at 31 n.58 (stating that in the absence of "joint dominance" by SBC/AT&T and Verizon/MCI, "the parties are unlikely to be able to successfully engage in widespread anticompetitive degradation or pricing strategies in the downstream Internet backbone market.").

negotiating leverage over smaller backbone providers,⁴⁰⁰ we conclude that the merged SBC/AT&T likely would lack the ability to target its larger rivals, including [REDACTED]—all of which command significant revenue shares of the backbone market.⁴⁰¹ These providers each have unique advantages in the backbone services marketplace and likely would provide significant counterweight to the merged entity. In addition, we note that some backbone providers appear to have higher shares of traffic than of revenue.⁴⁰² In this regard, we note that Level 3 recently surpassed AT&T in backbone traffic volume.⁴⁰³ Similarly, the recent merger of Sprint and Nextel creates a backbone and wireless competitor with a business plan focused on providing wireless data, including sports and entertainment video, as well as traditional wireless telephony.⁴⁰⁴ The increasingly IP-based traffic of Sprint's 44 million plus mobile phone subscribers would presumably ride on its backbone network. Qwest, as another vertically-integrated incumbent LEC and Tier 1 backbone provider, should continue to bring competitive heft to the backbone market as well.⁴⁰⁵ Based on the foregoing, we see no need for the conditions that commenters suggest.⁴⁰⁶ As discussed above, we take further comfort from the commitments the Applicants have made regarding their peering practices.

136. *Coordinated Effects.* Other commenters suggest that SBC/AT&T and Verizon/MCI together might come to dominate the Tier 1 IBP market and then engage in coordinated interaction.⁴⁰⁷ As an initial matter, we conclude that the proposed merger will likely not result in competitive harms due to

⁴⁰⁰ [REDACTED]. See Confidential Appendix E, Table 1 (Market Shares and HHIs of Tier 1 Backbone Providers).

⁴⁰¹ See *id.*

⁴⁰² AT&T Apr. 22 *Ex Parte* Letter, Attach.

⁴⁰³ SBC/AT&T Schwartz Reply Decl. at para. 12.

⁴⁰⁴ Arshad Mohammed, *Training to Become Wireless Heavyweight*, WASHINGTON POST, Aug. 22, 2005, at D01; *Sprint/Nextel Order*, FCC 05-148 at para. 134 (noting merger-specific benefits related to the deployment of 3G technology, including high performance push-to-talk capabilities and high speed data rates).

⁴⁰⁵ In addition, Comcast, the largest cable modem ISP, has announced that it will build its own Internet backbone. See *Comcast Extends National Fiber Infrastructure* (Dec. 7, 2004) available at <http://www.cmsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=650960&highlight=backbone>. Google has also announced that it is reviewing bids for the deployment of a national fiber network. See *Google Reviewing Bids for National Optical Switching Network* (Sept. 19, 2005) available at http://www.ipmediamonitor.com/subscribers/index.htm?iid=6&article_id=21.

⁴⁰⁶ Commenters proffer a number of remedies, which we do not discuss in detail, because as noted, we find that the commenters have not established either merger-related harms requiring remedy, or substantial and material questions of fact concerning whether such harms exist. See, e.g., Cox Comments at 3; Vonage Petition at 11; Broadwing and SAVVIS Aug. 12 *Ex Parte* Letter at 11; Letter from Christopher J. Wright *et al.*, Counsel for Broadwing and SAVVIS, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 8-10 (filed Oct. 21, 2005) (Broadwing and SAVVIS Oct. 21 *Ex Parte* Letter); NCTA Reply at 2-3; EarthLink Aug. 26 *Ex Parte* Letter at 11-15; Letter from John W. Butler, Counsel for EarthLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 3-12 (filed Oct. 3, 2005).

⁴⁰⁷ See, e.g., EarthLink Petition at 7 (arguing further that SBC and Verizon have long history of avoiding significant competition with each other, and that the two merged firms thus are likely to do so here); Letter from Kristen Verderame, BT Americas, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 (filed May 6, 2005) (claiming that the merged firms can effectively signal each other through bilateral contractual dealings and leaks to achieve common objectives).

coordinated interaction among Tier 1 backbone providers. Because sufficient vigorous Tier 1 backbone competitors would remain (even if some current backbone providers were de-peered) the feasibility of such coordinated strategies is questionable.⁴⁰⁸ In short, the commenters' arguments would seem to require that SBC/AT&T or other firms be able to de-peer a sufficient number of Tier 1 backbones so as to make coordinated effects more likely. We find this result to be speculative at the very least, and not supported by the record. Accordingly, we conclude that SBC's control of AT&T is unlikely to result in anticompetitive coordinated effects in the Tier 1 Internet backbone market.

137. For the reasons discussed above, we also are unpersuaded that SBC/AT&T and Verizon/MCI, in particular, will have the ability 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.⁴⁰⁹ We conclude that it would be difficult for the merged SBC/AT&T and Verizon/MCI 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.⁴¹⁰ It is also not clear that, even together, the merged SBC/AT&T and Verizon/MCI would be able successfully to engage in global de-peering. To the extent that other Tier 1 backbones have a significant number of content customers, which commenters claim to be the case, SBC/AT&T's and Verizon/MCI's “eyeball” customers likely will value access to that content so highly that the strategy would not be profitable. In addition, even after combining their respective retail broadband customer bases, the merged SBC/AT&T and Verizon/MCI would have less than 30 percent of all broadband “eyeballs.”⁴¹¹

138. *Loss of Potential Competition.* We reject commenters' assertions that the proposed merger will eliminate SBC as a potential Tier 1 competitor. Commenters contend that SBC had aggressive, pre-merger plans to build a nationwide backbone network, and that, in fact, SBC's backbone has grown rapidly over the last four years. They further contend that SBC is nearly a Tier 1 competitor that potentially could compete with AT&T.⁴¹²

⁴⁰⁸ While some commenters contend that de-peering places the de-peered backbone at a competitive disadvantage, it is possible that the act of de-peering one competitor may very well make another competitor stronger, as the de-peered provider (or its customers) will need to purchase transit and will be disinclined to do so from the very provider (such as SBC/AT&T) that just de-peered it. See, e.g., Cox Comments at 14 (claiming that the merged company would have increased capability and incentive to maintain transit rates at supra-competitive levels in order to raise the costs of IP service providers who compete against SBC's core retail services).

⁴⁰⁹ See, e.g., Broadwing and SAVVIS Reply at 48-51; BT Americas White Paper at 6-31.

⁴¹⁰ 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).

⁴¹¹ SBC/AT&T Schwartz Reply Decl. at Table 4. While some commenters note that “eyeballs” come from SBC's dial-up Internet access customers as well, there likewise are many more customers of competing dial-up ISPs nationwide than subscribe to SBC's service. SBC Info. Req., Exh. 13(b)(1) (for the fourth quarter of 2004, SBC and Verizon combined had only [REDACTED]% of dial-up Internet access customers).

⁴¹² See Broadwing and SAVVIS Petition at 42; SAVVIS Dovens Decl. at para. 11. BT Americas contends that SBC over time could have used its eyeballs to grow into an Internet backbone provider rivaling the size and competitive position of the largest Tier 1 providers. Letter from A. Sheba Chacko, Chief Regulatory Counsel, BT Americas, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. (filed May 6, 2005).

139. While it certainly is possible that SBC would have achieved Tier 1 status absent the merger, we find that this fact alone does not raise a potential competition concern.⁴¹³ In order for a loss of potential competition to raise an antitrust concern, four criteria must be met: the market must be concentrated; the potential entry must produce a substantial likelihood of producing a deconcentrated market; there must be few other equivalent potential competitors; and the company being acquired must be able to enter the market without the merger.⁴¹⁴ Here, only the last criterion is satisfied. As discussed above, we are satisfied that there are enough competitors in the Internet backbone market to provide sufficient competition. Given this, the acquisition of a *potential* competitor – which by definition does not diminish the current state of competition – cannot cause substantial competitive harm.

b. Vertical Effects (Raising Rivals' Costs)

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

141. *Packet 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 degrade or otherwise discriminate against competitors' IP traffic. Commenters claim that the merger increases the potential for three forms of "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.⁴¹⁵ Such actions by the merged entity would allegedly place competing providers at a significant competitive disadvantage as to quality of service.⁴¹⁶

⁴¹³ We note that SBC's network is sufficiently robust to qualify as a settlement-free peer with [REDACTED]. SBC Info. Req. at 72 ([REDACTED]). SBC's [REDACTED]. See SBC Info. Req. at 97 (indicating that based on successful completion of trials with [REDACTED]). SBC had also entered into trial peering with [REDACTED]. SBC Info. Req. at 98. In addition, SBC continues to build its domestic and global backbone network. SBC has opened points of presence in Europe in order to satisfy the requirements of many of the international Internet backbone providers that a prospective peer be able to interconnect at multiple geographic locations both inside and outside the United States. SBC expected [REDACTED]. SBC/AT&T Info. Req. at 97.

⁴¹⁴ ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 354-62 (5th ed. 2000).

⁴¹⁵ See, e.g., Vonage Comments at 14 (describing possible broadband discrimination); EarthLink Collins Decl. at paras. 5-6 (describing possible methods of programming routers to discriminate against competing service providers, such as by disconnecting networks that carry particular types of traffic or creating "queues" that give a lower priority to competing service providers' traffic); Vonage Comments at 1, 14 (expressing concerns about broadband discrimination based in part on a March 2005 Consent Decree between Madison River Communications and the Commission's Enforcement Bureau concerning the company's practice of port blocking, such that all of the communications generated by Vonage customers were blocked, and citing *Madison River Communications, LLC and Affiliated Companies*, File No. EB-05-1H-0110, DA 05-543 (EB rel. March 3, 2005)).

⁴¹⁶ Vonage Comments at 14. Vonage claims that while cable providers have committed not to block customer access to new innovative IP applications, SBC has waffled on its commitments in this area and opposes conditions that would preclude it from discriminating in price, terms, conditions or quality of service to customers that chose to (continued....)

142. We are generally unpersuaded that commenters' concerns are sufficiently merger specific and that the merged entity is likely to pursue the alleged strategies. First, we note that no commenter has alleged that SBC (or AT&T) currently engages in packet discrimination or degradation.⁴¹⁷ Second, to the extent that commenters allege that packet degradation or discrimination could occur using AT&T's backbone, we find it unlikely that the merged SBC/AT&T would have the incentive to engage in such conduct. We acknowledge that, in theory, the merger could give the merged company an incentive to degrade or discriminate against the IP traffic of its retail competitors. On the other hand, we agree with the Applicants 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.⁴¹⁸ Consequently, we believe that these countervailing incentives make it unlikely that the merged company would choose to engage in packet discrimination or degradation of IP traffic.

143. Third, it is not clear that the merged company would be able effectively to discriminate or degrade competitors' IP traffic using its Internet backbone.⁴¹⁹ 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 SBC/AT&T

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purchase a competitive IP application not offered by SBC or its affiliates. *Id.* Global Crossing similarly alleges that combining SBC and AT&T, which are current competitors in the enterprise VoIP market, could have a negative impact on VoIP services. Global Crossing Comments at 22, 24.

⁴¹⁷ While the merger does not materially alter SBC's existing incentives to prefer affiliated VoIP and other IP traffic and to protect traditional voice revenues by discriminating against or degrading the traffic of competing VoIP providers, some commenters contend that SBC could currently leverage its control over last mile facilities, on which VoIP traffic terminates, to block or degrade access. *See, e.g.,* Vonage Comments at 15 (discussing possible discrimination through port blocking). That is not a merger-specific concern. Further, this general issue is the subject of a pending Commission proceeding. *See IP-Enabled Services*, 19 FCC Rcd at 4915, para. 77 (seeking comment, for example with respect to "the incentives of facilities-based IP service providers to provide network access to non-facilities-based IP service providers").

⁴¹⁸ SBC/AT&T Application at A-3 (noting that Project Lightspeed will bring next-generation integrated video, super high-speed broadband access, and voice over IP (Internet Protocol) services via a new fiber-rich network to 18 million households in its 13-state region by the year 2007); Joint Opposition at 69, note 20. Even if the merger were to increase the ability of the merged entity to engage in packet discrimination and degradation, the record indicates that such strategies are unlikely to be profitable in the long term. The relevant calculus is whether the potential benefits of packet discrimination or degradation against the merged entity's VoIP competitors (*i.e.*, potentially higher customer take rates or win-back and resulting increases in VoIP revenues) would outweigh the potential costs (*i.e.*, network administration costs and possible customer churn). *Compare* EarthLink Collins Decl. at para. 8 (discussing possible network administration costs and technical obstacles associated with a selective degradation strategy, although suggesting that some of the technical obstacles might not be that great) *with* Earthlink Aug. 26 *Ex Parte* Letter at 7-8 (selective degradation possible on current network architecture and would not be easily identified or defeated). In the race to roll out competitive, nationwide VoIP offerings, we are not convinced that the merged entity has much to gain from blocking or affirmatively degrading rival VoIP services.

⁴¹⁹ As an initial matter, although SBC's backbone is not a Tier 1 backbone, all traffic destined for its in-region Internet access and other Internet customers is carried on SBC's backbone today prior to delivery to those customers. *See* Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 2 (filed Oct. 10, 2005) (SBC/AT&T Oct. 10 *Ex Parte* Letter).

backbone.⁴²⁰ 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.⁴²¹ Thus, in the absence of affirmative efforts to degrade a competitor's traffic, queuing and packet prioritization is likely to yield only very small increases in latency and packet loss in many cases.⁴²²

144. Finally, we take further comfort in the Applicants' commitment to conduct business in a manner that comports with the principles set forth in the Commission's September 23, 2005 Policy Statement designed to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers.⁴²³ Because we find that this commitment will serve the public interest, we accept it and adopt it as a condition of our merger approval.

145. *Special Access and the Internet Backbone Market.* Several commenters maintain that the merged firm will have an incentive to leverage its alleged market power in the special access market to gain a competitive advantage in the backbone and broadband markets.⁴²⁴ As noted above, the issue of competition in the special access market is currently being addressed in two ongoing rulemaking proceedings, which will allow the Commission to address any competitive issues on a full record on an industry-wide basis.⁴²⁵

F. Wholesale Interexchange Competition

146. We find that the merger is not likely to result in anticompetitive effects in the wholesale interexchange services market. We conclude that the market will remain competitive post-merger, due primarily to the presence of extensive competitive national networks with excess capacity.

⁴²⁰ See, e.g., EarthLink Aug. 26 *Ex Parte* Letter at 4 (explaining that while VoIP calls are routed in a variety of ways today, EarthLink currently routes VoIP calls solely over Level 3's backbone until they are handed off to the PSTN); Letter from J.G. Harrington, Counsel for Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 4 (filed July 28, 2005) (describing Cox's use of dedicated facilities, rather than the public Internet, for its provision of VoIP services). EarthLink speculates that within two years VoIP providers might choose to route 50% of VoIP traffic between Internet backbones. See, e.g., EarthLink Aug. 26 *Ex Parte* Letter at 4-5. While we find it fundamentally speculative that VoIP providers necessarily will choose to pursue the approach EarthLink proposes, we note in any event that we find it unlikely that the merged entity would have the incentive to engage in such conduct.

⁴²¹ See, e.g., Broadwing and SAVVIS Wilkie Decl. at para. 6 (noting the excess capacity held by Internet backbone providers).

⁴²² EarthLink, for example, asserts that a backbone provider might assign competing VoIP traffic to a "queue" that results in those packets being delivered only after all the other queues are empty. EarthLink Collins Decl. at para. 7. To the extent that there is excess capacity, however, the other queues will quickly empty, and there will be little or no delay for the competing VoIP traffic, absent some affirmative efforts to delay that traffic. Cf. *id.* (noting that the backbone provider might choose to implement this queuing process only in certain circumstances, such as high-traffic periods).

⁴²³ See SBC Oct. 31 *Ex Parte* Letter, Attach. at 4; see also Appendix F.

⁴²⁴ See, e.g., Broadwing and SAVVIS Petition at 52-53; CompTel/ALTS Petition at 33; Consumer Federation *et al.* Petition at 24; Global Crossing Comments at 6, 9; BT Americas White Paper at 13-14.

⁴²⁵ See discussion *supra* at Part V.B (Wholesale Special Access Competition).

1. Relevant Markets

a. Relevant Product Markets

147. The Commission previously has identified wholesale domestic, interstate, interexchange (*i.e.*, long distance) services as a separate product market,⁴²⁶ although it has not always found it necessary to conduct a separate analysis of that product market.⁴²⁷ In light of concerns raised by some commenters, we address here the impact of the proposed merger on the market for wholesale long distance services.

b. Relevant Geographic Markets

148. Consistent with our definition of the relevant geographic markets for retail enterprise and retail mass market services,⁴²⁸ we conclude that the relevant geographic market for wholesale long distance services is the customer's location.⁴²⁹ We then aggregate locations where customers face similar competitive choices. Since all the major providers of wholesale long distance services have nationwide networks,⁴³⁰ we can aggregate customers of wholesale long distance service who are located throughout the United States. Moreover, wholesale long distance customers generally need to connect to the wholesale long distance provider at multiple locations throughout the United States. Consequently, we find it appropriate to aggregate customer locations and evaluate wholesale long distance services at the national level.⁴³¹

2. Competitive Analysis

149. The record does not support the contention of some commenters that the Applicants, unilaterally or in conjunction with the proposed Verizon/MCI entity, will be able to exercise market power to discriminate against retail competitors by withdrawing, in whole or in part, from the wholesale long

⁴²⁶ See, e.g., *WorldCom/MCI Order*, 13 FCC Rcd at 18041-42, para. 28.

⁴²⁷ *Id.*

⁴²⁸ See *supra* Parts V.C (Retail Enterprise Competition), V.D (Mass Market Competition).

⁴²⁹ We note that individual customers of wholesale long distance services are, like larger, multi-location enterprise customers, likely to require access to service at multiple geographic locations, often throughout the United States or a region thereof. See *supra* Part V.C (Retail Enterprise Competition).

⁴³⁰ See, e.g., Jeff Halpern, U.S. Telecom: Wholesale Segment is Declining, but Still Significant at 2 (Bernstein Research, 2005) (Bernstein Wholesale Report), in Letter from Peter J. Schildkraut, Counsel for SBC, to Gary Remondino, Wireline Competition Bureau, FCC, WC Docket No. 05-65 (filed June 6, 2005) ([REDACTED]); AT&T Info Req., ATT598001453-78 at 598001453-72 ([REDACTED]).

⁴³¹ We note that this approach is consistent with our definition of the relevant geographic markets for larger multi-location enterprise customers with a nationwide presence and for Tier 1 Internet backbone providers. See *supra* Parts V.C (Retail Enterprise Competition), V.E (Internet Backbone Competition). We reject the suggestion that the Commission examine specific routes in the SBC region on which AT&T and SBC have overlapping facilities. See Qwest Bernheim Decl. at para. 51; CompTel/ALTS Reply at 7 n.27; Cox Comments at 15-16. First, SBC currently does not own any long distance facilities in or out of its region, but instead purchases and resells long distance transport from independent providers such as WilTel. See SBC Info. Req. at 79. The merger will not, therefore, result in ownership of overlapping long distance facilities in the SBC region. Further, the merger will not lead to horizontal concentration on those routes where AT&T is currently the sole provider of interexchange transport.

distance market or by providing wholesale long distance service on discriminatory terms or conditions.⁴³² The record suggests that AT&T accounts for a declining portion of wholesale long distance revenues and minutes of transport due to significant competition from multiple other facilities-based long distance service providers.⁴³³ The evidence of wholesale long distance competition is consistent with prior Commission findings that Sprint, Qwest, Level 3, and others have a significant presence in this market.⁴³⁴ As a result, the Applicants' ability to discriminate against their retail competitors will be highly constrained, contrary to the concerns of some commenters.⁴³⁵ Further, as the Commission has found previously, it would not be economically rational for the Applicants to attempt to discriminate against rival providers of retail long distance service if the wholesale market is highly competitive and there are numerous competing wholesale providers ready and able to supply those rivals.⁴³⁶

150. The evidence in the record further demonstrates that there is significant spare capacity in this market.⁴³⁷ In addition, the evidence shows that this industry segment faces increasing pressure from the migration of minutes to packet-switched voice services, Internet-based applications, and other technological substitutes,⁴³⁸ suggesting further reductions in AT&T's presence in this market and increasing excess capacity by its competitors. Indeed, given that SBC currently represents approximately

⁴³² See, e.g., United States Cellular Comments at 3-4, Independent Alliance Comments at 2-4; T-Mobile Reply at 12-14.

⁴³³ AT&T Info. Req., ATTFCC02257-313 ([REDACTED]).

⁴³⁴ See, e.g., Bernstein Wholesale Report at 2 ([REDACTED]); AT&T Info Req., ATT598001453-78 at 598001453-72 ([REDACTED]); see also *AT&T Non-Dominance Order*, 11 FCC Rcd at 3308, paras. 70, 72; *WorldCom/MCI Order*, 13 FCC Rcd at 18052-56, 18066-7, paras. 43-50, 70. Because we find there exists sufficient excess capacity in this market, we decline to impose non-structural conditions such as those suggested by United States Cellular and T-Mobile. See United States Cellular Comments at 2-5; T-Mobile Reply at 13-14.

⁴³⁵ See *supra* note 432. We reject as fundamentally speculative commenters' concerns that other BOCs will acquire the remaining independent facilities-based interexchange carriers. See ACN *et al.* Aug. 10 *Ex Parte* Letter, Attach. at 6. No such mergers are pending before the Commission and, in any event, the Commission could address any concerns arising from such mergers when, and if, they are presented to the Commission for approval.

⁴³⁶ See *WorldCom/MCI Order*, 13 FCC Rcd at 18066-67, para. 70 (“[E]ven a long distance carrier with a large retail customer base will have an incentive to provide wholesale services to resellers if the reseller can obtain these services on favorable terms from other providers.”) (footnote omitted). For the same reasons, we find the concerns of United States Cellular regarding the sharing of “call detail” or other “competitively sensitive information” between AT&T, SBC and their wireless affiliate unconvincing. See United States Cellular Comments at 3. To the extent United States Cellular or other parties have concerns, they should be able to negotiate an appropriate arrangement with a competitive provider of wholesale long distance services. Further, although United States Cellular has not identified the nature of the information it seeks to protect with great specificity, we note that § 222(b) of the Act provides all carriers with certain protections. See 47 U.S.C. § 222(b).

⁴³⁷ See, e.g., Bernstein Wholesale Report at 2 ([REDACTED]); Level 3 Communications, Inc., SEC Form 10-K at 18 (filed March 16, 2005) (“The result of [high competitive entry] was an oversupply of capacity and an intensely competitive environment.”) available at <http://www.sec.gov/Archives/edgar/data/794323/000104746905006668/a2153221z10-k.htm>; Leucadia National Corp., SEC Form 10-K at 44 (filed March 14, 2005) (stating that “telecommunications capacity far exceeds actual demand and the marketplace is characterized by fierce price competition. . . .”) (Leucadia 2005 10-K), available at http://www.sec.gov/Archives/edgar/data/96223/000090951805000159/jd3-14_new10k.txt.

⁴³⁸ See, e.g., Bernstein Wholesale Report at 2-3; AT&T Info. Req., ATTFCC02915-51 at 02932-34.

70 percent of WilTel's long distance revenue, the migration of SBC's long distance traffic to the AT&T network will free significant capacity on the network of a national facilities-based wholesale long distance provider.⁴³⁹ Therefore, there should be more than sufficient capacity among the remaining independent providers of facilities-based wholesale long distance services to accommodate any carrier that cannot obtain satisfactory service from the Applicants.⁴⁴⁰ This evidence of continued competition from a variety of wholesale interexchange service providers convinces us that the merger is unlikely to result in anticompetitive effects through either unilateral effects or coordinated interaction.

151. Finally, the record does not support the contention of some commenters that the Applicants, unilaterally or in conjunction with the proposed Verizon/MCI entity, will adversely affect the viability of the wholesale interexchange market by eliminating SBC as a purchaser of wholesale long distance services.⁴⁴¹ While the merger likely will gradually eliminate SBC as a purchaser of wholesale long distance service over the next five years,⁴⁴² this primarily will impact only WilTel, SBC's primary wholesale provider of long distance services – not the market as a whole.⁴⁴³ Further, as this process will take some time, affected carriers will have an opportunity to seek other customers.⁴⁴⁴ As the Commission has noted previously, “[o]ur statutory duty is to protect efficient competition, not competitors.”⁴⁴⁵

152. Based on the foregoing, we find that the merger is not likely to result in anticompetitive effects in the wholesale segment of the domestic, interstate, interexchange market.

⁴³⁹ Leucadia 2005 10-K at 2, 10-11 (“SBC Communications Inc. (‘SBC’), a major communications provider in the U.S., is WilTel’s largest customer, accounting for 70% of the Network segment’s 2004 operating revenues. On January 31, 2005, SBC announced that it would buy AT&T Corp., and announced its intention to migrate the services provided by WilTel to the AT&T network.”).

⁴⁴⁰ Qwest Bernheim Decl. at para. 54 (“Even with [the SBC/AT&T and Verizon/MCI] mergers, significant independent long distance transport capacity would remain.”).

⁴⁴¹ See, e.g., ACN *et al.* Comments at 29-30; CompTel/ALTS Reply at 6; CompTel/ALTS Reply, Reply Declaration of Lee L. Selwyn (CompTel/ALTS Selwyn Reply Decl.) at paras. 29-32.

⁴⁴² See SBC SEC Form 8-K (filed June 15, 2005) available at <http://www.sec.gov/Archives/edgar/data/732717/000073271705000325/wiltel.htm>; Leucadia National Corp., SEC Form 8-K at 1 (filed January 25, 2005).

⁴⁴³ SBC/AT&T Reply at 79-80.

⁴⁴⁴ Leucadia 2005 10-K at 44 (“WilTel expects it will take anywhere from two to three years from now for SBC to migrate all of its traffic off of WilTel’s network, and anticipates that it will continue to provide some level of service to SBC into 2007.”)

⁴⁴⁵ *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company*, File Nos. 00762-CL-AL-1-95 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-1-95; 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)).

G. U.S. International Services Competition

153. In this section we consider the competitive effects of the proposed merger in the markets for U.S. international services.⁴⁴⁶ 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.

154. While there exist specific differences between domestic and international long distance telecommunications services, both types of services reflect fundamental similarities. As with access to domestic long distance telecommunications, mass market customers may presubscribe to a stand-alone domestic long distance telecommunications carrier that includes access to international telecommunications services; select a provider of bundled local and long distance service that includes access to international long distance telecommunications; or use prepaid calling cards, dial-around carriers, VoIP carriers, or wireless telecommunications carriers. In contrast to domestic long-distance service, however, mass market customers of international long distance telecommunications generally appear more willing to access carriers other than their presubscribed carrier through the use of prepaid calling cards and dial-around services.

155. The expressed preferences of international mass market telecommunications users reflect several distinct attributes of international telecommunications that differ from domestic long distance telecommunications. Specifically, because international routes differ in terms of traffic capacity, competition, and government regulation, the wholesale cost and consequently retail price of calls to different international destinations vary. For example, the cost to terminate international services – the settlement rate – varies for each market and is usually higher than that for domestic services. Because of this, consumer preferences for access to international long distance telecommunications will differ from consumer preferences for domestic long distance telecommunications, notwithstanding the fact that the *same* modes of access are available for either domestic or international long distance telecommunications.

156. There generally appear to be few barriers to entry into the international long distance telecommunications industry for either facilities-based or resale entrants. Resale entrants, in particular, face relatively modest costs of market entry as evidenced by the presence of approximately 770 international telecommunications resellers. These low entry barriers make it unlikely that SBC will be able to raise price or restrict output after the merger.

157. We examine below three separate end-user product markets: the mass market, enterprise market, and global telecommunications market. 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 international message telecommunications service (IMTS) and private line service. Input markets, particularly international

⁴⁴⁶ 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 but are billed by a U.S. carrier, such as international calling card or prepaid card calls. This proceeding includes thirteen applications to transfer control of licenses and authorizations covering the provision of U.S. international services and the underlying facilities used to provide them: eight international 214 authorizations, one submarine cable landing license, one international public fixed license, and three earth station authorizations. See File Nos. ITC-T/C-20050222-00079, ITC-T/C-20050222-00080, ITC-T/C-20050222-00081, ITC-T/C-20050222-00082, ITC-T/C-20050222-00083, ITC-T/C-2005022-00071, ITC-T/C-2005022-00072, ITC-T/C-2005022-00073 (International Section 214 Applications); SCL-T/C-20050222-00002 (Submarine Cable Application); SES-T/C-20050224-00233 (International Public Fixed Application); SES-T/C-20050224-00230, SES-T/C-20050224-00231, SES-T/C-20050224-00232 (Earth Station Applications).

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. We also examine the Applicants' affiliations with foreign carriers.

1. International Transport Market

158. International transport refers to the international physical transmission paths carriers use to offer services between the United States 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.⁴⁴⁷ We need not conduct an analysis of the international transport market here, however, because neither SBC nor any of its affiliates own or control international facilities.⁴⁴⁸ Rather, these carriers only provide international service through the resale of other carriers' facilities.⁴⁴⁹ The Applicants specifically state that SBC holds no interests in submarine cable landing licenses and no indefeasible rights of use or other ownership interest in any international submarine cable.⁴⁵⁰ Moreover, no commenter has contested this assertion, and we have no other evidence to suggest that SBC may control such ownership interests. Further, we note that neither AT&T nor SBC holds any ownership interest in satellite systems or satellite transponder capacity. Accordingly, we find that the merger will not likely have anticompetitive effects in the market for international transport capacity.

2. Intermediate Facilities-Based Markets

159. 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 – a wholesale sector in which carriers can buy and sell bulk IMTS minutes and a retail sector in which carriers sell minutes to “end-users.” Wholesale IMTS minutes are ultimately provided by facilities-based U.S. international carriers that terminate those minutes over their own networks through interconnection agreements with their foreign correspondents.⁴⁵¹ Because SBC does not provide facilities-based IMTS, the merger will not increase concentration in these markets. Therefore, we do not analyze the wholesale

⁴⁴⁷ In 2003, submarine cables accounted for 80% of the overall active transmission capacity. Terrestrial links accounted for 18% and satellites for 1%. See International Bureau, FCC, 2003 Section 43.82 Circuit Status Data, at 13, Table 2, 19, Table 3, and 25, Table 4 (Dec. 2004) (2003 Circuit Status Report) available at www.fcc.gov/ib/pd/pf/csmanual.html; International Bureau Releases 2003 Year-End Circuit Status Report for U.S. Facilities-Based International Carriers; Capacity Use Shows Healthy Growth, News Release (IB Dec. 23, 2004), at 1.

⁴⁴⁸ A traditional analysis of the international transport market would focus on submarine cable capacity because most international service is transmitted over submarine cables, but it would also look at satellite capacity and the terrestrial links on the U.S.-Canada and U.S.-Mexico routes. See, e.g., *WorldCom/MCI Order*, 13 FCC Rcd at 18072-74, paras. 82-85.

⁴⁴⁹ SBC Info. Req. at 126.

⁴⁵⁰ SBC/AT&T Application at 115.

⁴⁵¹ Approximately 80% of all facilities-based IMTS minutes are sold to other carriers, which then resell them to end users or to other resellers. See Strategic Analysis and Negotiations Division, International Bureau, FCC, 2003 *International Telecommunications Data* at 1 (January 2005) (2003 Section 43.61 Report) available at <http://www.fcc.gov/ib/sand/mniab/traffic/>. 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.

facilities-based market as a part of this merger analysis. Similarly, because SBC does not provide international private line service, we need not analyze the international private line services market.

3. End-User Markets

a. Mass Market

160. 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.⁴⁵² 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 IMTS mass market facilitate entry and will ensure that the market remains competitive.

161. As discussed above, a mass market customer's presubscribed interexchange carrier and/or wireless carrier will be the presubscribed carrier for both the domestic and international long distance calls placed by that customer.⁴⁵³ Presubscription, however, is not as important a factor in a consumer's choice of an IMTS provider as it is for determining his choice of a domestic long distance provider. Because international calls are relatively more expensive than domestic long distance calls, consumers who use a large amount of international telecommunications services often choose IMTS providers other than their presubscribed carrier by using "dial-around" service or prepaid calling cards, which often are significantly less expensive.⁴⁵⁴ The facts that IMTS resale comprises such a large portion of IMTS minutes, and dial-around carriers and prepaid cards make up a high proportion of IMTS resale, suggest that many consumers approach IMTS as an "a la carte" service often purchased from providers other than their presubscribed carrier, including independent resellers.⁴⁵⁵

162. In addition, the IMTS mass market is not highly concentrated. There are approximately 40 facilities-based carriers and approximately 770 resellers providing IMTS service. Many of these carriers offer service on all or most international routes and sell directly to residential and small business customers. Major market participants include MCI, AT&T, IDT Corporation, and Sprint, as well as a number of other highly active, facilities-based carriers and resellers.⁴⁵⁶ Within the last several years, AT&T, MCI, and Sprint have begun focusing on the provision of wholesale IMTS to resale carriers. Many smaller, highly competitive resellers also have entered in recent years to compete against the

⁴⁵² 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 included as participants in this market. *Cf. supra* Part V.D (Mass Market Competition). We further find that wireless providers of IMTS should be included in this market.

⁴⁵³ *See supra* Part V.D (Mass Market Competition).

⁴⁵⁴ Based on a study in the record of this proceeding, international prepaid minutes constituted approximately [REDACTED]% of total end-user international minutes for 2003. *See, e.g., Atlantic ACM Excerpt at 9; 2003 Section 43.61 Report* (sum of world total minutes in Tables 41 and 42).

⁴⁵⁵ In 2003, U.S. end-user customers purchased approximately 37 billion IMTS minutes. *See 2003 Section 43.61 Report*, Tables 41 and 42. Resellers reported approximately 35 billion IMTS minutes in 2003, although this figure includes substantial double-counting. *Id.* at Table D. Resold IMTS is mostly, but not entirely, provided as a non-presubscribed service, such as prepaid calling cards or "dial-around."

⁴⁵⁶ *See 2003 Section 43.61 Report*, Tables A, D.

traditional carriers in the provision of mass market IMTS. As a result, the traditional international carriers no longer hold the substantial market shares in the IMTS mass market that they once held. Although SBC has the most presubscribed lines of any carrier within its footprint, SBC operates exclusively as a reseller in the IMTS mass market [REDACTED].⁴⁵⁷ The fact that SBC sold only [REDACTED]⁴⁵⁸ minutes in 2004 is evidence that it possesses only a limited share of mass market IMTS within its footprint.⁴⁵⁹ Given such a competitively dynamic environment, we find that the merger is not likely to result in anticompetitive effects in the IMTS mass market.

163. We also find that various structural characteristics of the IMTS mass market will ensure that the market remains competitive. As explained above, 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, as discussed above, 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 presence of approximately 770 resellers nationwide demonstrates that successful entry into the IMTS mass market is feasible even for smaller, non-facilities-based carriers.

b. Enterprise Market

164. 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.⁴⁶⁰ Further, SBC states that it generally does not compete for businesses where more than half of the customers’ locations are outside the SBC footprint or where more than 20 percent of the customer’s traffic is international.⁴⁶¹ In light of these facts and the fact that SBC does not provide facilities-based

⁴⁵⁷ SBC Info. Req. at 174-75, 178 (unredacted).

⁴⁵⁸ SBC Info. Req., Exh. 21(b)(3).

⁴⁵⁹ An extremely rough upper bound on SBC’s market share can be derived as follows: Nationwide, end-user IMTS minutes totaled approximately 37 billion minutes in 2003. *See 2003 Section 43.61 Report*, Tables 41, 42. Reflecting growth in traffic, it is likely that volume grew to approximately 40 billion end-user IMTS minutes in 2004. The proportion of residential and small business minutes to total end-user minutes is approximately 60%, so that the residential market in 2004 consists of approximately 24 billion minutes nationwide. Because SBC has approximately 31% of total U.S. local loops in its footprint, we estimate that approximately 7.4 billion residential minutes were sold by all carriers in the SBC footprint in 2004. As mentioned above, SBC reported [REDACTED] end-user minutes in 2004. *See supra* note 458. If all of SBC’s minutes are residential and small business minutes (*i.e.*, if SBC sells *no* IMTS to large businesses) then it has approximately [REDACTED]% of the mass market in its footprint. This is an upper limit on SBC’s mass IMTS market share.

⁴⁶⁰ *See supra* Part V.C (Retail Enterprise Competition).

⁴⁶¹ SBC/AT&T Kahan Decl. at para. 27.

international services, we conclude that SBC's merger with AT&T is not likely to result in anticompetitive effects.

c. Global Telecommunications Services

165. 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 United States. These customers are generally large multi-national corporations that have significant expertise in telecommunications issues.⁴⁶² 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, characteristics, features, and capabilities wherever they are provided.”⁴⁶³

166. We are not persuaded by BT Americas' claims that the proposed transaction will result in anticompetitive effects in the provision of global telecommunications services.⁴⁶⁴ BT Americas' primary argument is that the merger would increase SBC's control over special access services for enterprise networks, a critical input for GTS.⁴⁶⁵ We have already addressed the wholesale special access issue in this Order.⁴⁶⁶ We do not find any unique characteristics with respect to the application of special access to GTS that warrant a different conclusion as to that market.

167. We also reject the contention of BT Americas and CompTel/ALTS that the merger will remove a potential competitor in the GTS market.⁴⁶⁷ The Applicants claim that the merger raises no horizontal concerns with respect to GTS. Specifically, they assert that SBC should not be considered a significant potential entrant into GTS given that SBC has limited international operations, assets, and expertise, and has concentrated on serving domestic U.S. business customers with locations predominantly located within its footprint. The Applicants also note that SBC does not attempt to win bids when 20 percent or more of the traffic involved is international.⁴⁶⁸ Since SBC has limited international operations, we find

⁴⁶² See *AT&T/British Telecom Order*, 14 FCC Rcd at 19151-57, paras. 22-39.

⁴⁶³ *AT&T/British Telecom Order*, 14 FCC Rcd at 19153, para. 28; see also, e.g., *Sprint Corporation, Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended*, File No. I-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).

⁴⁶⁴ See generally BT Americas Reply at 3-21; see also CompTel/ALTS Petition at 25 (stating that the merger would harm consumers by eliminating SBC as a significant new competitor of AT&T in the provision of global enterprise services, at least within SBC's footprint).

⁴⁶⁵ BT Americas Reply at 7-20.

⁴⁶⁶ See *supra* Part V.B (Wholesale Special Access Competition).

⁴⁶⁷ BT Americas Reply at 3-7; see also CompTel/ALTS Petition at 25 (stating that the merger would harm consumers by eliminating SBC as a significant new competitor of AT&T in the provision of global enterprise services, at least within SBC's footprint).

⁴⁶⁸ See SBC/AT&T June 2 *Ex Parte* Letter at 4; SBC/AT&T Kahan Decl. at para. 27.

that SBC does not have a unique competitive advantage as a potential entrant in the GTS market. To the extent that SBC could serve to constrain the exercise of market power as an entrant, other firms, some with more international assets and operations, and thus more suited to entry into the GTS market than SBC, would continue to exert a restraining influence, or, if entry would become profitable, would recognize the opportunity to enter. For these reasons we also are not persuaded that the SBC/AT&T merger, taken in combination with the proposed merger of Verizon and MCI, would likely result in anticompetitive effects in the GTS market.

4. Foreign Carrier Affiliations

168. As a part of our public interest analysis under section 214(a) of the Act, we also consider whether, upon consummation of the proposed transfers of control, the international section 214 authorization holders will become affiliated with a foreign carrier that has market power on the foreign end of a U.S. route that the international section 214 authorization holders have the authority to serve pursuant to the authorizations that will be transferred.⁴⁶⁹ Under rules adopted in the *Foreign Participation Order*, the Commission classifies a U.S. carrier as “dominant” on a particular international route if it is, or is affiliated with, a foreign carrier that has market power on the foreign end of that route.⁴⁷⁰ Similarly, under section 1.767(a)(8) and (a)(11) and section 1.768 of the Commission’s rules, a submarine cable licensee that proposes to transfer control of an interest in a submarine cable landing license granted pursuant to the Cable Landing License Act is required to disclose if it will become affiliated with a foreign carrier as a result of the transfer of control.⁴⁷¹ The Commission applies competitive safeguards to a cable landing license held by a licensee that is, or is affiliated with, a carrier with market power in relevant input markets on the foreign end of the cable that could result in harm to competition in the U.S. market.⁴⁷² Neither SBC nor AT&T is currently affiliated with any foreign carrier that has market power

⁴⁶⁹ 47 U.S.C. § 214(a). For international section 214 applicants, the terms “affiliated” and “foreign carrier” are defined in section 63.09 of the Commission’s rules. 47 C.F.R. § 63.09.

⁴⁷⁰ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23969-70, 23987, 23991-99, paras. 177-78, 215, 221-39 (1997) (*Foreign Participation Order*). A carrier classified as dominant on a particular U.S. international route due to an affiliation with a foreign carrier that has market power on the foreign end of the route is subject to specific international dominant carrier safeguards set forth in section 63.10 of the rules. See 47 C.F.R. § 63.10(c), (e). These safeguards are designed to address the possibility that a foreign carrier with control over facilities or services that are essential inputs for the provision of U.S. international services could discriminate against rivals of its U.S. affiliates. In the *Foreign Participation Order*, the Commission concluded that these safeguards, in conjunction with generally applicable international safeguards, are sufficient to protect against vertical harms by carriers from World Trade Organization (WTO) Member countries in virtually all circumstances. In the exceptional case where an application poses a very high risk to competition in the U.S. market – where the standard safeguards and additional conditions would be ineffective – the Commission reserves the right to deny the applications. *Foreign Participation Order*, 12 FCC Rcd at 23913-14, para. 51.

⁴⁷¹ 47 C.F.R. §§ 1.767(a)(8), (a)(11), 1.768; see also 47 U.S.C. §§ 34-39; Exec. Ord. No. 10530 § 5(a), reprinted as amended in 3 U.S.C. § 301. For submarine cable applicants, the terms “affiliated” and “foreign carrier” are defined as in § 63.09 of the Commission’s rules, 47 C.F.R. § 63.09, except that the term “foreign carrier” also shall include any entity that owns or controls a cable landing station in a foreign market. See Note to § 1.767, 47 C.F.R. § 1.767.

⁴⁷² 47 C.F.R. § 1.767(l), 1.768(f); see also *Submarine Cable Report and Order*, 16 FCC Rcd at 22180, para. 25. Relevant foreign carrier input markets include those facilities or services for the landing, connection, or operation of submarine cables. *Submarine Cable Report and Order*, 16 FCC Rcd at 22180, para. 23. The Commission found that these competitive safeguards should be sufficient in all but the most exceptional of circumstances to detect and (continued....)

on the foreign end of a U.S.-international route.⁴⁷³ We therefore need not impose our dominant carrier safeguards as part of our approval of the merger.⁴⁷⁴

169. Both SBC and AT&T have ownership interests in foreign carriers that compete in Mexico, the second largest U.S.-international route.⁴⁷⁵ SBC has an ownership interest in, and a close working relationship with, Telefonos de Mexico, S.A. de C.V. (Telmex) and its affiliates.⁴⁷⁶ AT&T has an ownership interest in Alestra S. de R.L. de C.V. (Alestra), which provides service in Mexico under the AT&T brand name, and also has two indirect subsidiaries that provide service in Mexico – AT&T Global Network Services Mexico S. de R.L. de C.V. (AGNS Mexico) and AT&T de Mexico S.A. de C.V. (AT&T Mexico).⁴⁷⁷ Each of these carriers competes directly with Telmex.⁴⁷⁸ Neither carrier is classified as dominant on the U.S.-Mexico route, however. Although Telmex is the incumbent carrier and has market power in Mexico,⁴⁷⁹ SBC's ownership interest is below the threshold to be considered an affiliate of Telmex. Alestra, AGNS, and AT&T Mexico do not have market power in Mexico. Consequently, the dominant carrier safeguards do not currently apply to AT&T or SBC on the U.S.-Mexico route. SBC's ownership interest in Telmex will not increase due to the merger and therefore dominant carrier status will continue not to be applicable.

170. We do not find any evidence in the record that demonstrates that this merger will likely have anticompetitive effects for U.S. consumers on the U.S.-Mexico route. However, if in the future we find, based on an investigation initiated by a complaint or on our own initiative, that the combined SBC/AT&T

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deter any anti-competitive behavior associated with market power in WTO Member markets where U.S.-licensed cable systems land and operate. *Id.*

⁴⁷³ See SBC/AT&T Application at 115.

⁴⁷⁴ Under the rules, the carriers must notify the Commission if they subsequently become affiliated with a foreign carrier. 47 C.F.R. §§ 1.768, 63.11. If that foreign carrier has market power on the foreign end of the relevant U.S.-international route, the safeguards will apply. See 47 C.F.R. §§ 1.767(l), 63.10(c).

⁴⁷⁵ 2003 Section 43.61 Report, Table A1 (in 2003 there were over 4.7 billion minutes of service on the U.S.-Mexico route).

⁴⁷⁶ SBC has an equity and voting interest in Telmex. SBC's interest in Telmex is held through a trust and under the Trust agreement, its shares must be voted in accordance with Carso Global Telecom, the controlling stockholder of Telmex, except regarding the election of the directors and the members of the Executive Committee. SBC has the right to appoint [REDACTED] out of the 18 members of the Telmex board of directors, and one member of the Executive Committee. SBC and Telmex have also entered into a Management Services Agreement. SBC Info. Req. at 169 -70 (unredacted). SBC has also entered into a Joint Marketing Agreement with Telmex USA, LLC, a wholly-owned subsidiary of Telmex, pursuant to which SBC assists Telmex USA in marketing two types of Telmex prepaid calling cards that bear the SBC logo. *Id.* at 166-67.

⁴⁷⁷ AT&T Info. Req. at 70-73.

⁴⁷⁸ *Id.* at 71-72.

⁴⁷⁹ See *The International Bureau Revises and Reissues the Commission's List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, 19 FCC Rcd 20385 (IB 2004).

is acting in an anti-competitive manner on the U.S.-Mexico route, or any other U.S.-international route, we have the authority to take appropriate actions to protect U.S. consumers.⁴⁸⁰

H. SBC's Qualifications to Acquire Control of AT&T's Licenses

171. As previously noted, section 310(d) of the Communications Act provides that no station license may be 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."⁴⁸¹ 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."⁴⁸² 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.⁴⁸³ In making this determination, 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. In this proceeding, no issues have been raised with respect to the basic qualifications of AT&T, and we thus find that AT&T has the requisite qualifications. Conversely, section 310(d) requires the Commission to consider whether SBC, the proposed transferee, is qualified to hold a Commission license.⁴⁸⁴

172. 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.⁴⁸⁵ 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.⁴⁸⁶ 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.⁴⁸⁷

⁴⁸⁰ See, e.g., 47 U.S.C. §§ 151, 201, 202, 203, 204, 205, 208, 214.

⁴⁸¹ 47 U.S.C. § 310(d).

⁴⁸² *SBC/SNET Order*, 13 FCC Rcd at 21305, para. 26.

⁴⁸³ See 47 U.S.C. § 310(d); 47 C.F.R. §§ 1.948, 25.119.

⁴⁸⁴ See *SBC/BellSouth Order*, 15 FCC Rcd at 25465, para. 14.

⁴⁸⁵ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20092-93, para. 236.

⁴⁸⁶ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209-10 at para. 57 (1986) (*Character Qualifications*), *modified*, 5 FCC Rcd 3252 (1990) (*Character Qualifications Modification*), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 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 is relevant to the Commission's public interest analysis. *SBC/SNET Order*, 13 FCC Rcd at 21306-07, paras. 28-30.

⁴⁸⁷ See, e.g., *SBC/SNET Order*, 13 FCC Rcd at 21305, para. 26; *Bell Atlantic/NYNEX Order*, 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*, FCC 05-148 at paras. 24-25.

173. We disagree with commenters that we should reevaluate concerns regarding SBC's character qualifications that already were addressed and rejected in the *Cingular/AT&T Wireless Order*.⁴⁸⁸ We likewise disagree with commenters who question SBC's character qualifications by pointing to the fact that SBC has entered into consent decrees with the Commission as a result of its past record of non-compliance with merger conditions and other rules intended to prevent anticompetitive behavior.⁴⁸⁹ The Commission has previously stated that consent decrees that are voluntarily entered into do not call into question a carrier's authority to hold Commission licenses and authorizations.⁴⁹⁰

174. We likewise reject the claims of commenters expressing concerns about SBC's character qualifications based on its exercise of its legal rights, such as petitioning courts and regulatory bodies.⁴⁹¹ 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."⁴⁹²

175. We also do not agree with commenters' alleged character concerns based upon specific, unresolved disputes with the Applicants.⁴⁹³ Some of the alleged violations of the Act or Commission

⁴⁸⁸ See, e.g., *Cbeyond et al.* Comments at 10-19; *Cox* Comments at 7-8; and *CompTel/ALTS* Petition at 50-59, 61-69; *EarthLink* White Paper, Apps. B1-B6.

⁴⁸⁹ See *CompTel/ALTS* Petition at 65-66 (raising new character concerns based on consent decrees that were not previously addressed in the *Cingular/AT&T Wireless Order*).

⁴⁹⁰ See *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21550, paras. 53-54. Furthermore, we disagree with *CompTel/ALTS* that we should consider the conduct leading up to a consent decree in determining an applicant's fitness to hold a Commission license. *CompTel/ALTS* Petition at 68-69. 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 Character Qualifications Policy Statement*, 102 FCC 2d at 1205).

⁴⁹¹ See, e.g., *ACN et al.* Comments at 36 n.93 (petitioning state legislatures); *Cox* Comments at 7-8 (re-arbitrating issues before the California commission).

⁴⁹² *SBC/Ameritech Order*, 14 FCC Rcd at 14950, para. 571.

⁴⁹³ See, e.g., *ACN et al.* Comments at 74-75 (citing SBC's failure to negotiate section 271 access pursuant to the section 252 process); *Broadwing and SAVVIS* Petition at 32-33 (citing section 272 audit reports identifying minor differences in treatment); *CompTel/ALTS* Petition at 50-59 (citing SBC's pricing of section 271 switching); *Global Crossing* Comments at 22 n.55 (citing SBC's filing a voluntary TIPTop tariff for IP-enabled service providers); *Telscape* Comments at 6, 12 (citing SBC's offering temporary promotional pricing for winback purposes and its implementation of the *Triennial Review Remand Order*); *Wisconsin Local Government Telecommunications Coalition* Comments at 1-2 (stating that SBC has overcharged, misbilled, and used questionable business tactics in dealing with Wisconsin local government customers); Letter from Joshua H. Seidemann, Counsel for the Rural Alliance, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 5-6 (filed Sept. 22, 2005) (asserting that the Applicants will have advantages if a bill-and-keep system is adopted for intercarrier compensation); Letter from John M. Ryan, Assistant General Counsel/Senior Vice President, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 1 (filed Apr. 26, 2005) (seeking clarification of intercarrier compensation rules applicable to VoIP services); Letter from Patrick J. Donovan, Counsel for Neutral Tandem, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 1-3 (filed Oct. 14, 2005) (expressing concern that, post-merger, AT&T might terminate its direct connections with Neutral Tandem, based on the decision of a current SBC affiliate not to directly connect with Neutral Tandem); see also *Telecom Consultants' Coalition* (AT&T reporting of its enterprise contract prices, terms, and conditions).

rules involve legal interpretations that would apply to numerous companies in the industry. The Commission has previously declined to address in merger proceedings matters for which the public interest would be better served by addressing the matter in the broader proceeding of general applicability.⁴⁹⁴ Moreover, we also note that many allegations concerning the Applicants' conduct have been specifically rebutted by evidence proffered by the Applicants.⁴⁹⁵ We conclude that none of the foregoing allegations provides a basis for finding that SBC lacks the fitness to acquire licenses and authorizations currently held by AT&T.

176. We also do not believe that other, isolated adjudicated decisions against SBC are indicative of character concerns. We thus disagree that character concerns are raised by the California commission's determination that SBC's operations support system (OSS) did not meet applicable legal requirements or the section 271 violation by Ameritech.⁴⁹⁶ Faced with claims by Telscape that "viewed as a whole, the OSS structure and the way SBC-CA employs it create anticompetitive barriers," the California commission found that while "aspects of SBC CA's OSS implementation are not in compliance with SBC CA's legal obligations," the record did "not show that the problems are . . . pervasive or intractable," and thus the California commission required only modest remedies.⁴⁹⁷ Given these conclusions, we do not believe that this decision demonstrates that SBC is unfit to acquire AT&T's licenses. While a concern is raised by the section 271 violation, in which Ameritech partnered with interexchange carriers to offer a combined local and long distance service prior to receiving section 271 authority,⁴⁹⁸ we do not find that this past violation, standing alone, renders SBC unqualified to acquire AT&T's licenses or raises a substantial and material question of fact warranting further inquiry.

⁴⁹⁴ See *SBC/Ameritech Order*, 14 FCC Rcd 14950, para. 571; see also *SBC/SNET Order*, 13 FCC Rcd at 21306, para. 29.

⁴⁹⁵ See, e.g., *SBC/AT&T Reply* at 182-83 (unredacted) (noting that differences in treatment identified in a prior SBC section 272 audit could be attributable to a low number of observations, and that the more recent section 272 audit found no concerns that would warrant enforcement actions); *id.* at 189 (noting that the concerns about SBC's TIPTop tariff cited by Global Crossing were based on the erroneous assumption that the tariffed offering was mandatory, rather than optional for IP-enabled service providers); *id.* at 190-91 (noting that the California Public Utility Commission recently rejected claims by Telscape that SBC's winback promotional prices were predatory).

⁴⁹⁶ Telscape Comments at 11 (citing the California OSS decision, *Telscape Communications, Inc. v. Pac. Bell Tel. Co.*, Case No. 02-11.011, Decision No. 04-12-053, slip op. (Cal. P.U.C. Dec. 16, 2004) (*Telscape v. Pac. Bell*)); *CompTel/ALTS Petition* at 64 (citing the Ameritech section 271 violation, *In re MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, Memorandum Opinion and Order, 15 FCC Rcd 23184 (2000)). We note that Global Crossing also expresses concerns about SBC's line splitting performance in Michigan, based on an article in *Communications Daily* noting allegations raised in the section 271 proceeding. Global Crossing Comments at 22 n.55. As SBC notes, the Commission subsequently rejected the competitive LECs' complaints, and granted section 271 approval for Michigan. *SBC/AT&T Reply* at 189-90. Given the Commission's rejection of the claims underlying the article cited by Global Crossing, we do not believe that it gives rise to character concerns.

⁴⁹⁷ *Telscape v. Pac. Bell* at 28.

⁴⁹⁸ *SBC/AT&T Reply* at 184-85.

I. Other Issues

177. We disagree with commenters that the loss of AT&T as an advocate for competitive LEC viewpoints in state and federal regulatory proceedings justifies our designating this merger for hearing.⁴⁹⁹ As the Applicants point out, there will continue to be numerous competing carriers, trade associations, and other interested parties that remain free to express their positions in regulatory proceedings.⁵⁰⁰ Indeed, we note that dozens of commenters participated in the present proceeding, representing a variety of viewpoints.⁵⁰¹ Thus, we do not find that the loss of AT&T as an advocate of competitive LEC interests will unduly weaken the ability of competitors to participate and express their views in Commission and state proceedings.

178. Commenters similarly express concern about the loss of AT&T and SBC as carriers with significant leverage in negotiations for interconnection or for inputs used in retail services, which form the basis for agreements with smaller carriers.⁵⁰² With respect to interconnection arrangements, carriers are free to opt-in to interconnection agreements of other carriers, or to negotiate their own interconnection agreements subject to the right of arbitration as provided for by the Act.⁵⁰³ To the extent that commenters deem these procedures inadequate as a general matter, that is not appropriately addressed in the context of this merger review. With respect to wholesale inputs, we anticipate there continuing to be multiple purchasers and sellers, and reject the speculative concerns that small carriers will be increasingly disadvantaged as a result of the merger.

179. We reject NASUCA's claim that the Applicants should not only be required to comply with applicable section 272 requirements, but also that additional accounting, non-accounting, and auditing safeguards should be reinstated or imposed.⁵⁰⁴ The Applicants state that AT&T "will become a subsidiary of SBC, organized as a section 272 affiliate throughout SBC's region."⁵⁰⁵ Thus, the merger does not

⁴⁹⁹ See, e.g., CompTel/ALTS Petition at 41-47; NASUCA Comments at 16-17; New Jersey Ratepayer Advocate Comments at 23-34; Texas O.P.U.C. Comments at 6; Global Crossing Comments at 22-23, 25; United States Cellular Comments at 2. In particular, Global Crossing suggests that the Commission consider adopting a "baseball-style," alternative dispute resolution process in this proceeding because the proposed merger will diminish the diversity of voices in the telecommunications public policy arena and dramatically widen the resource gap between SBC and its competitors. Global Crossing Comments at 25. To the extent that the resources required for Global Crossing to pursue a section 208 complaint against SBC outweigh the possible benefits in particular instances, this is not a merger-specific concern to be addressed in this proceeding. Moreover, as the Applicants note, it is not clear that Global Crossing's proposed alternative to the section 208 complaint process necessarily would be superior. SBC/AT&T Reply at 165-66.

⁵⁰⁰ SBC/AT&T Reply at 160-63.

⁵⁰¹ See Appendix A.

⁵⁰² See, e.g., Cox Comments at 3-4 (interconnection agreements); Independent Alliance Comments at 4 (wholesale inputs); Letter from Genevieve Morelli, Counsel for the California Association of Competitive Telecommunications Companies, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 4-5 (filed May 16, 2005) (asserting that the SBC/AT&T and Verizon/MCI mergers, in conjunction, will shift the balance between incumbent LECs and the competitive industry).

⁵⁰³ 47 U.S.C. §§ 251, 252.

⁵⁰⁴ NASUCA Comments, Attach. at 49-51.

⁵⁰⁵ SBC/AT&T Reply at 166.

appear to raise concerns about compliance with SBC's applicable section 272 obligations.⁵⁰⁶ With respect to the additional safeguards, NASUCA cites concerns about special access discrimination as the underlying theory of harm to support such obligations. We discussed above other commenters' concerns about special access discrimination,⁵⁰⁷ and we likewise decline to impose NASUCA's proposed requirements in this proceeding.⁵⁰⁸

180. The State of Alaska expressed concern that certain federal and state obligations imposed on AT&T Alascom should continue post-merger.⁵⁰⁹ In response, the Applicants made the following commitments. First, they acknowledged that the merger does not change the carrier of last resort obligations imposed by the State of Alaska on interexchange services provided by Alascom. Second, they acknowledged that the merger will not alter the statutory and regulatory geographic rate averaging and rate integration rules that apply to Alascom. Finally, they committed to operate Alascom as a distinct, though not structurally separate, corporate entity for a period of at least two years.⁵¹⁰ Because we find these commitments will serve the public interest, we accept them and adopt them as conditions of our approval of the merger.

181. Finally, we reject the claims of APCC that the merger will harm competitively-owned payphone service providers (PSPs) through either discrimination against competitive PSPs or actions that will negatively affect payments to all payphone owners.⁵¹¹ We find these concerns speculative, and in any event we agree with the Applicants that concerns expressed by APCC are adequately addressed by existing law.⁵¹² Competitive payphone owners that believe the merged company has violated these rules

⁵⁰⁶ We note that we rejected above the competitive concerns that formed the basis for NASUCA's request for the re-imposition of section 271 or 272 requirements no longer applicable to SBC. *See supra* Part V.D (Mass Market Competition).

⁵⁰⁷ *See infra* Part V.B.2.b (Wholesale Special Access Competition – Vertical Issues).

⁵⁰⁸ *See* NASUCA Comments at 49 (expressing concern about possible special access discrimination against retail competitors).

⁵⁰⁹ Alaska Comments at 2-3. For example, these obligations include certain state carrier of last resort obligations for interexchange offerings and federal geographic rate averaging and rate integration requirements pursuant to section 254(g) of the Act. SBC/AT&T Reply at 151.

⁵¹⁰ *See* SBC Oct. 31 *Ex Parte* Letter, Attach. at 4; *see also* Appendix F.

⁵¹¹ *See generally* APCC Petition, Attach. A competitively-owned payphone is one that is not owned by a LEC.

⁵¹² *See, e.g.*, 47 C.F.R. § 64.1300 *et seq.*; *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 18 FCC Rcd 19975 (2003); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 19 FCC Rcd 21457 (2004); *see also* 47 U.S.C. § 276(2) (stating that a BOC such as SBC “(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and (2) shall not prefer or discriminate in favor of its payphone service”). We also are not persuaded by APCC that the merged entity could use completed dial-around call volume information to “provide an unwarranted competitive advantage” to SBC's payphone affiliates. We note that to the extent that the information of concern to APCC constitutes “carrier proprietary information” within the meaning of section 222(b), or to the extent that SBC's conduct would have the effect of “prefer[ring]” its payphone service within the meaning of section 276(a)(2), the Act already prohibits the behavior about which APCC is concerned. *See* 47 U.S.C. §§ 222(b), 276(a)(2). Moreover, we conclude that the likelihood of harm expressed by APCC is remote. For example, APCC has not demonstrated a (continued....)

or statutory requirements can avail themselves of the Commission's complaint process. Regarding APCC's concern that the combined company may fail to pay dial-around compensation on calls that are routed at least partially in IP networks, we note that this issue is the subject of an ongoing proceeding, and is properly dealt with there.⁵¹³

VI. POTENTIAL PUBLIC INTEREST BENEFITS

A. Introduction

182. In addition to assessing the potential competitive 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.⁵¹⁴ 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

183. 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."⁵¹⁵ Under 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.⁵¹⁶

184. 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 be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects."⁵¹⁷ Second, the claimed benefit must be verifiable.

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factual basis for its concern that the merged company would have the specific location information necessary to take action with respect to the call volume information.

⁵¹³ See *Pleading Cycle Established for Comments on American Public Communications Council's Petition For Declaratory Ruling and Rulemaking Regarding IP-Enabled Dial-Around Calls From Payphones*, Docket No. 05-176, Public Notice, DA 05-1106 (rel. Apr. 21, 2005).

⁵¹⁴ *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.

⁵¹⁵ See *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.

⁵¹⁶ See *EchoStar/DirecTV Order*, 17 FCC Rcd at 20630, para. 188; *SBC/Ameritech Order*, 14 FCC Rcd at 14825, para. 256; see also *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

⁵¹⁷ *EchoStar/DirecTV Order*, 17 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 are merger-specific, *i.e.*, that would not be achievable but for the proposed merger. Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be 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 (continued....)

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.⁵¹⁸ In addition, as the Commission has noted, “the magnitude of benefits must be calculated net of the cost of achieving them.”⁵¹⁹ 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.”⁵²⁰ Third, the Commission has stated that it “will more likely find marginal cost reductions to be cognizable than reductions in fixed cost.”⁵²¹ 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.⁵²²

185. 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’ demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.”⁵²³ 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. Enhancements to National Security and Government Services

186. We take considerations of national security extremely seriously, and we find that the merger has the potential to generate benefits arising from more efficient routing. Additionally, we believe that the

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merger. . .”); *AT&T/Comcast Order*, 17 FCC Rcd at 23313, para. 173 (Commission considers whether benefits are “merger-specific”); cf. *DOJ/FTC Guidelines* § 4.

⁵¹⁸ *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 . . .”); *AT&T/Comcast Order*, 17 FCC Rcd at 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. . .”).

⁵¹⁹ *EchoStar/DirecTV Order*, 17 FCC Rcd at 20630, para. 190.

⁵²⁰ *Id.*

⁵²¹ *Id.* at 20631, para. 191; see also *DOJ/FTC Guidelines* § 4.

⁵²² See *EchoStar/DirecTV Order*, 17 FCC Rcd at 20631, para. 191; see also *DOJ/FTC Guidelines* § 4.

⁵²³ *EchoStar/DirecTV Order*, 17 FCC Rcd at 20631, para. 192 (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 be 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 be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.”).

combined, nonoverlapping, IP networks can provide the government with additional security and routing efficiency for vital and sensitive government communications.⁵²⁴

187. We agree with the Applicants that the merger will enhance service to U.S. government customers and strengthen U.S. national security. Both SBC and AT&T provide substantial telecommunications and technology services to federal and state government agencies involved in national security. We find that the merger will create a stable, reliable, U.S.-owned company that will provide improved service to government customers.⁵²⁵ The Applicants contend, and we agree, that the merger will strengthen SBC by transforming it into a strong, full-service, facilities-based provider capable of delivering integrated end-to-end services to the government on a national or international basis.⁵²⁶ Moreover, we find that the merger will help SBC improve communications security and network efficiency, which in turn should benefit national defense and homeland security.⁵²⁷

188. We reject commenters' arguments that the merger will not benefit national security or government customers. ACN *et al.* argue that we should discount the benefits of a unified network because the merger will bring end-to-end service to only a portion of the United States.⁵²⁸ Cbeyond *et al.* assert that AT&T is capable of conducting its government services business without the help of SBC, and that the merger will not result in any change in the quality of service provided to the government.⁵²⁹ Cbeyond *et al.* further argue that the merger will result in SBC's taking over AT&T's government contracts, which would undermine national security by overriding the government selection process.⁵³⁰ While we acknowledge that SBC's claimed benefits relating to end-to-end services are largely limited to SBC service territories, we nevertheless expect that benefits will result. Moreover, as discussed below, we find significant efficiencies arising from vertical integration, which are likely to improve the quality of services that SBC provides to government customers.⁵³¹

189. We also note the Applicants' commitments⁵³² in the *IP-Enabled Services* proceeding to meet the Commission's recently-adopted E911 obligations for interconnected VoIP services.⁵³³ Those

⁵²⁴ Because we find that the networks of SBC and AT&T largely are non-overlapping, *see, e.g.*, SBC/AT&T Reply at 12 n.42 (pointing out that the Applicants' networks have "very limited overlap on the East Coast and especially the greater Washington, D.C. area (where security needs are particularly concentrated), and virtually no overlap in global network capabilities used by many of AT&T's national security customers"), we reject commenters' concerns that the merger could reduce network redundancy. *See, e.g.*, CompTel/ALTS Petition at 60; EarthLink White Paper at 29.

⁵²⁵ SBC/AT&T Application at 19.

⁵²⁶ *Id.* at 19-20.

⁵²⁷ SBC/AT&T Reply at 11-12.

⁵²⁸ *See, e.g.*, ACN *et al.* Comments at 66-68.

⁵²⁹ Cbeyond *et al.* Petition at 63-65.

⁵³⁰ *Id.* at 64-65.

⁵³¹ *See infra* paras. 190-83.

⁵³² *See* Letter from James C. Smith, Senior Vice President, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-36, 05-196 (filed Oct. 17, 2005); Letter from Robert W. Quinn, Jr., Vice President - Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-36, 05-196 (filed Oct. 7, 2005).

requirements “extend our longstanding and continuing commitment to a nationwide communications system that promotes the safety and welfare of all Americans” by serving to “promote cooperative efforts by state and local governments, public safety answering point (PSAP) administrators, 911 systems service providers, and interconnected VoIP providers that will lead to improved emergency services.”⁵³⁴ The Applicants’ actions thus help ensure the timely deployment of E911 services for interconnected VoIP in order to advance the safety and welfare of the public.

D. Efficiencies Related to Vertical Integration

190. As the Commission has previously recognized, vertical transactions may generate significant efficiencies.⁵³⁵ For example, vertical integration may produce a more efficient organizational form, which can reduce transaction costs, limit free-riding by internalizing incentives, and take advantage of technological economies.⁵³⁶ Vertical integration also may reduce prices in the downstream market because the integrated firm, in determining the costs of producing the downstream product and consequently the final price charged to consumers, may consider the real economic cost of the input rather than the higher price (including the upstream profit margin) previously charged by the unintegrated upstream firm. This is referred to as the elimination of “double marginalization.”⁵³⁷

191. We find that significant benefits are likely to result from the vertical integration of the largely complementary networks and facilities of SBC and AT&T. The Applicants assert that their networks are complementary, with SBC providing an extensive network with substantial local fiber, Cingular having an advanced and extensive wireless network, and AT&T providing a global fiber optic long distance network and global data capabilities. They claim that the combined company will be able to offer services over a centrally managed network and provide customers with end-to-end communications and comprehensive network management as well.⁵³⁸ The Applicants maintain that the combination of their services will benefit large enterprise and wholesale customers by enhancing the merged entity’s ability to

(Continued from previous page) _____

⁵³³ See generally *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) (*VoIP 911 Order*).

⁵³⁴ *Id.* at 10248, para. 5.

⁵³⁵ *News Corp./Hughes Order*, 19 FCC Rcd at 507-08, para. 70.

⁵³⁶ *Id.*

⁵³⁷ *Id.* Double marginalization occurs when an upstream firm sells an input to a downstream firm at a price that exceeds marginal cost, and the downstream firm then sells its product in the downstream market at a price that exceeds its marginal cost. The margin charged by the upstream firm increases the marginal cost of the downstream firm, which results in a higher end-user price than would occur if the input had been priced at marginal cost. Vertical integration in theory reduces the problem of double marginalization because the integrated firm, in determining the uniform price at which it will sell the downstream product, will consider the real economic cost of producing the input. Because vertical integration effectively reduces the marginal cost of the input, it is likely to result in the integrated firm’s setting a lower price for the downstream products, which will benefit consumers. The extent of this benefit, however, will depend crucially on the elasticity of demand for the downstream product. The less elastic is the demand, the greater is the benefit. JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 239 (1988) at 174-75; Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J., 513, 523-36 (1995).

⁵³⁸ SBC/AT&T Application at 15-16; SBC/AT&T Reply at 6-7.

make available the broad range of communications services and global reach that those customers demand.⁵³⁹ We find that the merger will permit the integration of the complementary networks and assets of SBC and AT&T, giving each carrier facilities it previously lacked. We further find that this network integration will permit the merged entity to offer a wider range of services to its broad range of customers. Moreover, customers will benefit not only from new services, but also from the improvements in performance and reliability resulting from the network integration.

192. We reject Cbeyond *et al.*'s assertion that SBC would not add to AT&T's global competitiveness, and that a unified network would offer no new public interest benefit.⁵⁴⁰ We find that the combined company will be able to provide network management services more efficiently to large enterprise and wholesale customers, and customers will value the merged entity's ability to provide one-stop shopping.

E. Economies of Scope and Scale

193. We find that the merger of SBC and AT&T is likely to give rise to significant economies of scope and scale, as well, although these are difficult to quantify. While SBC and AT&T compete in many of the same markets, the focus and success of their efforts has often come in different segments of these markets.⁵⁴¹ The merger thus not only gives the combined company a larger total customer base, but also significant shares of customers across a wider range of communications markets than either carrier had before the merger. The Commission has recognized in the past that, when a "transaction enables the parties to combine their R&D efforts and to spread the cost of those R&D efforts over" a more extensive customer base, this "could result in new products and services that would not have been introduced absent the proposed transaction."⁵⁴² Likewise, the Commission has found that, "if the merged entity can secure larger volume discounts from suppliers, and then pass those lower costs through to consumers in the form of lower end-user prices, this likewise would constitute a public interest benefit that should be considered in balancing the potential harms and benefits of the proposed transaction."⁵⁴³

194. In this regard, the Applicants stress that SBC has a larger base of mass market customers, while AT&T has a larger base of large enterprise customers. Similarly, SBC has been most successful in offering consumer voice and broadband services, wireless services, and local connectivity, equipment, and professional services to local or regional business customers, while AT&T has had success offering large enterprise services, especially those with a global reach.⁵⁴⁴ The Applicants further contend that SBC will bring its investment-oriented focus to the merged firm and that SBC's deep financial resources will

⁵³⁹ SBC/AT&T Application at 15-17; SBC/AT&T Reply at 6-10; Letter from Richard L. Rosen and David L. Lawson, Counsel for SBC and AT&T, to Gary Remondino, Wireline Competition Bureau, FCC at 1-2 (filed Aug. 3, 2005) (SBC/AT&T Aug. 3 *Ex Parte* Letter).

⁵⁴⁰ Cbeyond *et al.* Petition at 72; ACN *et al.* Comments at 63. We disagree with ACN *et al.* that improving service quality should not be credited as a merger-specific benefit. Rather, as we find above, the vertical integration of the Applicants' largely complementary networks is likely to produce just such merger-specific benefits.

⁵⁴¹ For example, SBC has a larger base of mass market customers than AT&T, while AT&T has a larger base of large enterprise customers. Likewise, SBC has been most successful offering local service to enterprise customers, while AT&T has had success for a wider range of service offerings. See, e.g., SBC/AT&T Application at 6-9.

⁵⁴² *News Corp./Hughes Order*, 19 FCC Rcd at 619, para. 342.

⁵⁴³ *Id.* at 620, para. 343.

⁵⁴⁴ SBC/AT&T Application at 9-10, 32; SBC/AT&T Reply at 13-17.

ensure that its networks, including critical national defense networks, remain robust and technologically advanced. Finally, they claim that the transaction will accelerate service innovations, such as VoIP and advanced IP services.⁵⁴⁵

195. We agree with the Applicants that, by broadening its customer base, the merged entity will have an increased incentive to engage in basic research and development. We further find that continued intense competition from other carriers will provide sufficient incentives for the merged company to continue to invest in more applied research and product development. As SBC points out, it will have little choice but to continue investment and innovation, and it expects the combined company to spend at least as much on innovation and investment in network infrastructure as the standalone companies did prior to the transaction.⁵⁴⁶ Thus, we reject commenters' claims that the merged firm will be less innovative.⁵⁴⁷

F. Cost Synergies

196. As discussed below, we credit certain cost reductions as benefits resulting from the merger. The Applicants assert that the merger will result in over \$15 billion in savings for both fixed and variable operations costs.⁵⁴⁸ They contend that the cost savings would come from the elimination of duplicative network facilities, staff, and information and operation systems; greater utilization of network assets by combining the companies' traffic streams; greater scalability from business process improvements; and elimination of duplicative information technology (IT) development projects.⁵⁴⁹ The Applicants filed a synergies model in the record, which estimated both cost and revenue synergies.⁵⁵⁰

197. No commenter discusses the synergy model itself. Cbeyond *et al.* argue generally, however, that, to the extent much of the cost savings are reportedly due to increased elimination of personnel, it is not clear that they should be counted as a benefit under the Commission's public interest standard.⁵⁵¹

⁵⁴⁵ SBC/AT&T Application at 42-43. The record is mixed regarding the merger's likely effect regarding fiber deployment. Compare ACN *et al* Comments at 57-60 (asserting that SBC/AT&T fail to show their claimed benefit of an increase in fiber deployment is merger specific) with Ad Hoc Telecom Manufacturers Comments at 4-5 (asserting that the merger will promote fiber deployment). We are not identifying a particular benefit arising from increased fiber deployment specifically, except to the extent that we note generally above that the merger could result in increased incentives to invest in research and development (in which case such benefit would be merger-specific). The record does not allow us to identify particular technologies toward which such increased investment incentives might be directed (such as increased fiber deployment or elsewhere).

⁵⁴⁶ SBC/AT&T Application at 31-33; SBC Info. Req. at 136-37, 148-52.

⁵⁴⁷ ACN *et al.* Comments at 60-62, 65-66; see also Cbeyond *et al.* Petition at 68-72; Qwest Petition at 37-39. Although Qwest claims that AT&T offered many VoIP innovations, it does not indicate that those were the only (or even the majority) of innovations in VoIP. Qwest Petition at 38.

⁵⁴⁸ SBC/AT&T Application at 44.

⁵⁴⁹ SBC/AT&T Application at 43-44.

⁵⁵⁰ SBC Info. Req., SBC453019-409 (hereinafter "Synergy Model"); see also SBC Info. Req. at 184-191.

⁵⁵¹ Cbeyond *et al.* Wilkie Decl. at para. 54 (arguing that marginal cost reductions are more likely to be cognizable than fixed cost reductions, but that the bulk of the headcount savings will be fixed cost reductions); see also NASUCA Comments at 20-21 (asserting that the purported benefit of cost savings is insignificant and that such benefits did not accrue after the *Bell Atlantic/GTE* merger was approved).

198. After careful examination of the Applicants' synergy model, we find that we cannot credit the \$15 billion savings in its entirety. First, the model's calculations assume that all the model's synergies continue in perpetuity.⁵⁵² As mentioned above, benefits that are to occur 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. We thus evaluate the evidence of synergy benefits over shorter and more reasonable timeframes included in the model.

199. The remaining scenarios, focusing on the valuation of synergies over time, calculate the value of the synergies as if they lasted to [REDACTED].⁵⁵³ According to the Applicants' synergy model, the merged firm will enjoy synergies of [REDACTED] by [REDACTED] and nearly double that by [REDACTED].⁵⁵⁴ We give more weight to the nearer timeframe of [REDACTED], however, because we expect that before [REDACTED] the telecommunications market will be so different from today that these synergies may no longer be realizable or relevant.⁵⁵⁵

200. We are skeptical of some of the Applicants' cost-savings calculations. For instance, SBC claims that it will save [REDACTED] on advertising annually. According to its synergy model spreadsheet, however, its own advertising is [REDACTED] annually while AT&T's advertising for 2005 is [REDACTED].⁵⁵⁶ Thus, SBC asserts it can reduce its combined advertising by many times the amount that AT&T itself spends on advertising. We are also skeptical of the cited advertising savings, because there is no information on the record supporting SBC's quantification of the potential reductions in its advertising expenditures. Rather, we believe that the combined firm will face largely the same incentive to advertise as before.

201. We reject commenters' assertions that the costs savings of headcount reductions will produce no cognizable benefits.⁵⁵⁷ According to the synergy model, much of the cost savings are from headcount

⁵⁵² The synergy model calculates the synergies as the present value of the infinitely-lasting stream of extra income and reduced costs. The Commission does not dispute the use of the net present value concept (to quantify future incomes and cost reductions) itself.

⁵⁵³ The synergy model allows cost savings to be calculated out to [REDACTED], but not revenue enhancements. See Synergy Model at 453029 ([REDACTED]); 453241-42 ([REDACTED]).

⁵⁵⁴ As noted above, the Applicants' synergy model does not allow revenue figures to be calculated out to [REDACTED], so a precise synergy benefit for [REDACTED] cannot be calculated from the model. These figures include [REDACTED] of unspecified "Other Transactions Costs." Synergy Model at 453029 ([REDACTED]).

⁵⁵⁵ Because [REDACTED] was one of the model choices, calculating the synergy to that date meant relatively few calculations were necessary. Using any date other than one for which the model was designed would require many manual calculations. Thus, although we ordinarily discount claimed benefits that are more distant, and we would prefer to calculate the synergies based on a shorter time period, using the [REDACTED] date in the model was more administratively practical.

⁵⁵⁶ See SBC Info. Req. at 190; see also Synergy Model at 453132, 453137 ([REDACTED]).

⁵⁵⁷ *Cbeyond et al.* state generally that for many of the jobs that SBC has stated would be eliminated as a result of the merger, reductions in personnel and overhead would reduce the merged company's fixed costs, not its marginal costs, and, thus, would not be passed on as a benefit to consumers. *Cbeyond et al.* Petition at 73-74.

reductions, and those calculations seem reasonable.⁵⁵⁸ We have no reason to doubt that many overhead positions can be eliminated after the merger. But because most of these positions are overhead and thus represent savings in fixed costs, we will not give them the same weight as savings in marginal cost (which are more likely to flow through in the form of retail price reductions). We recognize, however, that some of the headcount savings are likely to come from positions where compensation is based primarily on commission; savings in those positions should reduce variable costs.⁵⁵⁹

202. The net present value of the savings from the elimination of sales jobs out to [REDACTED] is about [REDACTED], which the Commission fully credits toward marginal cost reductions. We find that the remainder of the claimed headcount savings represent primarily savings in overhead, to which the Commission generally has given less weight than marginal cost reductions.⁵⁶⁰

203. Certain other claimed cost synergies are unexplained. The synergy model explains very little of the nature of the capital expenditure and operations expenditure reductions.⁵⁶¹ SBC adds some explanation in its response to our information request, but in most cases, the synergy amounts are simply inserted into the model without comment.

204. In summary, we find that the proposed transaction is likely to generate several significant public interest benefits, although it is difficult to quantify precisely the magnitude of some of these benefits.

VII. PROCESS AND ENFORCEMENT

205. As discussed in various sections above, the Applicants have offered a number of voluntary commitments. Because we find these commitments serve the public interest, we accept them and adopt them as express conditions of our merger approval order. In order to ensure that the full benefits of these commitments are realized, we also establish certain procedural and enforcement rules. First, where commitments involve the filing of tariff revisions, we require the Applicants to file such revisions within 30 days of the effective date of the Order. Second, we require the Applicants to file annually a declaration by an officer of the corporation attesting that SBC/AT&T has substantially complied with the terms of the conditions in all material respects. Third, the term of each condition will be as specified in Appendix F.

206. In addition, we will continue to monitor the markets within which the Applicants compete. If the Commission determines that out-of-region competition is failing to develop, then it will revisit the merger conditions on its own motion or pursuant to a petition of a party. Similarly, if the Commission determines that the Applicants are acting to exclude competitors, it will revisit the merger conditions on its own motion or pursuant to a petition of a party.⁵⁶²

⁵⁵⁸ See Synergy Model at 453022-23 ([REDACTED]); 453024 ([REDACTED]); 453025 ([REDACTED]).

⁵⁵⁹ Synergy Model at 453036-37 ([REDACTED]).

⁵⁶⁰ *EchoStar/DirecTV Order*, 17 FCC Rcd at 20631, para. 191; see also *DOJ/FTC Guidelines* § 4.

⁵⁶¹ In a few cases, the underlying synergy causes are identified, such as the “other Expense/Capex synergy, which is described as [REDACTED].” See Synergy Model at SBC453047, SBC453059 ([REDACTED]); see also SBC Info. Req. at 184.

⁵⁶² In addition, the public may pursue a claim in accordance with either section 207 or section 208 of the Act. See 47 U.S.C. §§ 207, 208.

207. In addition, as noted above, the Applicants have made a voluntary commitment to offer stand-alone DSL.⁵⁶³ In order to ensure that this commitment benefits consumers, we will monitor all consumer-related problems concerning this service, including reviewing consumer complaints and other information. We expect that the terms and conditions for these services will reflect the underlying competitiveness of the market. The Commission retains its historical discretion to monitor the market and take corrective action if necessary in the public interest.

208. More generally, due to the Commission's interest in widespread broadband availability, the Commission commits to seek comment and issue an annual report assessing the competitiveness of the broadband market and whether there is evidence of anticompetitive conduct in this market.

VIII. CONCLUSION

209. We find that public interest benefits are likely to result from the proposed transaction and that, in light of the DOJ Consent Decree, the merger is not likely to have anticompetitive effects in any relevant markets. As we discuss above, we recognize that there will be an increase in market concentration with respect to certain services, including special access services, retail enterprise services, mass market services, and Internet backbone services. Nonetheless, in each case we find that the possible harms identified by commenters do not justify designating this application for hearing.

210. We also find potential public interest benefits from the proposed merger that, taken as a whole, outweigh the relatively limited possible public interest harms. These public interest benefits relate to enhancements to national security and government services, efficiencies related to vertical integration, economies of scope and scale, and cost savings.

211. We therefore conclude that on balance, the positive public interest benefits likely to arise from this transaction are sufficient to support the Commission's approval of SBC's and AT&T's application under the public interest test of sections 214 and 310(d) of the Communications Act. Finally, we note that the Applicants offered certain commitments related to special access, stand-alone DSL, the Commission's Internet Policy Statement, and Internet backbone services. We find that these commitments serve the public interest, and, accordingly, we accept them and adopt them as express conditions of our merger approval.⁵⁶⁴

IX. ORDERING CLAUSES

212. Accordingly, having reviewed the applications, the petitions, and the record in this matter, IT IS ORDERED that, pursuant to sections 4(i) and (j), 214, 309, 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 214, 309, 310(d), section 2 of the Cable Landing License Act, 47 U.S.C. § 35, and Executive Order No. 10530, the applications for the transfer of control of licenses and authorizations from AT&T to SBC as discussed herein and set forth in Appendix B ARE GRANTED subject to the conditions stated below.

213. IT IS FURTHER ORDERED that as a condition of this grant SBC and AT&T shall comply with the conditions set forth in Appendix F of this Order.

⁵⁶³ See SBC Oct. 31 *Ex Parte* Letter, Attach. at 4; see also Appendix F.

⁵⁶⁴ See generally SBC Oct. 31 *Ex Parte* Letter, Attach.; see also Appendix F.

214. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the Petitions to Deny the transfer of control of licenses and authorizations from AT&T to SBC filed by American Public Communications Council; Broadwing Communications, LLC, and SAVVIS Communications Corporation; Cbeyond Communications, *et al.*; CompTel/ALTS; Consumer Federation of America, *et al.*; EarthLink, Inc.; and Qwest Communications International Inc. ARE DENIED for the reasons stated herein.

215. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, may be filed within 30 days of the date of public notice of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters

<u>Commenters:</u>	<u>Abbreviation</u>
ACN Communications Services, Inc. ATX Communications Inc. Bullseye Telecom, Inc. Cavalier Telephone Mid-Atlantic, LLC CIMCO Communications, Inc. CTC Communications Corp. Gillette Global Network, Inc., d/b/a Eureka Networks Granite Telecommunications, LLC Lightship Communications, LLC Lightyear Network Solutions, LLC PAC-WEST Telecom, Inc. RCN Telecom Services Inc. USLEC Corporation U.S. TelePacific Corp. d/b/a TelePacific Communications	ACN <i>et al.</i>
Ad Hoc Telecom Manufacturer Coalition	Ad Hoc Telecom Manufacturers
Alliance for Public Technology	APT
American Antitrust Institute	AAI
Communications Workers of America	CWA
Cox Communications, Inc.	Cox
Global Crossing North America, Inc.	Global Crossing
Independent Alliance	Independent Alliance
Missouri Public Service Commission	Missouri Commission
New Jersey Board of Public Utilities	New Jersey BPU
New Jersey Division of the Ratepayer Advocate	New Jersey Ratepayer Advocate
National Association of State Utility Consumer Advocates	NASUCA
Nevada Department of Justice, Office of the Attorney General, Bureau of Consumer Protection	Nevada BCP
Progress and Freedom Foundation	PFF
Small Business and Entrepreneurship Council	SBE
State of Alaska	Alaska
Telecommunications Consultants Coalition	Telecom Consultants
Telscape Communications, Inc.	Telscape
Texas Office of Public Utility Counsel	Texas OPC
United States Cellular Corporation	United States Cellular
Vonage Holdings Corp.	Vonage
WilTel Communications, LLC	WilTel
Women Impacting Public Policy	WIPP

<u>Petitioners:</u>	<u>Abbreviation</u>
American Public Communications Council	APCC
Broadwing Communications LLC and SAVVIS Communications, Inc.	Broadwing and SAVVIS
Cbeyond Communications Conversent Communications Eschelon Communications NuVox Communications TDS Metrocom XO Communications Xspedius Communications	Cbeyond <i>et al.</i>
CompTel/ALTS	CompTel/ALTS
Consumer Federation of America Consumers Union Public Research Group	Consumer Federation <i>et al.</i>
EarthLink, Inc.	EarthLink
Qwest Communications International Inc.	Qwest

<u>Reply Commenters:</u>	<u>Abbreviation</u>
ACN Communications Services, Inc. ATX Communications Inc. Bullseye Telecom, Inc. Cavalier Telephone Mid-Atlantic, LLC CIMCO Communications, Inc. CTC Communications Corp. Gillette Global Network, Inc., d/b/a Eureka Networks Granite Telecommunications, LLC Lightship Communications, LLC Lightyear Network Solutions, LLC McLeod USA Telecommunications Services, Inc. PAC-WEST Telecom, Inc. RCN Telecom Services Inc. USLEC Corporation U.S. TelePacific Corp. d/b/a TelePacific Communications	ACN <i>et al.</i>
Ad Hoc Telecommunications Users Committee	Ad Hoc Telecom Users
American Public Communications Council	APCC
BT Americas Inc. and BT Infonet USA	BT Americas
California Small Business Association and California Small Business Roundtable	CSBA
Competitive Enterprise Institute	CEI
CompTel/ALTS	CompTel/ALTS
Cox Communications, Inc.	Cox
EarthLink, Inc.	EarthLink
Missouri Office of the Public Counsel	Missouri OPC
National Association of State Utility Consumer Advocates	NASUCA

Reply Commenters:	Abbreviation
New Jersey Division of the Ratepayer Advocate	New Jersey Ratepayer Advocate
National Telecommunications Cooperative Association	NTCA
Qwest Communications International Inc.	Qwest
SBC Communications Inc. and AT&T Corp.	SBC/AT&T
Small Business and Entrepreneurship Council	SBE
Telecommunications Consultants Coalition	Telecom Consultants Coalition
Telecommunications Consumers' Coalition	Telecom Consumers' Coalition
TeleTruth	TeleTruth
T-Mobile USA, Inc.	T-Mobile

APPENDIX B

**List of AT&T Licenses and Authorizations
Subject to Transfer of Control**

*Domestic Section 214 Authority***AT&T Affiliates and Subsidiaries Holding Domestic 214 Authority**

AT&T Interstate Division
 AT&T Communications of Illinois, Inc.
 AT&T Communications of Indiana, Inc. (now AT&T Communications of Indiana, GP)
 AT&T Communications of Michigan, Inc.
 AT&T Communications of Ohio, Inc.
 AT&T Communications of Wisconsin, Inc. (now AT&T Communications of Wisconsin I, LP)
 AT&T Communications of New England, Inc.
 AT&T Communications of New York, Inc.
 AT&T Communications of Washington D.C., Inc. (now AT&T Communications of Washington D.C., LLC)
 AT&T Communications of Delaware, Inc. (now AT&T Communications of Delaware, LLC)
 AT&T Communications of Maryland, Inc. (now AT&T Communications of Maryland, LLC)
 AT&T Communications of New Jersey, Inc. (now AT&T Communications of NJ, LP)
 AT&T Communications of Pennsylvania, Inc. (now AT&T Communications of Pennsylvania, LLC)
 AT&T Communications of Virginia, Inc. (now AT&T Communications of Virginia, LLC)
 AT&T Communications of West Virginia, Inc.
 AT&T Communications of The Midwest, Inc.
 AT&T Communications of the Southwest, Inc.
 AT&T Communications of The Southern States, Inc. (now AT&T Communications of The Southern States, LLC)
 AT&T Communications of The South Central States, Inc. (now AT&T Communications of The South Central States, LLC)
 AT&T Communications of California, Inc.
 AT&T Communications of The Mountain States, Inc.
 AT&T Communications of Nevada, Inc.
 AT&T Communications of Pacific Northwest, Inc.
 AT&T Communications of Puerto Rico, Inc. and
 AT&T Communications of The Virgin Islands, Inc.

International Section 214 Authorizations

<u>File No.</u>	<u>Authorization Holder</u>	<u>Authorization Number</u>
ITC-T/C-20050224-00072	AT&T Corp.	ITC-214-19980209-00085 <i>et al.</i>
ITC-T/C-20050224-00071	Alascom, Inc.	ITC-214-1997-0421-00221 <i>et al.</i>
ITC-T/C-20050224-00073	TCG America, Inc.	ITC-214-1997-0814-00493 <i>et al.</i>
ITC-T/C-20050222-00079	TCG Delaware Valley, Inc.	ITC-90-003 <i>et al.</i>
ITC-T/C-20050222-00080	AT&T of the Virgin Islands, Inc.	ITC-89-060 <i>et al.</i>
ITC-T/C-20050222-00081	AT&T of Puerto Rico, Inc.	ITC-91-034 <i>et al.</i>
ITC-T/C-20050222-00082	TC Systems, Inc.	ITC-96-002 <i>et al.</i>
ITC-T/C-20050222-00083	ACC National Long Distance Corp.	ITC-93-131 <i>et al.</i>

Cable Landing Licenses

<u>File No.</u>	<u>Authorization Holder</u>	<u>Authorization Number</u>
SCL-T/C-20050222-00002	AT&T Corp.	SCL-87-004 <i>et al.</i>

International Public Fixed License Application

<u>File No.</u>	<u>Licensee</u>	<u>Lead Call Sign</u>
SES-T/C-20050224-00233	AT&T of the Virgin Islands, Inc.	WBH79

Satellite Earth Station Authorization Applications

<u>File No.</u>	<u>Licensee</u>	<u>Lead Call Sign</u>
SES-T/C-20050224-00230 ⁵⁶⁵	AT&T Corp.	E000037
SES-T/C-20050224-00231 ⁵⁶⁶	AT&T Corp.	E930445
SES-T/C-20050224-00232 ⁵⁶⁷	Alascom, Inc.	E000650

Satellite Space Station Authorization Applications

<u>File No.</u>	<u>Licensee</u>	<u>Call Sign</u>
SES-T/C-20050929-00187 ⁵⁶⁸	<u>Alascom</u> , Inc.	S2379

⁵⁶⁵ See Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC (filed Sept. 29, 2005) (updating File Nos. SES-T/C-20050224-00230 and SES-T/C-20050224-00231 to indicate relinquished or assigned earth stations (to be deleted) and new applications pending (to be added)).

⁵⁶⁶ *Id.*

⁵⁶⁷ See Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC (filed Sept. 29, 2005) (updating File No. SES-T/C-20050224-00232 to indicate relinquished or assigned earth stations (to be deleted) and new applications pending (to be added)).

⁵⁶⁸ Because the Commission's IBFS database shows that this space station license is issued to SES Americom, Inc., and does not reflect that the license is jointly licensed to SES Americom, Inc. & Alascom, Inc., the Applicants inadvertently omitted this authorization from the initial transaction filing. *Id.* The Applicants also state that SES Americom, Inc. has no objection to this transfer of control filing and the processing of this application by the Commission. *Id.* We will include this application as under the Applicants' request in its initial filing to "include any authorizations that may have been inadvertently omitted." SBC/AT&T Application at 118.

Wireless Radio Services Applications

<u>File No.</u>	<u>Licensee</u>	<u>Lead Call Sign</u>
0002052427 ⁵⁶⁹	AT&T Corp.	KAC58
0002052535 ⁵⁷⁰	Alascom, Inc.	KBK7
0002052424	AT&T of the Virgin Islands, Inc.	WLK648
0002052409	AT&T Communications of California, Inc.	KMJ96
0002052528	AT&T Communications of Illinois, Inc.	KSF30
0002052521	AT&T Communications of Maryland, Inc.	WAD25
0002052513	AT&T Communications of Michigan, Inc.	KQI61
0002052481	AT&T Communications of Pennsylvania, Inc.	WCG308
0002052471	AT&T Communications of the Midwest, Inc.	KAS91
0002052450	AT&T Communications of the Mountain States, Inc.	KAN28
0002052440	AT&T Communications of the Pacific Northwest, Inc.	WHR380
0002052418	AT&T Communications of the South Central States, Inc.	KIV64
0002052444	AT&T Communications of the Southern States, Inc.	KIA47
0002052419	AT&T Communications of the Southwest, Inc.	KPP57
0002052399	AT&T Communications of Virginia, Inc.	KIA30
0002052431	AT&T Communications of West Virginia, Inc.	KXR62
0002052438	AT&T Communications of Wisconsin, Inc.	WHO319
0002051267	Biztel, Inc. c/o AT&T Corp.	WMT548

⁵⁶⁹ See Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC (filed Sept. 29, 2005) (updating File No. 0002052427 to indicate relinquished or assigned licenses (to be deleted) and new applications pending (to be added)).

⁵⁷⁰ See Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC (filed Sept. 29, 2005) (updating File No. 0002052535 to indicate relinquished or assigned licenses (to be deleted) and new applications pending (to be added)).

Experimental Radio Service Applications

<u>File No.</u>	<u>Licensee</u>	<u>Call Signs</u>
0012-EX-TU-2005 ⁵⁷¹	AT&T Corp.	WD2XDQ WD2XPJ WD2XSL

⁵⁷¹ See Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC (filed Sept. 29, 2005) (updating File No. 0012-EX-TU-2005 to indicate relinquished licenses (to be deleted) and new applications pending (to be added)).

APPENDIX C (CONTINUED)

TABLE 3* (CONTINUED)													
2004 HIGH CAP SERVICE REVENUE (% SHARE) – MEDIUM/LARGE ENTERPRISE CUSTOMERS													
	All SBC States	Midwest					West	Southwest					East
		IL	IN	MI	OH	WI	CA	AR	KS	MO	OK	TX	CT
Post-merger (SBC+AT&T) market share	[REDACTED]												
Median Post-merger (SBC+AT&T) market share													
Pre-merger HHI													
Median Pre-merger HHI													
Post-merger HHI													
Median Post-merger HHI													
Delta													

*See *supra* note 200 (citing source of SBC/AT&T medium and large enterprise data).

APPENDIX C (CONTINUED)

TABLE 5*														
2004 LOCAL ACCESS CUSTOMER SHARES - SMALL ENTERPRISE CUSTOMERS														
	All SBC States	Midwest					West		Southwest				East	
		IL	IN	MI	OH	WI	CA	NV	AR	KS	MO	OK	TX	CT
Pre-merger SBC market share (%)	[REDACTED]													
Median pre-merger SBC market share (%)														
Post-merger (SBC+AT&T) market share (%)														
Median Post-merger (SBC+AT&T) market share (%)														
Carriers identified in the survey as serving customers in the states														
Pre-merger HHI														
Median Pre-merger HHI														
Post-merger HHI														
Median Post-merger HHI														
Delta														

*Given the volume of small enterprise data filed by SBC/AT&T, we do not repeat that data here. See supra note 209 (citing source of SBC/AT&T small enterprise data).

TABLE 6*														
2004 LONG DISTANCE VOICE CUSTOMER SHARES - SMALL ENTERPRISE CUSTOMERS														
	All SBC States	Midwest					West		Southwest				East	
		IL	IN	MI	OH	WI	CA	NV	AR	KS	MO	OK	TX	CT
Pre-merger SBC market share (%)	[REDACTED]													
Median pre-merger SBC market share (%)														
Post-merger (SBC+AT&T) market share (%)														
Median Post-merger (SBC+AT&T) market share (%)														
Carriers identified in the survey as serving customers in the states														
Pre-merger HHI														
Median Pre-merger HHI														
Post-merger HHI														
Median Post-merger HHI														
Delta														

*Given the volume of small enterprise data filed by SBC/AT&T, we do not repeat that data here. See supra note 209 (citing source of SBC/AT&T small enterprise data).

APPENDIX C (CONTINUED)

TABLE 7*														
2004 INTERNET CUSTOMER SHARES - SMALL ENTERPRISE CUSTOMERS														
	All SBC States	Midwest					West		Southwest					East
		IL	IN	MI	OH	WI	CA	NV	AR	KS	MO	OK	TX	CT
Pre-merger SBC market share (%)	[REDACTED]													
Median pre-merger SBC market share (%)														
Post-merger (SBC+AT&T) market share (%)														
Median Post-merger (SBC+AT&T) market share (%)														
Carriers identified in the survey as serving customers in the states														
Pre-merger HHI														
Median Pre-merger HHI														
Post-merger HHI														
Median Post-merger HHI														
Delta														

*Given the volume of small enterprise data filed by SBC/AT&T, we do not repeat that data here. See supra note 209 (citing source of SBC/AT&T small enterprise data).

APPENDIX C (CONTINUED)

TABLE 8*	
2004 LONG DISTANCE VOICE NATIONAL REVENUE (% SHARE) - ENTERPRISE CUSTOMERS WITH OPERATIONS BOTH INSIDE AND OUTSIDE THE SBC REGION	
Carrier:	Share
	[REDACTED]
Post-Merger SBC+AT&T Share	
Pre-Merger HHI	
Post-Merger HHI	
Delta	

*See supra note 215 (citing source of SBC/AT&T national enterprise data).

TABLE 9*	
2004 LONG DISTANCE DATA NATIONAL REVENUE (% SHARE) - ENTERPRISE CUSTOMERS WITH OPERATIONS BOTH INSIDE AND OUTSIDE THE SBC REGION	
Carrier:	Share
	[REDACTED]
Post-Merger SBC+AT&T Share	
Pre-Merger HHI	
Post-Merger HHI	
Delta	

*See supra note 215 (citing source of SBC/AT&T national enterprise data).

APPENDIX D

Mass Market Data (% Share)

	Local Services*		Long Distance Services*		Local and Long Distance Bundle*	
	SBC Pre-Merger	SBC Post-Merger	SBC Pre-Merger	SBC Post-Merger	SBC Pre-Merger	SBC Post-Merger
AR	[REDACTED]					
CA						
CT						
IL						
IN						
KS						
MI						
MO						
NV						
OH						
OK						
TX						
WI						
Minimum						
Maximum						
Median						
<p>* See <i>supra</i> para. 102 and accompanying footnotes for the underlying assumptions. Data as of March 2005. Sources: SBC Info. Req., Exhs. 16(a)(1), 16(a)(2), 16(a)(4), 16(b)(1&4); Letter from Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, Attach. (June 13, 2005) <i>in</i> Letter from Nirali Patel, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed July 21, 2005) (Exh. 16(b)(iv) Revised, Exh. SALD Customer Base by RBOC); Numbering Resource Utilization / Forecast (NRUF) database.</p>						

APPENDIX E

Internet Backbone Data

Table 1: Market Shares and HHIs of Tier 1 Backbone Providers*

Tier 1 Provider	Pre-merger Revenue (\$M)	% Share (pre-merger)	Post-merger Revenue (\$M)	% Share (post-merger)
	[REDACTED]			
Pre-merger HHI				
Post-merger HHI				
Change in HHI				
<p>*Market shares are calculated from reported revenues for dedicated Internet access and wholesale upstream transit. Letter from Thomas F. Hughes, Vice President-Federal Regulatory, SBC, to Gary Remondino, Wireline Competition Bureau, FCC, WC Docket No. 05-65, Attach. (filed July 22, 2005) (providing DIA revenues and upstream transit revenues). We note that the post-merger share for MCI is calculated based on the assumption that the parallel pending merger of Verizon and MCI will be consummated. In addition, the post-merger revenue shares of Sprint, Level 3, and Qwest were adjusted based on available data regarding transit revenues previously paid to those IBPs by SBC and Verizon. See SBC Info. Req. at 97 (2004 transit payments); Letter from Dee May, Vice President – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, Attach. (filed Oct. 13, 2005).</p>				

Table 2: AT&T Pre-Merger Traffic Ratios**

AT&T Peer	1/2/2004 Ratio	4/2/2004 Ratio	7/2/2004 Ratio	10/1/2004 Ratio	1/1/2005 Ratio	4/2/2005 Ratio
	[REDACTED]					
<p>** AT&T submitted traffic flows with its peers for each quarter from January 2004 to April 2005. SBC/AT&T Martens Reply Decl., Exh. I. The Applicants then calculated the corresponding quarterly traffic ratios for April 2004 to April 2005. SBC/AT&T Martens Reply Decl., Exh. II.</p>						

APPENDIX F

Conditions

The Applicants have offered certain voluntary commitments, enumerated below. Because we find these commitments will serve the public interest, we accept them and adopt them as Conditions of our approval of the merger. Unless otherwise specified herein, the Conditions described herein shall become effective 10 business days after the Merger Closing Date. The Conditions described herein shall be null and void if SBC and AT&T do not merge and there is no Merger Closing Date.

It is not the intent of these Conditions to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these Conditions, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these Conditions.

The term “SBC/AT&T” as used in this letter refers to SBC Communications Inc. and all of its affiliates whose financial results on the day following the Merger Closing Date would be included as consolidated subsidiaries in SBC’s consolidated financial statements as required by U.S. generally accepted accounting principles.

For the purposes of these Conditions, the term “Merger Closing Date” means the day on which, pursuant to their Merger Agreement, SBC and AT&T cause a Certificate of Merger to be executed, acknowledged, and filed with the Secretary of State of New York as provided in New York Corporation Law.

Unbundled Network Elements

1. For a period of two years, beginning on the Merger Closing Date, SBC/AT&T shall not seek any increase in state-approved rates for unbundled network elements (“UNEs”) that are currently in effect, provided that this restriction shall not apply to the extent any UNE rate currently in effect is subsequently deemed invalid or is remanded to a state commission by a court of competent jurisdiction in connection with an appeal that is currently pending (*i.e.*, for appeals of state commission decisions in Illinois, Indiana and Texas). In the event of a UNE rate increase in Illinois, Indiana or Texas during the two year period, following a court decision invalidating or remanding a UNE rate, SBC/AT&T may implement that UNE rate increase but shall not seek any further increase in UNE rates in that state during the two-year period. This condition shall not limit the ability of SBC/AT&T and any telecommunications carrier to agree voluntarily to any UNE rate nor does it supersede any current agreement on UNE rates.
2. Within thirty days after the Merger Closing Date, SBC/AT&T shall exclude fiber-based collocation arrangements established by AT&T or its affiliates in identifying wire centers in which SBC claims there is no impairment pursuant to section 51.319(a) and (e) of the Commission’s rules. SBC/AT&T shall file with the Commission, within thirty days of the Merger Closing Date, revised data or lists that reflect the exclusion of AT&T collocation arrangements, as required by this condition.

Special Access

1. SBC/AT&T affiliates that meet the definition of a Bell operating company in section 3(4)(A) of the Act (“SBC BOCs”)⁵⁷² will implement, in the SBC Service Area,⁵⁷³ the Service Quality Measurement Plan for Interstate Special Access Services (“the Plan”), as described herein and in Attachment A. The SBC BOCs shall provide the Commission with performance measurement results on a quarterly basis, which shall consist of data collected according to the performance measurements listed in Attachment A. Such reports shall be provided in an Excel spreadsheet format and shall be designed to demonstrate the SBC BOCs’ monthly performance in delivering interstate special access services within each of the states in the SBC Service Area. These data shall be reported on an aggregated basis for interstate special access services delivered to (i) SBC/AT&T’s section 272 affiliates, (ii) its BOC and other affiliates, and (iii) non-affiliates.⁵⁷⁴ The SBC BOCs shall provide performance measurement results (broken down on a monthly basis) for each quarter to the Commission by the 45th day after the end of the quarter. The SBC BOCs shall implement the Plan for the first full quarter following the Merger Closing Date. This condition shall terminate on the earlier of (i) thirty months and 45 days after the beginning of the first full quarter following the Merger Closing Date (that is, when SBC/AT&T file their 10th quarterly report); or (ii) the effective date of a Commission order adopting performance measurement requirements for interstate special access services.
2. For a period of thirty months after the Merger Closing Date, SBC/AT&T shall not increase the rates paid by existing customers (as of the Merger Closing Date) of the DS1 and DS3 local private line services that AT&T provides in SBC’s in-region territory⁵⁷⁵ pursuant to, or referenced, to its TCG FCC Tariff No. 2 above their level as of the Merger Closing Date.
3. For a period of thirty months after the Merger Closing Date, SBC/AT&T will not provide special access offerings to its wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions.
4. To ensure that SBC/AT&T may not provide special access offerings to its affiliates that are not available to other special access customers, for a period of thirty months after the Merger Closing Date, before SBC/AT&T provides a new or modified contract tariffed service under section 69.727(a) of the Commission’s rules to its own section 272(a) affiliate(s), it will certify to the Commission that it provides service pursuant to that contract tariff to an unaffiliated customer other than Verizon Communications Inc., or its wireline affiliates.

⁵⁷² For purposes of these conditions, SBC Advanced Services, Inc. (“ASI”) shall not be considered an SBC BOC.

⁵⁷³ For purposes of this condition, “SBC Service Area” means the areas within SBC’s service territory in which SBC’s Bell Operating Company subsidiaries, as defined in 47 U.S.C. § 153(4)(A), are incumbent local exchange carriers.

⁵⁷⁴ BOC data shall not include retail data.

⁵⁷⁵ For purposes of these conditions, SBC’s “in-region territory” means the areas within SBC’s service territory in which an SBC operating company is the incumbent local exchange carrier, as defined in 47 U.S.C. § 251(h)(1)(A) and (B)(i).

SBC/AT&T also will not unreasonably discriminate in favor of its affiliates in establishing the terms and conditions for grooming special access facilities.

5. SBC/AT&T shall not increase the rates in SBC's interstate tariffs, including contract tariffs, for special access services that SBC provides in its in-region territory and that are set forth in tariffs on file at the Commission on the Merger Closing Date. This condition shall terminate thirty months from the Merger Closing Date.

Internet Backbone

1. For a period of three years after the Merger Closing Date, SBC/AT&T will maintain at least as many settlement-free U.S. peering arrangements for Internet backbone services with domestic operating entities as they did in combination on the Merger Closing Date. SBC/AT&T may waive terms of its published peering policy to the extent necessary to maintain the number of peering arrangements required by this condition.
2. Within thirty days of the Merger Closing Date, and continuing for two years thereafter, SBC/AT&T will post its peering policy on a publicly accessible website. During this two-year period, SBC/AT&T will post any revisions to its peering policy on a timely basis as they occur.

Alaska

1. SBC/AT&T acknowledges that the merger does not change carrier of last resort obligations imposed by the State of Alaska on interexchange services provided by Alascom.
2. SBC/AT&T acknowledges that the merger will not alter statutory and regulatory geographic rate averaging and rate integration rules that apply on the Merger Closing Date to Alascom.
3. SBC/AT&T agrees that, for a period of at least two years after the Merger Closing Date, they will operate Alascom as a distinct, though not structurally separate, corporate entity.

ADSL Service

1. Within twelve months of the Merger Closing Date, SBC/AT&T will deploy and offer within its in-region territory ADSL service to ADSL-capable customers without requiring such customers to also purchase circuit switched voice grade telephone service. SBC/AT&T will continue to offer this service in each state for two years after the "implementation date" in that state. For purposes of this condition, the "implementation date" for a state shall be the date on which SBC/AT&T can offer this service to eighty percent of the ADSL-capable premises in SBC's in-region territory in that state.⁵⁷⁶ Within twenty days after meeting the implementation date in a state, SBC/AT&T will file a letter with the Commission certifying to that effect. In any event, this commitment will terminate no later than three years from the Merger Closing Date.

⁵⁷⁶ After meeting the implementation date in each state, SBC/AT&T will continue deployment so that it can offer the service to all ADSL-capable premises in its in-region territory within twelve months of the Merger Closing Date.

Net Neutrality

1. Effective on the Merger Closing Date, and continuing for two years thereafter, SBC/AT&T will conduct business in a manner that comports with the principles set forth in the FCC's Policy Statement, issued September 23, 2005 (FCC 05-151).

Annual Certification

1. For three years following the Merger Closing Date, SBC/AT&T shall file annually a declaration by an officer of the corporation attesting that SBC/AT&T has substantially complied with the terms of these conditions in all material respects. The first declaration shall be filed 45 days following the one-year anniversary of the Merger Closing Date, the second and third declaration shall be filed one and two years thereafter respectively.

Sunset

1. For the avoidance of doubt, unless otherwise expressly stated to the contrary above, all conditions and commitments contained in this letter shall end on the second anniversary of the Merger Closing Date.

**Conditions
Attachment A**

**Service Quality Measurement Plan
For Interstate Special Access**

Contents

Section 1: Ordering

FOCT: Firm Order Confirmation (FOC) Timeliness

Section 2: Provisioning

PIAM: Percent Installation Appointments Met

NITR: New Installation Trouble Report Rate

Section 3: Maintenance and Repair

CTRR: Failure Rate/Trouble Report Rate

MAD: Average Repair Interval/Mean Time to Restore

Section 4: Glossary

Section 1: Ordering

FOCT: Firm Order Confirmation (FOC) Timeliness

Definition

Firm Order Confirmation (FOC) Timeliness measures the percentage of FOCs returned within the Company-specified standard interval.

Exclusions

- Service requests identified as “Projects” or “ICBs”
- Service requests cancelled by the originator
- Weekends and designated holidays of the service center
- Unsolicited FOCs
- Administrative or test service requests
- Service requests that indicate that no confirmation/response should be sent
- Other exclusions as defined by each RBOC to reflect system and operational differences

Business Rules

Counts are based on the first instance of a FOC being sent in response to an ASR. Activity starting on a weekend or holiday will reflect a start date of the next business day. Activity ending on a weekend or holiday will be calculated with an end date of the last previous business day. Requests received after the company’s stated cutoff time will be counted as a “zero” day interval if the FOC is sent by close of business on the next business day. The standard interval will be that which is specified in the company-specific ordering guide.

Calculation

Firm Order Confirmation (FOC) Interval = (a - b)

- a = Date and time FOC is returned
- b = Date and time valid access service request is received

Percent within Standard Interval = (c / d) X 100

- c = Number of service requests confirmed within the designated interval
- d = Total number of service requests confirmed in the reporting period

Report Structure

- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
 - RBOC 272 Affiliates Aggregate

Geographic Scope

- State

SQM Disaggregation (Percent FOCs returned within Standard Interval)

- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

Section 2: Provisioning

PIAM: Percent Installation Appointments Met

Definition

Percent Installation Appointments Met measures the percentage of installations completed on or before the confirmed due date.

Exclusions

- Orders issued and subsequently cancelled
- Orders associated with internal or administrative (including test) activities
- Disconnect Orders
- Other exclusions as defined by each RBOC to reflect system and operational differences

Business Rules

This measurement is calculated by dividing the number of service orders completed during the reporting period, on or before the confirmed due date, by the total number of orders completed during the same reporting period. Installation appointments missed because of customer caused reasons shall be counted as met and included in both the numerator and denominator. Where there are multiple missed appointment codes, each RBOC will determine whether an order is considered missed.

Calculation

Percent Installation Appointments Met = $(a / b) \times 100$

- a = Number of orders completed on or before the RBOC confirmed due date during the reporting period
- b = Total number of orders where completion has been confirmed during the reporting period

Report Structure

- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
 - RBOC 272 Affiliates Aggregate

Geographic Scope

- State

SQM Disaggregation

- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

NITR: New Installation Trouble Report Rate**Definition**

New Installation Trouble Report Rate measures the percentage of circuits or orders where a trouble was found in RBOC facilities or equipment within thirty days of order completion.

Exclusions

- Trouble tickets issued and subsequently cancelled
- Customer Provided Equipment (CPE) or customer caused troubles
- Troubles closed by the technician to disposition codes of IEC (Inter-exchange Carrier) or INF (Information)
- RBOC troubles associated with administrative service
- No Trouble Found (NTF) and Test OK (TOK)
- Other exclusions defined by each RBOC to reflect system and operational differences
- Subsequent trouble reports

Business Rules

Only the first customer direct trouble report received within thirty calendar days of a completed service order is counted in this measure. Only customer direct trouble reports that required the RBOC to repair a portion of the RBOC network will be counted in this measure. The RBOC completion date is when the RBOC completes installation of the circuit or order.

Calculation

Trouble Report Rate within 30 Calendar Days of Installation = $(a / b) \times 100$

- a = Count of circuits/orders with trouble reports within 30 calendar days of installation
- b = Total number of circuits/orders installed in the reporting period

Report Structure

- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
 - RBOC 272 Affiliates Aggregate

Geographic Scope

- State

SQM Disaggregation

- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

Section 3: Maintenance & Repair

CTRR: Failure Rate/Trouble Report Rate

Definition

The percentage of initial and repeated circuit-specific trouble reports completed per 100 in-service circuits for the reporting period.

Exclusions

- Trouble reports issued and subsequently cancelled
- Employee initiated trouble reports
- Trouble reports/circuits associated with internal or administrative activities
- Customer Provided Equipment (CPE) or customer caused troubles
- Troubles closed by the technician to disposition codes of IEC (Inter-exchange Carrier) or INF (Information)
- Tie Circuits
- No Trouble Found (NTF) and Test OK (TOK)
- Other exclusions as defined by each RBOC to reflect system and operational differences

Business Rules

Only customer direct trouble reports that require the RBOC to repair a portion of the RBOC network will be counted in this report. The trouble report rate is computed by dividing the number of completed trouble reports handled during the reporting period by the total number of in-service circuits for the same period.

Calculation

Percent Trouble Report Rate = $(a / b) \times 100$

- a = Number of completed circuit-specific trouble reports received during the reporting period
- b = Total number of in-service circuits during the reporting period

Report Structure

- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
 - RBOC 272 Affiliates Aggregate

Geographic Scope

- State

SQM Disaggregation

- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

MAD: Average Repair Interval/Mean Time to Restore**Definition**

The Average Repair Interval/Mean Time to Restore is the average time between the receipt of a customer trouble report and the time the service is restored. The average outage duration is only calculated for completed circuit-specific trouble reports.

Exclusions

- Trouble reports issued and subsequently cancelled
- Employee initiated trouble reports
- Trouble reports associated with internal or administrative activities
- Customer Provided Equipment (CPE) or customer caused troubles
- Troubles closed by the technician to disposition codes of IEC (Inter-exchange Carrier) or INF (Information)
- Tie Circuits
- No Trouble Found (NTF) and Test OK (TOK)
- Other exclusions as defined by each RBOC to reflect system and operational differences

Business Rules

Only customer direct trouble reports that require the RBOC to repair a portion of the RBOC network will be counted in this measure. The average outage duration is calculated for each restored circuit with a trouble report. The start time begins with the receipt of the trouble report and ends when the service is restored. This is reported in a manner such that customer hold time or delay maintenance time resulting from verifiable situations of no access to the end user premise, other CLEC/IXC or RBOC retail customer caused delays, such as holding the ticket open for monitoring, is deducted from the total resolution interval ("stop clock" basis).

Calculation

Repair Interval = (a – b)

- a = Date and time trouble report was restored
- b = Date and time trouble report was received

Average Repair Interval = (c / d)

- c = Total of all repair intervals (in hours/days) for the reporting period
- d = Total number of trouble reports closed during the reporting period

Report Structure

- Non-Affiliates Aggregate
- RBOC Affiliates Aggregate
 - RBOC 272 Affiliates Aggregate

Geographic Scope

- State

SQM Disaggregation

- Special Access – DS0
- Special Access – DS1
- Special Access – DS3 and above

GLOSSARY

Access Service Request (ASR)	A request to the RBOC to order new access service, or request a change to existing service, which provides access to the local exchange company's network under terms specified in the local exchange company's special or switched access tariffs.
RBOC 272 Affiliates Aggregate	RBOC Affiliate(s) authorized to provide long distance service as a result of the Section 271 approval process.
RBOC Affiliates Aggregate	RBOC Telecommunications and all RBOC Affiliates (including the 272 Affiliate). Post sunset, comparable line of business (e.g., 272 line of business) will be included in this category.
Business Days	Monday thru Friday (8AM to 5PM) excluding holidays
CPE	Customer Provided or Premises Equipment
Customer Not Ready (CNR)	A verifiable situation beyond the normal control of the RBOC that prevents the RBOC from completing an order, including the following: CLEC or IXC is not ready to receive service; end user is not ready to receive service; connecting company or CPE supplier is not ready.
Firm Order Confirmation (FOC)	The notice returned from the RBOC, in response to an Access Service Request from a CLEC, IXC or affiliate, that confirms receipt of the request and creation of a service order with an assigned due date.
Unsolicited FOC	An Unsolicited FOC is a supplemental FOC issued by the RBOC to change the due date or for other reasons, e.g., request for a second copy from the CLEC/IXC, although no change to the ASR was requested by the CLEC or IXC.
Project or ICB	Service requests that exceed the line size and/or level of complexity that would allow the use of standard ordering and provisioning interval and processes. Service requests requiring special handling.
Repeat Trouble	Trouble that reoccurs on the same telephone number/circuit ID within 30 calendar days
Service Orders	Refers to all orders for new or additional lines/circuits. For change order types, additional lines/circuits consist of all C order types with "I" and "T" action coded line/circuit USOCs that represent new or additional lines/circuits, including conversions for RBOC to Carrier and Carrier to Carrier.

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, WC Docket No. 05-65

Today, we vote to approve the mergers of SBC and AT&T as well as Verizon and MCI. These mergers will create national facilities-based providers of telecommunications services that will provide new and advanced services to both mass market and enterprise customers. As end-to-end providers of communications services, these companies will make significant investments in fiber-optic networks and use these networks to provide customers a broad array of voice, data, and video services.

I believe that the transactions we approve today are consistent with and will further many of the Commission's competition, broadband, and public safety priorities. For example, these mergers create strong global carriers that will vigorously compete both internationally and domestically. Further, the complement of the local and long distance network facilities will permit the merged entities to offer a more diverse array of services to a broader range of customers. It is my expectation that these mergers will only increase the incentive and ability of the merged entities to invest in broadband infrastructure and spread the deployment of advanced services to all Americans. Of particular importance to me, the mergers will further the goal of public safety by virtue of the commitments that have been made with regard to compliance with the Commission's November 28th deadline to deploy a 911 solution for VoIP customers.

I know that many have expressed questions about these mergers. For example, some are concerned that these transactions will adversely affect competing providers that rely on the merger applicants for wholesale inputs. Others have been concerned about the effect of these mergers on end users – particularly business end users that purchase special access services. I believe that the remedy imposed by the Department of Justice should adequately address any concerns in this regard. Moreover, I note that under the commitments made by the Applicants, UNE rates are effectively capped for two years and special access prices are essentially frozen for 30 months from the merger closing date.

Concerns have also been raised about the impact of this merger on the Internet backbone market. We have found this market, which has never been regulated, to be sufficiently competitive. It is the Commission's prediction that these mergers will in no way alter this dynamic. In any event, the Applicants have committed to publicly post their peering criteria and to continue settlements-free peering arrangements with the same number of providers post-merger as they did, in combination, pre-merger.

Let me say that I do not believe that all of the conditions imposed today are necessary. I believe that the affected markets would remain vibrantly competitive absent these conditions. Nevertheless, the parties involved have chosen to make these commitments now in order to obtain the certainty of immediate Commission approval for their mergers. I understand their desire to move forward, and agree that the public interest will be well served by providing certainty sooner rather than later.

The fiber optic networks of today that are capable of delivering over 100 mbps worth of capacity have come a long way from the microwave transmission technology that was first used to compete several decades ago. We are seeing both intermodal and intramodal providers aggressively competing for customers using a multitude of new technologies and platforms. The telecommunications industry is a constantly evolving one, and the consummation of these mergers represents the opening of a new chapter in communications history. I look forward to the promise of continued technological innovation.

Finally, I would like to thank my colleagues for their rigorous review of these transactions. I know that these mergers presented difficult issues for them to consider and I appreciate, as always, their professionalism and willingness to always do what it is in the public interest.

**STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, WC Docket No. 05-65

It has often been said that nothing is constant except for change. And we as telecommunications regulators need to be particularly mindful of this because change is the engine that drives progress. Unfortunately, today we focus too much on micromanaging the growth and pace of change, rather than how to harness it to benefit consumers.

During my time as a Commissioner, I have spoken at length about the enormous disruptions in the telecommunications marketplace being wrought by convergence and the great progress it has brought. We now have competition more vibrant than has ever been seen in the telecommunications industry, and this has dictated a significant shift in the business strategies of the companies in that industry. Technological advances that spurred competition now allow us to consider mergers that might have been unthinkable in the “natural monopoly” pre-convergence era. Dramatic changes in the technology, the economics, and the structure of the market have mooted prior concerns.

The principal question before us today is this: whether the particular convergence of SBC and AT&T, on the one hand, and Verizon and MCI, on the other, is compatible with the public interest and, more specifically, whether the two mergers further innovation and the growth of competition. While I am pleased that we are allowing the mergers to go forward, some of the conditions in the Orders reflect a failure to appreciate the degree to which the market has changed and how that constrains market behavior by the applicants.

As the applicants know only too well, today’s market for telecommunications is vibrant and challenging and offers no guaranteed rate of return on investment. Perhaps most importantly, the economic foundations of the interexchange market have shifted dramatically as the Bell Operating Companies have won approval to offer in-region long-distance services. The local exchange market has also been transformed as the growing demands of business customers have emphasized the need for high-capacity networks with global reach. The market for data services and Internet access - - something barely on our radar screens 5 years ago - - has exploded as individuals and businesses alike consume more and more high-bandwidth content and require faster and faster broadband connections. And amidst all of this, the rise of high-capacity next-generation networks and fierce competition from wireless, cable-based, and VoIP providers has drastically undermined the rationale for extensive regulation.

These mergers must be viewed in the context of these changes, precisely because they are the natural outgrowth of these changes. As proposed, each of these transactions would marry a Bell Operating Company’s extensive local residential facilities and broadband Internet access offerings with an established interexchange carrier’s business service offerings, long-distance facilities, and Internet backbone assets. The combination of these capabilities expands the merged companies’ scope and scale outside their own regions, improves operational efficiencies, enlarges the companies’ range of offerings, and reduces prices for business and residential consumers alike. In short, these mergers are intended to give birth to strong, nimble competitors, able to meet the demands placed on twenty-first century providers by customers with widely disparate needs.

As approved, however, I fear that many of these potential gains will be delayed or compromised. In my judgment, the conditions included in the Orders before us require the merged companies to provide offerings that the market might not demand, to sacrifice synergies by needlessly treating their affiliates at

arms' length, and to maintain business relationships based on current assumptions even if those assumptions cease to reflect economic reality. Moreover, the companies will have to abide by these conditions while their most aggressive competitors – whether they use wireline, wireless, cable, or other, next-generation facilities – remain exempt.

I have consistently opposed this kind of micromanaged regulatory oversight in situations where competitive forces discipline market behavior. In addition, it is difficult for me to understand how this approach is consistent with this Commission's support for regulatory parity and competitive neutrality. It is no answer to say that the applicants have agreed to accept these conditions, and therefore they must certainly be good, or at least not all that bad. That position fails to take into account that such conditions are the *quid pro quo* that merger applicants must accept in order to get timely approval.

I would perhaps be less concerned about this aspect of today's decisions if either (a) the Department of Justice had outlined problems arising from the larger competitive impacts of these mergers; or (b) these remedies were clearly needed to cure palpable existing problems. But neither is the case here. While I recognize that the Commission's merger review mandate implicates a broader standard of review than that of DOJ, it remains nevertheless true that DOJ's review was focused on the same issues we are asked to examine: competition in the various markets involved. And all the expert economists, lawyers, and other professionals reviewing these issues for DOJ found no significant cause for concern in most of the areas subject to the conditions.

I am not suggesting that DOJ's evaluation is, or should be, co-extensive with ours. But what I would suggest is that it effectively places on the Commission the burden of showing the existence of other problems so grave and immediate that conditioning the merger agreement is the only effective remedy. It should not be standard operating procedure to craft company-specific merger conditions to address unknown and hypothetical competitive threats. After all, the customary administrative weaponry in the Commission's arsenal – rulemaking, enforcement, and so on – does not suddenly evaporate once a merger is approved. We always have these tools and we can always use them when and if necessary.

The competition unleashed by the convergence of formerly separate lines of business places an additional premium on taking a more circumspect approach to conditioning mergers. Competition is a *process*, not a *product*. This new competitive market is still developing, and it needs to be given reasonable regulatory elbow-room to do so. Imposing *ad hoc* conditions that do not reflect the realities of today's market hamstrings this development rather than helps it and creates market distortions. Therefore, it is my view that we should resort to imposing such conditions only *first*, where the perceived harm is an obvious consequence of the merger, not merely a prediction about what might go wrong; and *second*, where other administrative remedies are inadequate to address this harm. That simply isn't the case in these mergers, with these conditions.

The applicants have looked at their business plans and determined that change is not only inevitable, but necessary, if they are to continue to respond to consumer demand for lower prices and better technology. I agree. They argue that the explosion of competition has rendered extensive conditions unnecessary. Again, I agree. These companies, their customers, and their competitors all understand that we no longer live in the monopoly world of years past and that our job as regulators is to keep pace with change, embrace competition and focus on consumer protection, not the protection of the status quo.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING**

Re: SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, WC Docket No. 05-65 (Concurring)

The mergers before us are about more than the union of this country's largest telecommunications carriers. They are about consumers' phone bills, the availability of competitive broadband options and the future of the Internet. But in a sense, these mergers can also be seen as an epitaph for the competition that many of us thought we would enjoy as a result of the Telecommunications Act of 1996. That legislation, I am convinced, envisioned a vastly different communications landscape than the one we find ourselves living in today.

If you seek the reason why we haven't arrived at that happy valley of competition rife with consumer benefits, you can start with the misdirected policies of the FCC over the last several years. On too many fronts, the Commission put the spear to the pro-competitive policies of the Telecommunications Act of 1996. It put intra-modal competition for the residential market pretty much beyond reach for new entrant carriers and then proceeded to inhibit enterprise competition, too. We turned our eyes away when enforcement was needed to keep bottleneck facilities open. And all the while we kept singing confidently "Don't Worry, Be Happy"—*inter-modal* competition is going to save us with all its new options. Maybe, but then again maybe not—we're still waiting. I think we ought to be concerned. Thanks in part to our actions, the wireline market became increasingly the province of the few. More than half of the wireless market came under the control of incumbent wireline providers. New services like VoIP have been held back by the high cost of broadband in this country. And now the Internet backbone seems headed in the same direction of control by a favored few.

This state of affairs is not of my making or choosing. The record shows that I objected vociferously to many of these changes. I would have chosen a very different path than the one we travel today. But in the end, we are charged with considering these mergers in the context of the world that is, not the one that might have been.

In this environment, I believe my responsibility is to identify and fight for what we can preserve, so that American consumers can still enjoy some competition in telecom services; that business customers, too, can benefit from competitive rates and innovative service choices and lower prices; and that, when it comes to the Internet, we can all go where we want to go and do what we want to do with this dynamic tool that is so critical to our nation's future. These things are all clearly in the public interest.

The Order the Commission adopts today falls far short of ideal. Maybe a better way to put it on this Halloween Day is to say: It's not a trick or much of a treat, but it's all you get if you come knocking at the Commission's door today. Yet, clearly, this is better than approving these mergers without any conditions. There have been difficult discussions here in recent days, but they have been substantive, productive and fair. And while I wish I could have been more persuasive on a number of issues, we should keep in mind that this outcome is far from a rubber stamp approval of the item we received. I would not—could not—support an unconditioned approach. Would I have preferred to do more? Yes. Am I entirely satisfied? No. But this Order is now conditioned on provisions designed to address numerous possible harms to competition and to consumers, as well as to protect the openness and innovation that must always characterize the Internet.

- *Stand-Alone DSL:* We require the Applicants to make available stand-alone, or "naked" DSL. This means consumers can buy DSL without being forced to also purchase voice service. This is good news. If savvy consumers have cut the cord and use only a wireless phone, why should they have to pay for wireline voice service they don't even want? Looking forward, this condition is important for the development of VoIP. I also am pleased that the Commission has committed to enforce this condition and issue an annual report addressing anti-competitive conduct in this market. And I hope we will have the good sense to find it anti-competitive if the price for stand-alone DSL is not significantly less than the price for bundled voice and DSL.
- *Net Neutrality:* Two years ago I urged the Commission to ensure that its policies protect the openness that makes the Internet such a vibrant place. Two months ago, I pushed for this Commission to approve an Internet Policy Statement outlining the freedoms consumers have a right to expect in the digital age. Today, we make these principles enforceable. As a result, consumers will have an enforceable right to use their bandwidth as they see fit, going where they choose and running the applications they want on the Internet.
- *Internet Backbone:* The Internet's network of networks relies on providers handing traffic off to one another. This free exchange of traffic—known as peering—has been a hallmark of the Internet backbone. We require the Applicants to continue peering with as many providers as they do today. This will help prevent the network outages that come from de-peering. It will also help ensure that the free flow of traffic continues—and that new costs are not passed on to end-users.
- *Special Access:* We provide a measure of stability for businesses and carriers that use special access services—the high capacity facilities that so much of our communications rely on. We freeze rates and provide some protection against discriminatory practices. Let me note, however, that the Commission still has a long-standing and more comprehensive proceeding on special access to complete. It is vitally important that we do so without further delay.
- *UNEs:* To keep competition growing from competitive carriers, we require the Applicants to update the wire center test from the *Triennial Review Remand*. We also provide stability by capping UNE input rates for two years.

These conditions provide only a bare minimum. I can't say we made lemonade out of lemons, but we did the best we could. More would clearly have been better. Surely our statutory obligation to ensure that these mergers are in the public interest provides ample authority for the Commission to go further than it did. In addition to the areas I just discussed, a merger of this magnitude would seem to call for more significant divestiture of overlapping facilities and routes, going beyond the minimalist consent decrees that were announced last week by the Department of Justice. But in the good faith back and forth between my colleagues and me, these are the results we were able to achieve. Similarly, some will argue that several of the commitments outlined above are not in perpetuity and are not long enough. I agree. Commissioner Adelstein and I fought long and hard for lengthier commitments. But at least for the time periods enumerated, this becomes official policy. Once instituted, consumer expectations may compel their extension, and perhaps the Commission itself will come to see the wisdom of extending them. More to the point, Congress will have the opportunity to work its will as it revisits the telecommunications statute.

Going forward, our priority must be on vigilance, expert monitoring, and enforcement as needed. This new era of telecommunication is rife with all sorts of exciting opportunities for both consumers and entrepreneurs. But there are also new perils. No less a source than the *Wall Street Journal* pointed out less than two weeks ago that large carriers "are starting to make it harder for consumers to use the Internet

for phone calls or swapping video files.” The more powerful and concentrated our facilities providers grow, the more they have the ability, and perhaps even the incentive, to close off Internet lanes and block IP byways. I’m not saying this is part of their business plans today; I am saying we create the power to inflict such harms only at great risk to consumers, innovation and our nation’s competitive posture. Because, in practice, such stratagems can mean filtering technologies that restrict use of Internet-calling services or that make it difficult to watch videos or listen to music over the web. The conditions we adopt today speak directly to this issue—*before* increased concentration of last mile facilities and the Internet backbone make it intractable. This is why stand-alone DSL, enforceable net neutrality principles, and peering in the Internet backbone are so vital.

I also am pleased that these conditions now express a measure of concern for the effects of these mergers on competitive wireline providers. Competitive carriers will benefit from the reforms we put in place for special access and UNEs. This will provide at least some latitude for competitive players trying to crack open an increasingly concentrated marketplace. We need active and engaged competitive carriers to keep rates low. This is especially important for small business customers.

In addition, this Order takes a cautious view of the impact of these mergers on rural America. We share a concern that the mergers not be allowed to jeopardize interconnection for small and rural providers. To this end, the Commission commits to monitoring the situation on an ongoing basis. This is important because the wrong policies here could actually put rural America at further disadvantage compared to the rest of the country. I, for one, will be vigilant in making sure this never happens.

Looking beyond the transaction before us, it is obvious that the whole telecommunications landscape continues to change dramatically. But despite all of the advances in technology and efficiency over the last decade, local phone rates have failed to decline. Household phone penetration is at the lowest rate in 17 years. Surely being 16th in the world in broadband penetration is nothing to crow to about. And, yes, we still have enormous digital gaps from the inner city to the rural village, and there is a real threat that current policies may widen rather than close those gaps. So there are already ample warning signs something is not right. And it is long past time for the Commission to pay heed.

It may be that we can address all these concerns in a big carrier environment. Conversely, it may be that we are tacking back in time toward an era when concentrated power dictated what limited services we could and could not have and we had no recourse but to accept what was offered. In any case, I am mindful that there are large and portentous questions here—and that their ultimate resolutions often range beyond the boundaries of FCC jurisdiction. The Commission—important as its work is—does not design the legal landscape for telecommunications. Congress is looking at these issues and will hopefully be updating our telecommunications statute in the months or year ahead—and there is no substitute for that kind of guidance. I also believe we need some real national dialogue on these issues regarding consumer rights, Internet openness, broadband deployment and many more. I think we will find the American people more than happy to engage such a discussion. They understand that how these issues are decided is important to them. The bottom line here is that these issues are vitally important to the future of our country. Telecommunications are going to be a major driver of our economy in this new century. We just have to get the legal and regulatory landscape right. If we get it wrong, American consumers will pay and so will American technology, innovation and entrepreneurship. No less than our global competitiveness in the new information age is at stake.

Above all, we must have some humility about what we do. There are honest disagreements over these issues and I don’t believe that any one of us has it all figured out. So we have to be always open to new facts and always follow up on the real-world consequences of our actions. If rates go up for residential and business users as a result of our decision today, if our broadband penetration rates fall

further in comparison with what other countries with different policies are experiencing, and if consumers find that their Internet freedom is being shackled by monopoly or duopoly control, then we have a clear and pressing duty to revisit what we have done. So we need to put as much or more effort and resources into monitoring the consequences of our actions as we do in bringing them forward for a vote. I have worked in this proceeding to protect against injurious consequences, as best I can under the circumstances, and while I would have liked more, I will concur in these Orders and pledge my close attention to their unfolding consequences.

We at this table are all indebted to the work of the Bureau and to the tireless dedication of our personal staffs as these items matured and particularly their often heroic efforts over the past week. For my part I want to extend my appreciation and admiration to Jessica Rosenworcel. Her tenacity and creativity through all of this have been an inspiration.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN,
CONCURRING**

Re: SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, WC Docket No. 05-65 (Concurring)

While I am deeply concerned about the concentration and loss of wireline competition that may occur as a result of these mergers, I concur in these Orders because they each include a minimum set of conditions that tip the balance, albeit narrowly, in favor of approval.

In these proceedings, we consider the mergers of the two largest incumbent telephone companies in the United States with the two largest long distance telephone companies. My job is to determine whether these proposed combinations will advance the public interest.

The Applicants have argued that these mergers will create two companies that are stronger competitors in the global marketplace and that will be better positioned to bring broadband and video services to American consumers. I support the Applicants' efforts to promote ubiquitous broadband and competitive video services and look forward to seeing their continued commitment to these goals.

At the same time, I am concerned about the potential harms of these mergers. AT&T and MCI are, without question, two of the leading providers of competitive choice across the country, and these combinations will, by any measure, create more concentration in markets that are already highly concentrated. We must be particularly careful where a proposed merger would lead to less competition rather than more, so I give these concerns great weight.

Based on my weighing of these potential benefits and harms, I could not support these mergers in the absence of reasonable conditions. Without conditions, there is a real possibility that these combinations would increase rates for both residential and business consumers and put at risk the continued existence of the open and robust Internet. So, my support here is based on the Applicants' offers to comply with a minimum set of conditions that will help promote consumer choice and the development competitive alternatives. Indeed, I would have preferred additional and more rigorous safeguards beyond those set forth in these Orders.

I am particularly pleased that the Applicants have agreed to offer a stand-alone DSL broadband product. Consumer advocates strongly supported this condition, which will substantially expand the options available to residential and small business consumers. By conditioning this merger on the offering of a stand-alone DSL broadband offering, we create an opportunity for the development of competitive Voice Over Internet Protocol (VoIP) and help spur innovative communications technologies. According to consumer advocates, many consumers will want bundled services, but when companies unilaterally mandate that broadband and phone services be purchased together, they diminish the incentive of consumers to purchase VoIP phone service from competing providers or to rely on wireless service as their primary option. In addition, by committing to do annual reports that assess the competitiveness of the consumer broadband market, we also will have the ability to monitor whether these services are being made available to consumers at reasonable prices and under fair terms. Consumers deserve the option of choosing the combination of services that fits their needs, and encouraging greater purchasing flexibility through stand-alone DSL furthers this goal.

A stand-alone DSL offering is an important contribution to the marketplace, but I do not pretend that it is a panacea. It will not provide greater choice for those who cannot afford DSL or who do not

have DSL available in their area. Especially vexing is that the stand-alone DSL offering outlined in this Order could also have been more robust. For example, we could have done more to enable consumers to purchase DSL services free from any voice service, rather than just traditional circuit-switched voice services.

Some have argued that AT&T and MCI had already made irreversible decisions to exit the entire consumer market, but it is worth noting that this exit was certainly hastened, if not precipitated, by the actions of this Commission and the courts. In a very tangible way, we reap what was sown in prior Commission decisions that consistently undercut competitors' ability to offer choice to American consumers. As many of you know, I was a frequent dissenter to those FCC decisions, which form the prologue for today's action. I predicted then that those decisions would lead to less choice for consumers. In some ways, these transactions fulfill that prophecy. So while I am pleased that we are able to take some meaningful steps in these Orders to promote the interests of consumers, this Commission must closely monitor the affordability and availability of the broadband services and the intermodal competition that we count on to fill the gaps.

I also find compelling that the Applicants have agreed to comply with the Commission's Internet Policy Statement as an enforceable condition of these mergers. Commenters have voiced concern that the horizontal and vertical integration of the Applicants' Internet backbone networks, particularly considering the two mergers together, may create an incentive and ability to discriminate against other providers in what has heretofore been a competitive market. Maintaining an open and robust Internet is absolutely critical. Just two months ago, the Commission set out in this Policy Statement a basic set of consumer expectations for broadband providers and the Internet. With this Statement, we sought to ensure that consumers are entitled to access the lawful Internet content of their choice, to run applications and use services of their choice, subject to the needs of law enforcement, and to connect their choice of legal devices that do not harm the network. While I applaud the Applicants for agreeing to comply with this statement of principles as an enforceable condition of their mergers, I must admit a deep foreboding that this commitment is only for two years. Given that it is Halloween, I hope that there are no tricks up anyone's sleeve. If any attempt to disrupt consumers' ability to unfettered access to the content of their choice occurs before or after the conditions expire, I expect the Commission will treat such a violation of the public trust and our policy with the seriousness it deserves.

The Applicants have also made notable commitments to protect against concentration in the Internet backbone market. In the face of concern over their Internet backbone practices, the Applicants argued that there are sufficient incentives to facilitate a competitive market and that concerns about anticompetitive practices in the Internet backbone peering arrangements are ill-founded. By agreeing to publicly release their peering policies and by committing to maintain settlement-free peering with at least as many backbone providers as they peered with pre-merger, we give competitors important tools to assess and monitor the accuracy of these claims.

For American business customers, these mega-combinations may present the greatest risks. Although business users tend to have more options than residential users, the Commission concludes that there is still a high level of concentration in the enterprise market in most areas of the country today, and the record makes clear that AT&T and MCI are two of the largest sources of choice for business users and largest suppliers of wholesale special access services to competitive carriers. Indeed, the record suggests that even the mere presence of AT&T or MCI in the competitive bidding process results in lower wholesale prices. Based on these competitors' national positions and ability to apply competitive pressure to wholesale prices, I believe that a more substantial divestiture of overlapping facilities would have been appropriate with this merger. I am not convinced that the relatively minor number of facilities where the Applicants are required to lease high-capacity lines – representing far less than one percent of

their commercial buildings – is sufficient by itself to remedy this significant loss of actual and potential competition. The Department of Justice’s action leaves 99.9% of commercial buildings in SBC and Verizon territory wholly unprotected from the loss of competition that AT&T and MCI brought to bear.

In the absence of more thorough protections, I believe it is imperative that this Commission adopt safeguards to protect against the loss of competition. So, I am pleased that these Orders include price freezes for all four companies’ current special access offerings. The Orders also include anti-discrimination provisions, which will help ensure that the combined companies do not discriminate in favor of their own affiliates or in favor of each other. I also commend the Applicants for including provisions to ensure against unreasonable grooming restrictions, which might otherwise prevent competitors from choosing the least cost option for providing service. While I would have gone further to ensure fair pricing of services to retail and wholesale customers, and done so for a longer period than thirty months, we do afford some modest protection from price hikes that could otherwise occur after the loss of such formidable competitors.

I also am pleased that the Applicants have agreed to freeze rates for the wholesale network elements used by competitors and to recalculate the impairment triggers for determining the availability of these elements. This later point was particularly critical for my support.

In approving these mergers, I rely specifically on the companies’ assurances that they will fully implement the commitments they have made both in their applications and in their more recent filings. In these Orders, we state our expectation for increased competition among a broad array of intermodal and intramodal competitors. We also state our expectation for vigorous out-of-region competition by the Applicants. Unfortunately, the record on meeting past commitments on out-of-region competition is not what it could be. So, it is imperative that this Commission commit to monitor and vigorously enforce the terms of these merger orders.

The market changes approved in these Orders are historic in scope, but they are also part of a larger industry restructuring that is quickly changing the landscape for consumers of telephone, Internet and video services. The opportunities from these technologies are greater than ever, but so is the penalty for those left without options. We consider these mergers in light of these larger industry trends, but I must note that there is much analysis in these Orders that I find lacking or downright troubling. The Orders’ sweeping conclusions about the lack of impact of these combinations requires us to take a lot on faith: more than consumers should expect. But given the willingness of my colleagues and the parties to compromise, we strike a reasonable balance. So, while I can agree to support the package of conditions agreed to by the Applicants and my colleagues, I can only concur to the Orders given my concern with the overall analysis in these items.

I would like to commend my colleagues for their cooperation and willingness to accommodate many of my concerns here. I also commend the staff of the Wireline Competition Bureau for their hard work on this item right down to the wire. These fine public servants have been willing to stay many late nights and weekends to move the business of the Commission forward and I thank them for their efforts.