

**CONSUMER FEDERATION OF AMERICA  
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**BROKEN PROMISES AND STRANGLERED COMPETITION:**

**THE RECORD OF BABY BELL MERGER  
AND MARKET OPENING BEHAVIOR**

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# **BROKEN PROMISES AND STRANGLING COMPETITION:**

## **THE RECORD OF BABY BELL MERGER AND MARKET OPENING BEHAVIOR**

### **EXECUTIVE SUMMARY**

#### **THE ANTICOMPETITIVE IMPACT OF THE TELECOM MEGA-MERGERS**

The wave of proposed mergers in the telecommunications industry — SBC attempting to gobble up AT&T, and Verizon trying to swallow MCI — mark the ultimate demise of any hope for consumers getting more choices and lower prices for local, long distance, wireless, and the new Internet-based services exploding on the market.

Evidence submitted to regulators across the country proves the pending mega-mergers of telephone giants SBC/AT&T, and Verizon/MCI will have a devastating impact on the nation's residential customers.<sup>1</sup> Taken together, the merger protests submitted by consumer groups show beyond a shadow of a doubt that the mergers are anticompetitive and will impose substantial harm on consumers. The harm posed by these mergers goes well beyond local and long distance markets that are already highly concentrated. More importantly, the mergers will destroy the feeble competition in markets for the telecommunications facilities that are necessary to provide a wide range of telecommunications services, including access to the Internet.

These mergers would create super-Regional Bell Operating Companies (RBOCs) that monopolize the in-region public switched telephone network and “mega-Peer Internet backbone” providers that dominate access to the Internet for end-users. After a decade of market opening, the two firms being acquired account for about three quarters of the competitive presence in telephone markets. The four companies in question comprise the number one, two or three largest providers of local and long distance service, network access, switching and transport services. The remaining competitors in the telecommunications business would be minuscule in comparison, lacking the size and geographic reach to provide a competitive check on the two dominant firms.

Illogical promises of greater concentration bringing greater competition should be flatly rejected by regulators. The track record of the RBOCs since the passage of the Telecommunications Act of 1996 shows a persistent pattern of bad acts, broken promises and the failure to compete. Intermodal competitors—such as Voice over Internet Protocol and wireless—have all been recently examined and correctly dismissed as substitutes for retail services by both the Federal Communications Commission (FCC) and the Department of Justice (DOJ).<sup>2</sup> That RBOCs' dismal competitive track record, combined with the dearth of competitive alternatives and the dramatic increase in market power that the mega-companies would possess post-merger, demand the conclusion that anti-competitive and anti-consumer behavior would sharply increase post-merger.

**THE MERGERS SHOULD BE REJECTED, OR SUBJECT TO BOTH DIVESTITURE OF OVERLAPPING IN-REGION ASSETS AND MANDATED NON DISCRIMINATORY ACCESS TO INTEGRATED ASSETS**

Both mergers should be rejected. The companies being acquired were economically viable and vigorously competitive across a number of service and geographic markets. AT&T and MCI were also in the process of developing business models to compete in response to recent decisions by the Federal Communications Commission that eliminated the main avenue of local mass-market competition – unbundled network element platforms (UNE-P). Actual and potential competition will be eliminated by these two mergers on a scale that has never, heretofore, been allowed to take place.

Should regulators decide that the mergers could produce public benefits, they must act aggressively to repair the competitive damage that they would do. Given the massive overlap of competitive assets, the track record of bad behavior by the acquiring companies, and the failure of past penalties to dissuade the RBOCs from anti-competitive actions, regulators must require the divestiture of all overlapping in-region assets of the acquired companies. They should also impose rigorous, specific, enforceable conditions of non-discrimination for access to vertically integrated, in-region assets. Specifically:

- Wherever the two firms rank in the top four providers of in-region products within properly defined product and geographic markets, divestiture of all acquired assets related to that product should be required.
- Where the acquired firms is a leading supplier (top four rank) of a network facility that provides vertical leverage against in-region competitors, enforceable conditions to prevent anti-competitive discrimination and price squeeze should be imposed.

## **THE PROPOSED MERGERS WOULD ELIMINATE THE TWO LARGEST COMPETITORS OF THE BABY BELLS**

### **THE SBC-AT&T MERGER**

SBC is the dominant local exchange carrier in its home territory by far. It is also the number one long distance carrier and wireless service provider in most of its markets. AT&T is the number one or two competitive local exchange carrier in most of SBC 's service territory. It is the largest unaffiliated long distance company.

Applicants claim the proposed merger will not and cannot hurt mass-market competition. To support this far reaching assertion, applicants cite AT&T's decision, prior to the merger, to unilaterally cease any efforts to market services actively to the mass market based on unbundled network elements, and thus, absent the merger, AT&T would not be in head to head competition with SBC in the mass market. There is no dispute that the FCC's recent Triennial Review Order (TRO), fully supported by SBC, drove AT&T, MCI and other competitive local exchange carriers (CLECs) from serving the residential mass market through the UNE-P platform, but they were migrating to other technologies. AT&T planned to continue serving the mass market by migrating to other technologies.

While AT&T had declared its intention to phase out its local business based on UNE-P after the FCC decision to eliminate this avenue to competition, it still retains millions of customers throughout SBC's service areas. It had also declared its intention to continue to compete in the market relying on voice over Internet protocol (VoIP). Because of the FCC's decision to raise UNE-P prices, AT&T had raised its prices, but it switched to VoIP, which is a lower cost technology that would have alleviated those price pressures. Even Verizon lists AT&T as a competitor for local residential service in its application.<sup>3</sup> In other words, AT&T had set out on a strategy to remain a viable competitor, a strategy that is cut short by this merger.

In fact, AT&T has hardly withdrawn itself from competing for residential mass-market customers. In the face of steep increases in UNE prices, AT&T turned to the VoIP market as a more profitable method of reaching mass-market customers.<sup>4</sup> AT&T became an aggressive player in the VoIP market, aiming to become the nation's "premier provider" of competitive VoIP calling plans.<sup>5</sup> AT&T set a goal of winning 1 million business and residential VoIP customers by the end of 2005, according to company officials.<sup>6</sup> Within a few months of the initial rollout of its VoIP offering, and shortly after the FCC's TRO decision, the company engaged in aggressive price cutting of its "CallVantage" plan.<sup>7</sup> AT&T continues to sell local phone service, including VoIP over its website, <https://www.callvantage.att.com>. Proprietary evidence introduced by consumer interveners in the California merger approval proceeding supports AT&T's strong presence in the VoIP market.<sup>8</sup>

Eliminating AT&T CallVantage as a competitive threat may have been a factor in SBC's acquisition of AT&T. While AT&T, AOL and others compete in the VoIP market, SBC is struggling to introduce a consumer market VoIP offering.<sup>9</sup> Buying up an established VoIP

competitor makes sense for SBC. Speaking at the American Enterprise Institute recently, AT&T Chairman and CEO David Dorman noted that “AT&T’s residential Voice over Internet Protocol (VoIP) service, AT&T Call Vantage, would remain an important component of the combined AT&T-SBC consumer bundle.”<sup>10</sup> Last year, AT&T earned just as much income from its consumer line of business (\$577 million) as it did from its enterprise business (\$588 million).<sup>11</sup>

AT&T is certainly not a failing firm about to go bankrupt if it is not rescued by SBC. Nor has it exited businesses that directly compete with SBC at wholesale or retail.

#### **THE VERIZON-MCI MERGER**

Verizon is the dominant local exchange carrier in its home territory by far. It is also the number one long distance carrier and wireless service provider in most of its markets. MCI is the number one or two competitive local exchange carrier in most of Verizon’s service territory. It is the second largest unaffiliated long distance company.

While MCI had reduced its emphasis in its local residential business based on unbundled network element platform after the FCC decision to eliminate it, it still retains millions of customers throughout Verizon’s service areas. MCI pressed its role in the enterprise VoIP market,<sup>12</sup> claiming an advanced VoIP service:

MCI is uniquely positioned to enable the cable industry to rapidly enter the advanced telephony market.

MCI has the most connected farthest-reaching IP network in the world based on number of company owned POPs (“points of presence”).

MCI has one of the largest local footprints outside of the ILECs.

MCI is one of the nation’s largest long distance providers.

MCI is widely recognized in VoIP services.<sup>13</sup>

While it was emphasizing business market services, MCI had also entered into a multi-year, multi-million dollar agreement with Time Warner Cable to provide consumers with next-generation voice-over-IP (VoIP) communications services utilizing MCI’s global voice and data network: “As a result of the services provided by MCI under the terms of the agreement, Time Warner Cable will be able to deploy its residential Internet protocol (“IP”) voice service, Digital Phone, nationwide. In addition to providing local points of interconnection to terminate IP voice traffic to the public switched telephone network, MCI will also deliver enhanced 9-1-1 service, local number portability as well as manage network integration and electronic bonding of both companies’ order entry systems”.<sup>14</sup>

Over the years since the passage of the Telecommunications Act of 1996, AT&T and MCI have pursued various approaches to delivering telecommunications products to consumers, including fixed and mobile wireless, cable, resale, UNE-P and facilities based entry. They are the largest current and potential competitors to the Bell operating companies. The foreclosure of the UNE-P approach is recent and the entire CLEC industry is developing

alternative models. The elimination of the largest competitors will be a severe blow to the competitive fabric of the telecommunications industry.

MCI played a key “maverick” role in the industry for decades. Not only did it break open the long distance monopoly for residential customers, but it also pioneered local competition in New York and elsewhere. Because of MCI’s competitive leadership, incumbents and competitors are able to offer a uniform package across a large number of markets. MCI initiated the process with its “Neighborhood” program and other companies have followed suit. The ILECs have been forced to match the offers and the resulting consumer savings are totaling huge sums.

MCI is certainly not a failing firm about to go bankrupt if it is not rescued by Verizon. Indeed, it has just exited bankruptcy with a balance sheet with little debt and its assets were the object of a prolonged bidding war. Nor has it exited businesses that directly compete with Verizon at wholesale or retail.

### **THE BIG FLIP-FLOP**

Because these corporations have flip-flopped their arguments to support their immediate objectives, it is easy to find them contradicting themselves about whether their new partners were ever competitors. The speed with which the corporations will change their tune to gain favorable regulatory treatment underscores how little credence their latest argument should be given.

A few months ago, the Bells were citing AT&T and MCI as vigorous competitors because that supported their arguments for deregulation. As Ivan Seidenberg, CEO of Verizon, put it in October 2004 “So there’s lots of overlap there. So my view is we are both serving lots of overlap in the same market.”<sup>15</sup> Now, of course, the claim there is no such overlap. “The combination of Verizon’s and MCI’s complementary assets and expertise will strongly promote the public interest. At the level of network assets, the two companies are an almost perfect fit... In addition, this transaction will have no countervailing adverse effects on competition. Any concerns about lost competition are insubstantial.”<sup>16</sup>

Similarly, Verizon’s CFO claimed that “[a]nother key part of our strategy is the Enterprise and Business Segment. As you may have seen, a recent Yankee Group study indicated that we are the market leaders in this segment with a 22.4 percent market share.”<sup>17</sup> Now “Verizon is just one of many firms with a single-digit share in the large enterprise customer segment.”<sup>18</sup>

A few months ago, in attempting to eliminate the availability of unbundled network elements for enterprise customers, SBC declared that “it is difficult to see how the Commission could find any impairment at all – for any customers, anywhere, at any capacity – without access to ILEC dedicated transport and high-capacity loops or subloops, including dark fiber.”<sup>19</sup>

Now, seeking to acquire the largest, unaffiliated supplier of such services, SBC changes its tune. “We have come to realize that acquisition of a firm that has the strengths and resources we lack is far more prudent than incurring the massive investment and time that, without a substantial likelihood of return in a reasonable period of time, would be required to develop them independently.”<sup>20</sup>

If SBC, with its huge resources finds the massive investment and time too great to deploy out of region assets but must buy an existing supplier, how can anyone smaller not be impaired. AT&T and MCI certainly felt that they were impaired, and that “BOCs retain significant market power over the provision of special access facilities”<sup>21</sup> [because] “there are a very small number of ILEC wire centers to which competitive special access providers offer service.”<sup>22</sup>

More important than the self-contradictory statements of the incumbents is the analysis put forward by the competitors, who are now the takeover targets. While the incumbents were touting the fierce competition that their future takeover target represented, until they closed the deal to take them over, AT&T and MCI were among the most vocal competitors complaining about the incumbents’ anticompetitive practices and the anti-competitive impact of mergers between large telephone companies. For example, in recent years AT&T petitioned the Commission to reform regulation of the special access market, which is vital to competition across a number of services, because of the pervasive exercise of market power.<sup>23</sup>

Beyond the specific issues that AT&T and MCI raised before they became takeover targets, is the more general fact that they were the regulatory and policy counterweight to the RBOCs. As large corporations with substantial resources, they led the battle to create a space where competition could thrive. Their recent words as independent competitors should carry substantial weight.

As the largest competitors they highlighted the importance of head-to-head competition and the leverage that control over network facilities conferred on the incumbent local exchange carriers (ILECs). These are the features of the competitive landscape on which the FCC and the DOJ must focus. The map they will see, if they properly define product and geographic markets, is not encouraging.

In this merger as in all the previous RBOC mergers, the merging parties promise substantial benefits, not the least of which is an increase in competition by removing a potential or actual competitor. In this case, as in the others, the benefits claimed by the merging partners are speculative, dubious and contradicted by the results of previous mergers in which identical promises were made. They simply never deliver on their promises. Even if some cost-saving synergies are achieved, with the weakened state of competition in the industry, it would be very unlikely that such gains would be passed through to the public. This is the ultimate test of the public interest in merger analysis.



## **INTERMODAL COMPETITION CANNOT PREVENT THE ABUSE OF MARKET POWER THAT WILL RESULT FROM THESE MERGERS**

SBC and Verizon often point to new technologies, such as VoIP as the source of the supposedly great level of competition, but these are actually quite limited. Given that 70 percent of households don't have broadband service and, therefore, cannot take advantage of VoIP calling,<sup>24</sup> VoIP is not yet an effective competitor to the traditional wired phone service. And VoIP has other problems. The FCC has only recently ordered VoIP providers to offer 911 access and it is not clear whether a reliable solution will be found or what impact the order will have on competition from VoIP providers. It does not work when the power goes out. Even worse, some broadband providers have blocked VoIP providers' access to ports.

Making matters worse, SBC and Verizon (as well as BellSouth) also use an anti-competitive bundling tactic to ensure that VoIP can never effectively compete with their basic local voice services. Neither Verizon nor SBC will sell a consumer DSL on a stand-alone basis, what is known as "naked" DSL. Both force consumers to buy their voice service in order to get a DSL line. So a consumer who wants to buy VoIP from a competitor has to pay for local service twice.

Verizon's recent announcement that it would relent and let some consumers buy "naked DSL" did not impress New York Attorney General Elliot Spitzer, who saw through the ruse.

Before announcing these recent changes, Verizon claimed that customer identification issues prevented it from offering wireline and DSL services independent of each other. By contrast, Qwest Communications International Inc., the smallest regional phone company, has offered stand-alone DSL for quite some time. The inference is inescapable that Verizon's stalling is designed to hinder competition from other VoIP providers.

While the roll-out of FTTP [fiber-to-the-premises] progresses, Verizon has little incentive to offer stand-alone DSL – particularly from refraining to doing so hinders VoIP providers from competing against Verizon's monopoly voice product.<sup>25</sup>

In March 2005, the *New York Times* reported on the problems of bundling DSL with local wireline phone service, citing numerous examples of DSL customers who rely on wireless phones for normal calling, never using the wireline phone that they pay \$360 a year to keep connected.<sup>26</sup> Tacking on local phone service to a DSL bill raises the monthly price from \$20-\$40 (which is often only for a limited trial period and for those willing to sign a one-year contract) to \$50-\$80. This practice mirrors cable, which sells broadband for \$40-\$60, so long as you purchase its television service bringing your total to \$80-\$100 every month. Both telephone companies and cable operators force consumers to buy bundles of services – to pay twice – if they want to purchase VoIP service from a competitor.

Two critical factors limit the ability of wireless services to effectively compete with traditional services. First, even with a big bucket of minutes, wireless costs about ten cents a minute for the typical pattern of use of local calls – five times as much, on a per-minute basis, as local flat-rate dial tone, which is the staple of local service. Wireless is also less reliable than wireline and has limited access to the 911 system. Wireless “family plans” are considerably more expensive than a family sharing a wireline. Second, Cingular and Verizon Wireless, the nation’s two largest cell phone companies, are owned by two large Bells – SBC (with BellSouth) and Verizon, respectively – and, therefore, have little incentive to compete with their own wireline affiliates. Through mergers and acquisitions, as well as their brand name prominence, SBC and Verizon are each the leading wireless supplier within their respective local market.<sup>27</sup>

The Commission and the DOJ both recently concluded that wireless is not an economic substitute for wireline and nothing has happened in the past few months to change that conclusion.<sup>28</sup> If anything, the evidence reinforces it. A recent *Wall Street Journal* headline made the point well – “Cutting the Phone Cord Isn’t as Popular as Once Predicted.”<sup>29</sup> It remains the case that wireless service is substantially more expensive and of lower quality than landline service. Of the small percentage of households that do not have a landline phone – and the estimate of the percentages vary from 2 to 6 – a substantial number did not cut the cord, they are young people who never had one.

## **THE CURRENT STATE AND DIM FUTURE OF COMPETITION IN A REVESTED TELECOMMUNICATIONS INDUSTRY**

The FCC and DOJ cannot bury their heads in the sand and ignore the fundamental impact of these simultaneous mergers on the industry. The simultaneity of the proposed mergers is reinforced by the similarity of the arguments and flaws in the applications. In their statements and filings, the merging parties fantasize about intermodal competition and present nationwide data that purports to show that telecommunications markets are highly competitive. This approach to market analysis is simply wrong. Telecommunications markets are still essentially local markets. In order to provide telecommunications services, one must have a last mile technology to distribute the service to the consumer and a middle mile medium to aggregate traffic and deliver it to large national and international communications and Internet networks. These last- and middle-mile facilities are the bottlenecks through which all telecommunications must flow.

These are the bottlenecks that the ILECs like Verizon and SBC leveraged to maintain their market power over customers. These are the bottlenecks that CLECs, AT&T and MCI foremost among them, were trying to break down. When the analysis moves from the macro-level to take a more granular view of real product and geographic markets, the impact of the merger becomes even uglier from the consumer point of view.

These two proposed mergers represent a double dose of anticompetitive chutzpah that spells disaster for consumers.

- Within their regional market, first the Bells made life so miserable for competitors that they went into bankruptcy or threw up their hands in despair. Then the Bells say they should be allowed to buy up their largest local competitors, because they really aren't very good current or potential competitors.
- When competing head-to-head with other companies outside their region, the Bells flip the argument around, with the same unfortunate result for consumers. In order to secure approval of their previous mergers, which eliminated potential out of region competitors, the Bells promised to compete out of their home region markets, but they did not try very hard and have not done very well. So the Bells say, since we cannot be considered really good competitors now or in the future, we should be allowed to buy up the companies we were supposed to compete with.

The failure of competition becomes an excuse for the further re-consolidation and re-integration of the market, which eliminates the vestiges of competition and makes new entry into the market more difficult.

## **HORIZONTAL CONSOLIDATION**

### **Residential Market**

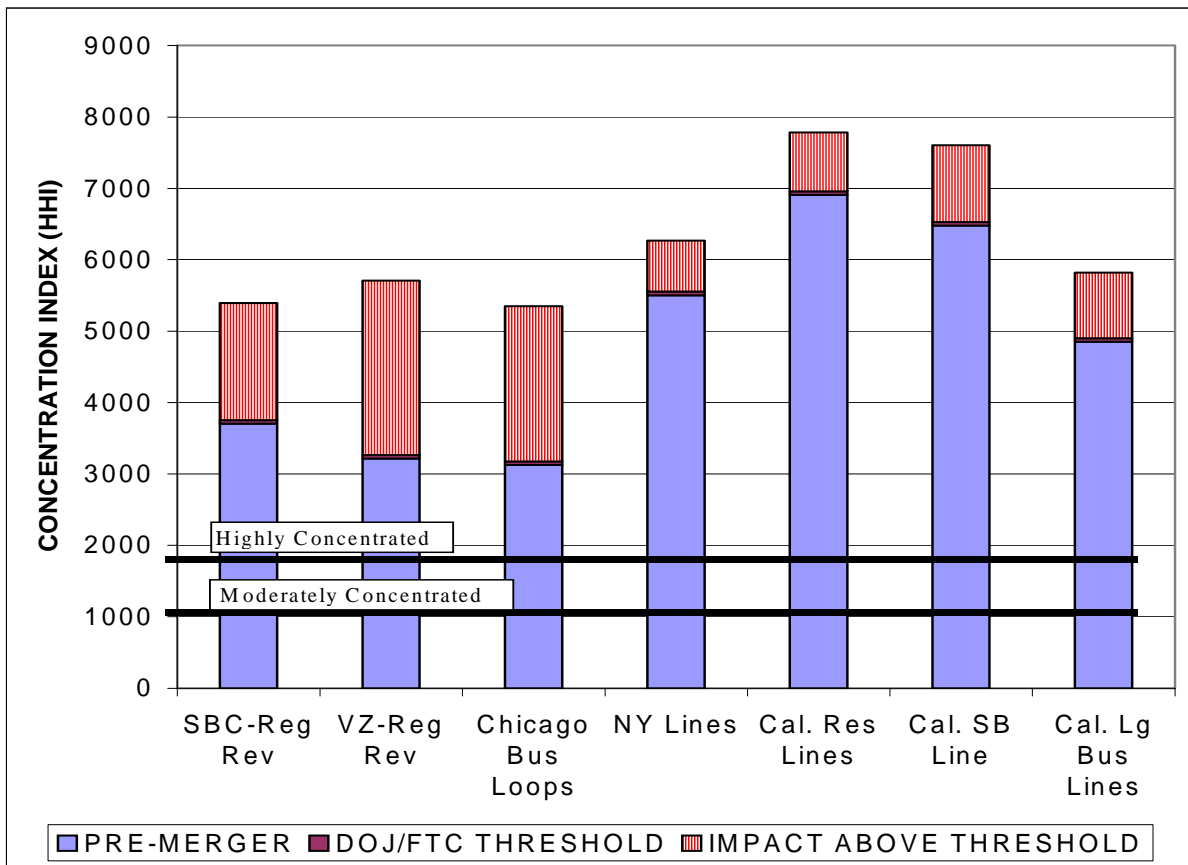
The SBC/AT&T and Verizon/MCI mergers will have a deep impact in important telecommunications sectors like the local and long-distance residential and business markets. Today, pre-merger, SBC and Verizon have about an 80 percent residential market share of local telephone service in their regions,<sup>30</sup> and that number will increase as a result of the latest acquisitions and the decision of the FCC to eliminate UNE-P, which allowed AT&T and MCI to compete in local markets. By buying up their largest competitors and eliminating the last vestige of competition, the market shares of these two behemoths in their regions will likely exceed 90 percent in the residential sector.

Although the merging companies have failed to voluntarily provide meaningful information on product and geographic markets, state commissions have begun the process of investigating the impact of the SBC/AT&T merger, and the severe problems it will cause are becoming clear.<sup>31</sup> As the Commission and DOJ well know, merger analysis starts by evaluating industry structure with a measure of concentration know as the HHI (Hirschman, Herfindahl Index). A market with an HHI of more than 1,000 is considered concentrated and any merger that raises the HHI by more than 100 points in such a market is suspect. A market with ten equal sized competitors would have an HHI of 1,000. A market with an HHI above 1800 is considered highly concentrated and any merger that raises concentration more than 50 points is suspect. A market with 6 equal-sized competitors would have an HHI of 1667.

This approach to market structure analysis takes a hard line on mergers in markets where there are fewer than the equivalent of six equal size competitors. This reflects a rule of thumb in both theoretical and empirical, industrial economics literature. By these standards, the anti-competitive impact will be extremely large.

A dominant firm with a local telephone service market share of 80 percent would ensure an HHI of 6400. But in California, the concentration ratio for residential customers today, before the merger, is just over 6900 (see Exhibit 1). The SBC/AT&T merger will

**Exhibit 1:  
Merger-Related Concentration Increases Exceed DOJ/FTC Thresholds by a Wide Margin**



Sources: Regional Revenue is “renormalized” as suggested by “Declaration of Simon J. Wilkie,” *In the Matter of Applications of Verizon Communications Inc., and MCI Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, May 9, 2005, p. 4, using data provided in *Comptel/ALTS Petition to Deny*, *In the Matter of Applications of SBC Communications Inc., and AT&T Corporation for Consent to Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing Licenses*, WC Docket No. 05-65, May 9, 2005, p. 46. Chicago loops are from Simon J. Wilkie, “SBC/AT&T: Preliminary Analysis of Competitive Effects,” Docket No. 065, May 9, 2005; New York Public Service Commission, *Analysis of Local Exchange Service Competition in New York State*, 2002 Competitive Analysis, p. 9; “Protest of the Utility Reform Network, Utility Consumer’s Action Network, Disability Rights Advocates, Consumer Union of the U.S., Inc., The Greenlining Institute, and Latino Issues Forum,” *In the Matter of the Joint Application of SBC Communications Inc. (“SBC”) and AT&T Corp. (AT&T) for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454), to SBC, Which Will Occur Indirectly as a Result of AT&T’s Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation*, before the Public Utilities Commission of the State of California, Application 05-02-027, February 28, 2005, Exhibit 2.

increase the concentration in the California residential market to 90 percent, creating an HHI of 8100.

Exhibit 1 also contains data from New York, which is more aggregated and somewhat older than the California data, but it reinforces the conclusion that geographic market analysis will show that local markets to be much more highly concentrated than national data would and indicates that the merger will have a large negative impact. Across residential and business markets, the HHI for December 2002 was about 5500. A Verizon-MCI merger would increase the HHI by over 700 points.<sup>32</sup>

The two corporations each already have about a 40 percent market share in the residential long-distance market within their regions, but if these mergers are approved, this will increase substantially to an estimated 70 percent.<sup>33</sup> The HHI would increase about 2000 points.

In fact, if these mergers go through, the telecommunications market will look a lot like the old days of “Ma Bell” before AT&T was broken up. SBC and Verizon will have about a 90 percent market share in residential local wireline,<sup>34</sup> 70 percent in long distance,<sup>35</sup> and 40-50 percent in wireless.<sup>36</sup> They will have the incentive and opportunity to squeeze out competitors that need access to the local or interstate “long-haul” networks.<sup>37</sup> They will have reconstituted the anticompetitive conditions that led to the break-up in the first place.

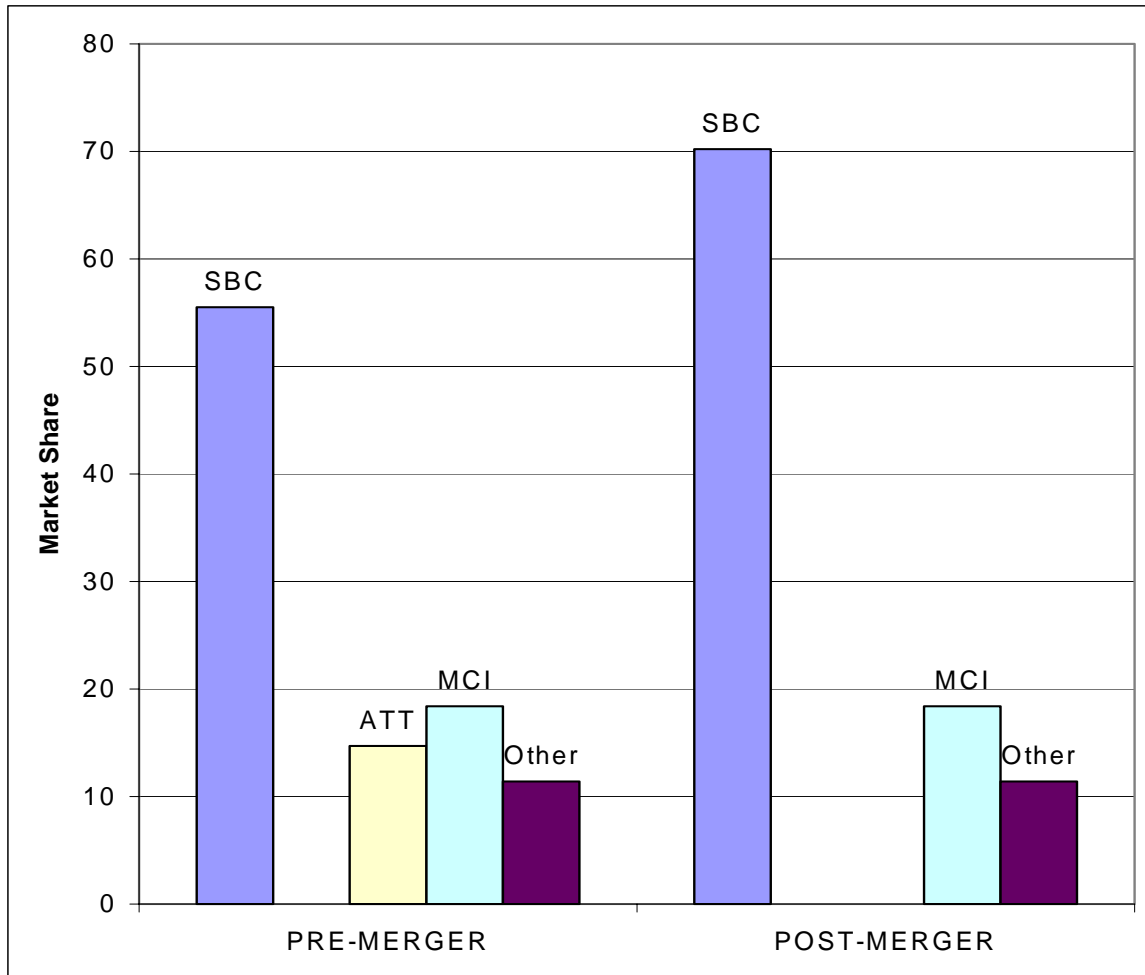
## **Business Market**

Although the residential sector is widely conceded to be highly concentrated, claims are frequently made for a much higher level of competition in the business segment. The big business service market appears to be only barely more competitive than residential, when measured by lines, and again these mergers would exacerbate the already-significant problems in this market segment. On average, SBC and Verizon have about a 75 percent market share for medium and large business customers.<sup>38</sup> These two proposed mergers, if allowed to go through, will increase the in-region market share substantially to above 80 percent, since AT&T and MCI are such large players in the market and because of the geographic pattern of competition.<sup>39</sup> These regional fortresses would also anchor their dominance over national corporate accounts.

As Exhibit 1 shows, in California the HHI in the large business segment is just under 4900. A dominant firm with a market share of 70 percent would cause the HHI to be at least 4900. The merger would raise the HHI in the California large business market to over 5800.

A very granular analysis of high capacity loops serving business buildings in Chicago reinforces this conclusion. The figures presented involve buildings with demand for telecommunications services at the level of a T3 line or higher. The HHI is already concentrated – just above 3000 – and would increase by over 2000 points. The market goes from the equivalent of a triopoly to a duopoly.

**Exhibit 2:  
Chicago Enterprise Loop – Buildings with Bandwidth Demand at Least T3**

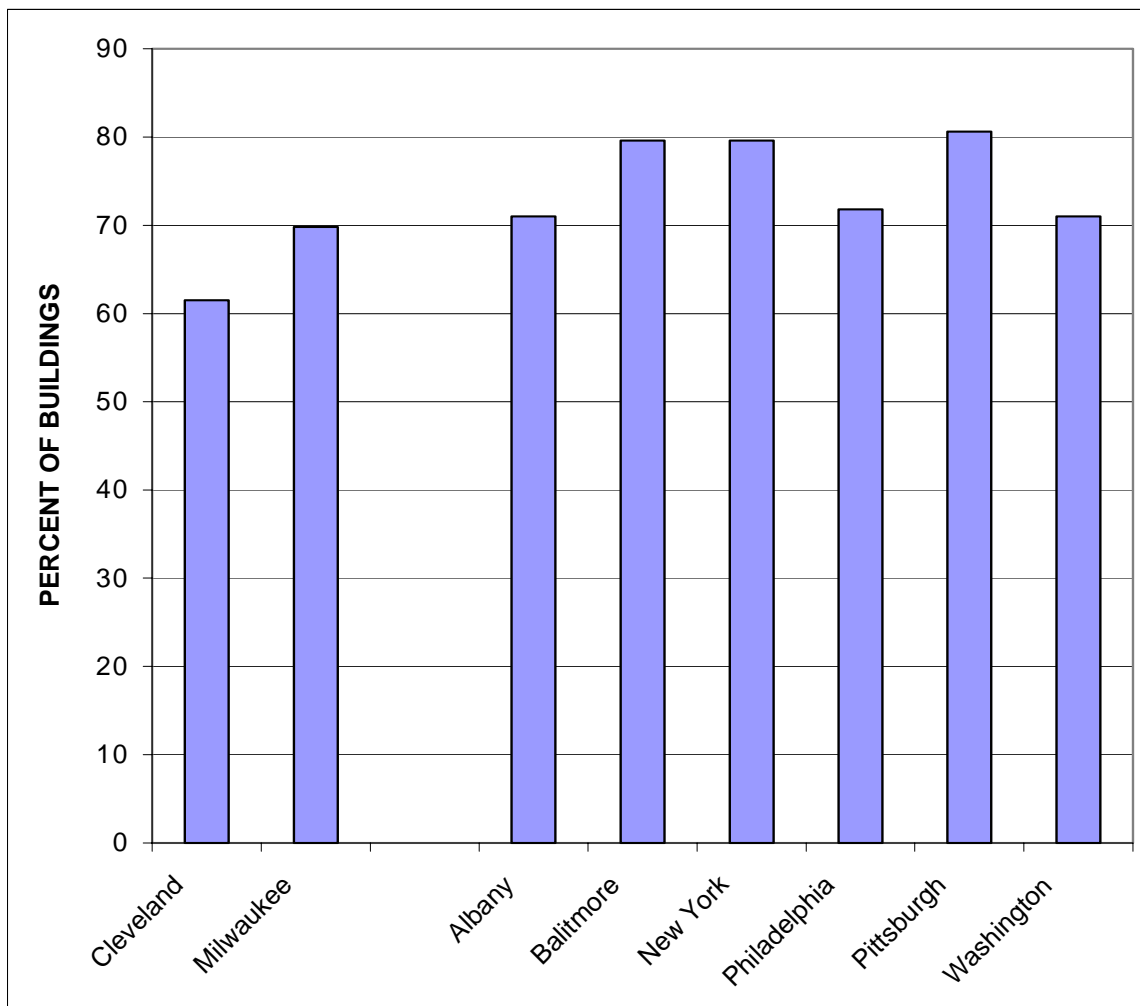


**Source: Simon J. Wilkie, “SBC/AT&T: Preliminary Analysis of Competitive Effects,”  
Docket No. 065, May 9, 2005.**

Exhibit 2 presents a second approach to showing this latter point that was provided in comments at the FCC about these mergers. After ten years of competition business customers, SBC still retains over a 50 percent market share of the buildings that are intensive users of telecommunications services. The merger would push this market share to 70 percent and SBC would dwarf the competition.

Similar analyses of competitors serving commercial buildings in Milwaukee, Cleveland, Albany, Baltimore, New York Philadelphia Pittsburgh and Washington, D.C. paint

**Exhibit 3:  
AT&T and MCI Account for the Vast Majority of CLEC Enterprise Loop Facilities**



**Source: Simon J. Wilkie, “SBC/AT&T: Preliminary Analysis of Competitive Effects,” Docket No. 065, May 9, 2005; “Petition to Deny of Cbeyond, et. al.” *In the Matter of Applications of Verizon Communications Inc., and MCI Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, May 9, 2005, p. 27**

a similar picture (See Exhibit 3). AT&T and MCI consistently account for close to three-quarters of competitive facilities serving those buildings.

For the totality of commercial buildings, competition is even less deeply implanted. The Bell’s own data shows that CLECs have loops serving over 30,000 buildings.<sup>40</sup> This is barely 1 percent of the approximately 3 million commercial buildings identified by the enterprise market customers.<sup>41</sup> Others estimate the universe of building differently, depending on the level of demand for capacity,<sup>42</sup> but it is clear that the availability of competitive

connections is extremely small, “SBC and Verizon are estimated to have the only facilities in place to 98% of commercial buildings in their regions.”<sup>43</sup>

AT&T’s witness in the special access proceeding painted a distressing picture of the feeble state of competition even in the market segment that was presumed to be the most competitive.

ILECs own subscriber access line facilities connecting some 3- to 4-million commercial buildings nationwide. AT&T currently provides service at approximately 186,000 commercial buildings. Of these, AT&T *owns* facilities to only about 6,700 buildings and obtains facilities *from other CLECs* at approximately 3,300 additional locations. Thus competitive alternatives to ILEC special access services are available at only about 10,000 locations, representing roughly 5.7% of the approximately 186,000 commercial buildings at which AT&T currently provides service, and at less than 0.4% of the 3- to 4-million commercial buildings nationwide.<sup>44</sup>

### **Imbalance in Resources**

Exhibit 1 shows the increase in concentration measured by revenue at the regional level for both SBC-AT&T and Verizon-MCI. These figures are regionalized by assuming that the Bell Operating Companies stick to their regions, which has generally been the case. It also assumes that the competitors’ revenues are randomly spread throughout the nation. This may understate the impact of the mergers. Given the increasingly consolidated market for wired services, and especially considering the demise of competitors to the Bells, it is critical for policymakers to consider the geographic distribution of the SBC and Verizon markets when analyzing these two mergers. MCI had its most intense competitive presence in Verizon’s service territory; the Verizon-MCI merger will eliminate Verizon’s most vigorous in-region competitor.<sup>45</sup> The situation with SBC-AT&T is similar. AT&T has a large presence in SBC’s service territory. If these mergers go through, policymakers will effectively be allowing SBC and Verizon to buy market power that eliminates their strongest in-region competitors. The estimated increase in concentration on a regional basis is massive, over 2000 points.

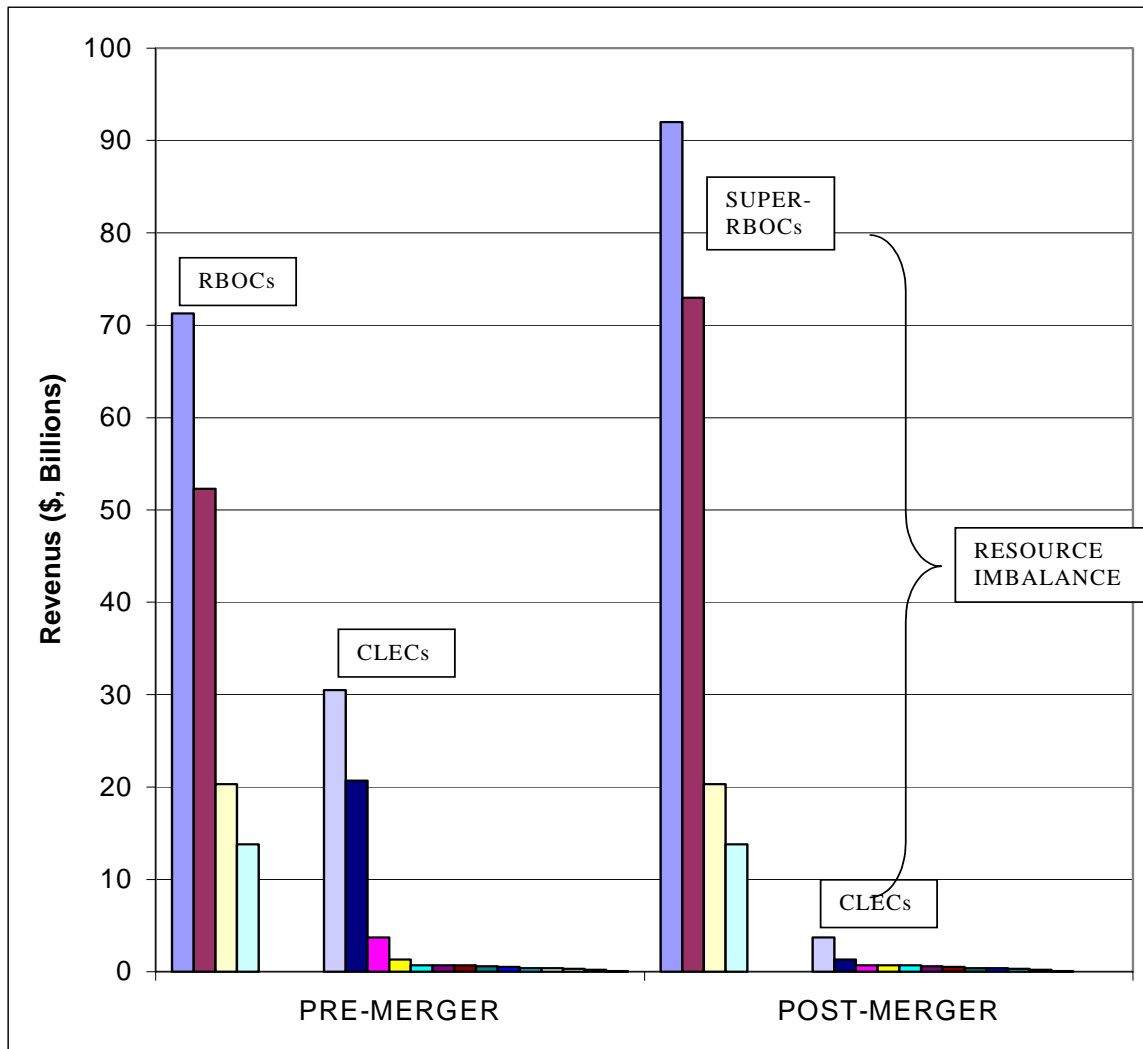
Exhibit 4 gives another view of the impact of the merger. It relaxes the regional assumptions and shows the revenue shares for the nation as a whole. By allowing the dominant ILECs to acquire their largest rivals, a huge imbalance in resources would be created. Two super-RBOCs would dominate the telecommunications landscape. Because these two RBOCs have refused to invade each other’s territories, they cannot be considered rivals. The two super-BOCs are 20 to 30 times the size of their largest rivals.

### **VERTICAL INTEGRATION**

The essence of a communications network is the ability to link any two points on the network. To do so, one needs the facilities to direct and carry the message between the two points. These functions are switching and transport.



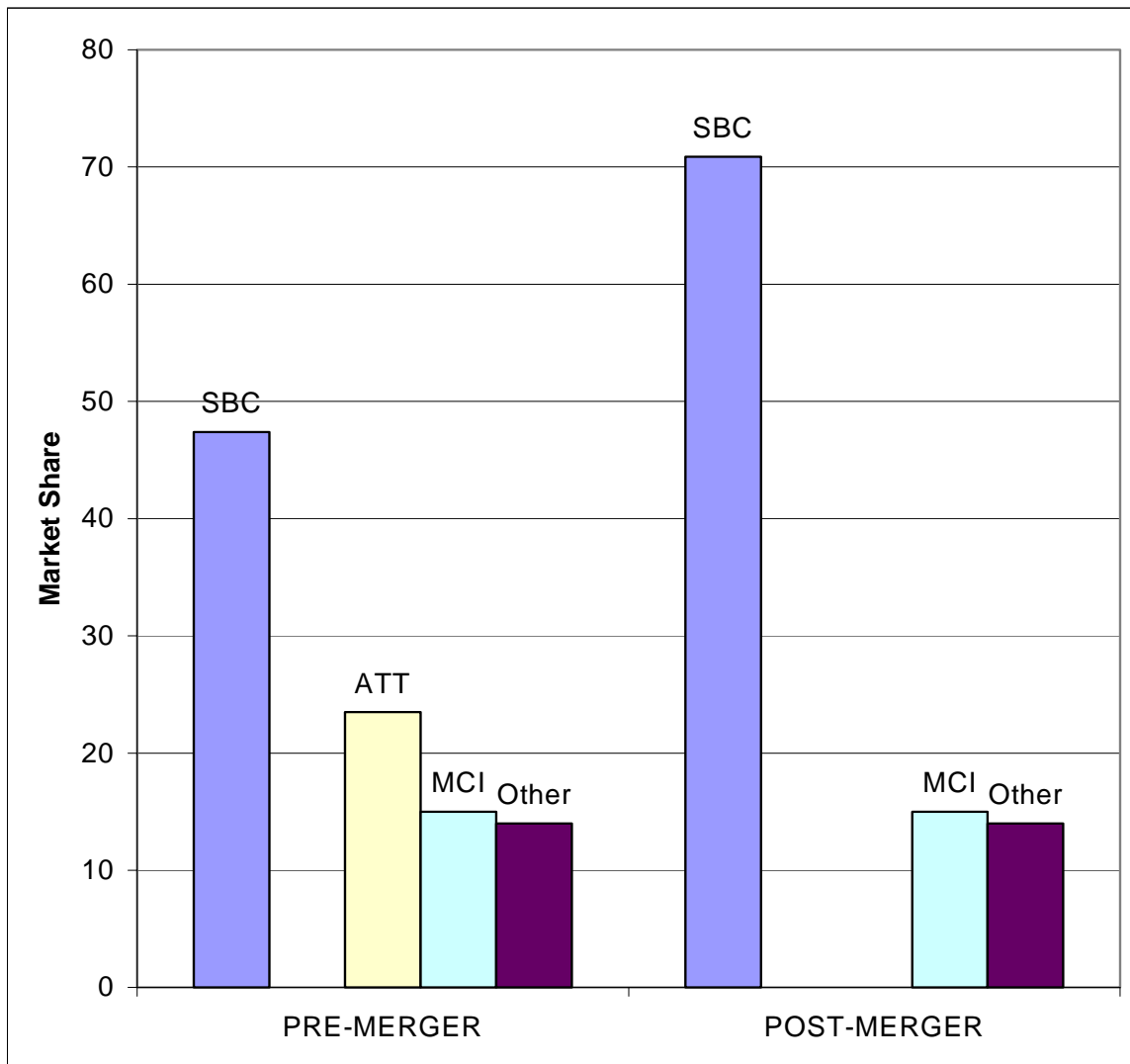
**Exhibit 4:  
Super-RBOCs Created by the Mergers**



**Source: Comptel/ALTS Petition to Deny, *In the Matter of Applications of SBC Communications Inc., and AT&T Corporation for Consent to Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing Licenses*, WC Docket No. 05-65, May 9, 2005, p. 46. These data differ slightly from the analysis presented in Petition to Deny of the Consumer Federation of America, Consumers Union, and USPIRG, *In the Matter of Applications of SBC Communications Inc., and AT&T Corporation for Consent to Transfer Control of Section 214 and 308 Licenses***

These mergers pose severe problems because they would allow the companies to control many of the critical inputs into the market, making it that much more difficult for competitors to obtain access to such inputs. The result of these proposed mergers – called “upstream vertical integration” in the parlance of economics – would therefore likely have a dramatic impact on a variety of markets.

**Exhibit 5:  
Local Transport Facilities, Chicago Area**



**Source: Simon J. Wilkie, “SBC/AT&T: Preliminary Analysis of Competitive Effects,” Docket No. 065, May 9, 2005.**

### **Local Transport**

Local transport facilities are a critical component of the network. Without the connection to the central office and between central offices, communications cannot flow. Once again, it is critical to recognize that these functions and facilities are local in nature.

The BOCs continue to dominate these network functions. These facilities go under a variety of names. Exhibit 5 shows the distribution on local transport facilities in the Chicago area. SBC is the dominant provider with almost a 50 percent market share. More importantly,

the merger would push this share to 70 percent. SBC would dwarf the other competitors. Large businesses, which have been the most likely to be the targets of competition, report that fewer than 10 percent of their locations have competitive alternatives for connection to the network.

The track record on special access rates provides a chilling warning about the concentration of these facilities. The FCC deregulated these rates in 1999 on the mistaken belief that this market was competitive. Since then, rates and profits have risen dramatically. There is simply inadequate competition to discipline BOC market power over price. There should be little wonder why. The incumbent local exchange carriers have billions of miles of local loop and interoffice transport deployed; the competitors have, at most hundreds of thousands.

As AT&T concluded in urging the FCC to reverse its decision to deregulate special access charges,

It is now crystal clear that the Commission's predictive judgments that special access rates would be disciplined by competitive entry were wrong. Facilities-based competition for all but the highest capacity special access facilities remains extremely limited. Yet the Commission's pricing flexibility rules have allowed the Bells to avoid rate regulation for all capacities and to all locations within entire MSAs.<sup>46</sup>

Exhibit 6 shows two aspects of special access pricing, the increase in profits which has been driven by falling costs. The key here is that as costs have fallen, prices have not. Indeed, they have risen slightly. This underscores the important point that cost savings are not passed through to consumers if markets are not sufficiently competitive.

### **Internet Backbone**

Internet backbone service is another form of transport service that is at the core of the advanced telecommunications network. The mergers pose a severe threat to the competitiveness of this market and the openness of access to the Internet.

Specifically, AT&T and MCI are large providers of Internet and interstate transport (backbone). As independent companies, their interest is in maximizing traffic. SBC and Verizon are large purchasers of Internet and interstate backbone services. Because of their continuing near-monopoly in "last mile" service, they transport Internet content to their customers. They are said to be eyeball-heavy.

As unaffiliated buyers, they make up a large portion of the market. From a competition standpoint, it is important to keep SBC and Verizon, which need the Internet and interstate backbone services as inputs, separate from AT&T and MCI, which provide this critical input. Otherwise, SBC's and Verizon's competitors will have difficulty gaining this

**Exhibit 6:  
Costs and Profits in Special Access**

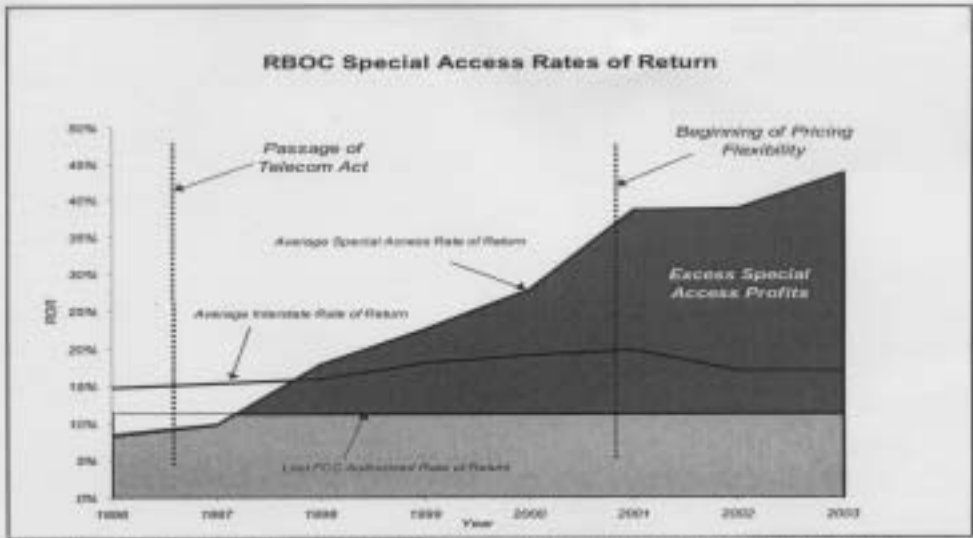


Figure 3.2. Average RBOC Special Access realized rates of return, 1996-2003.

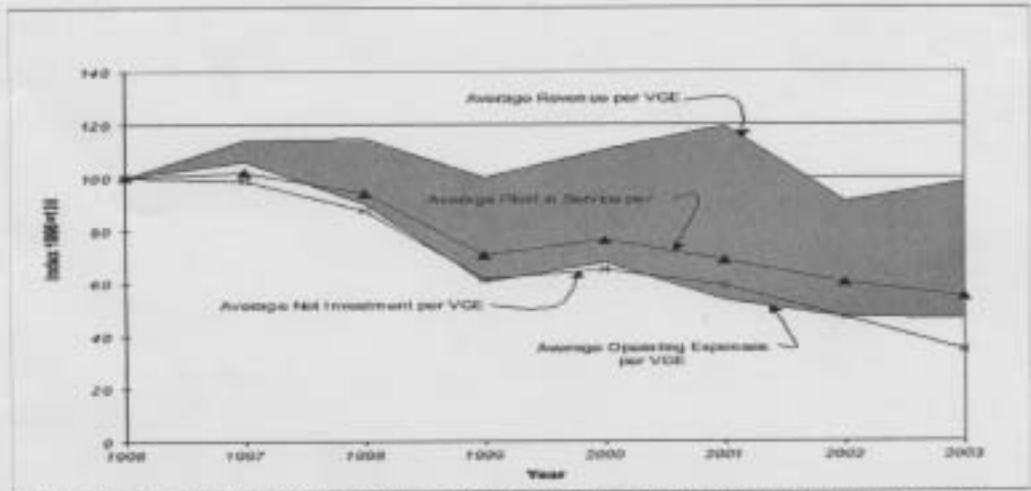
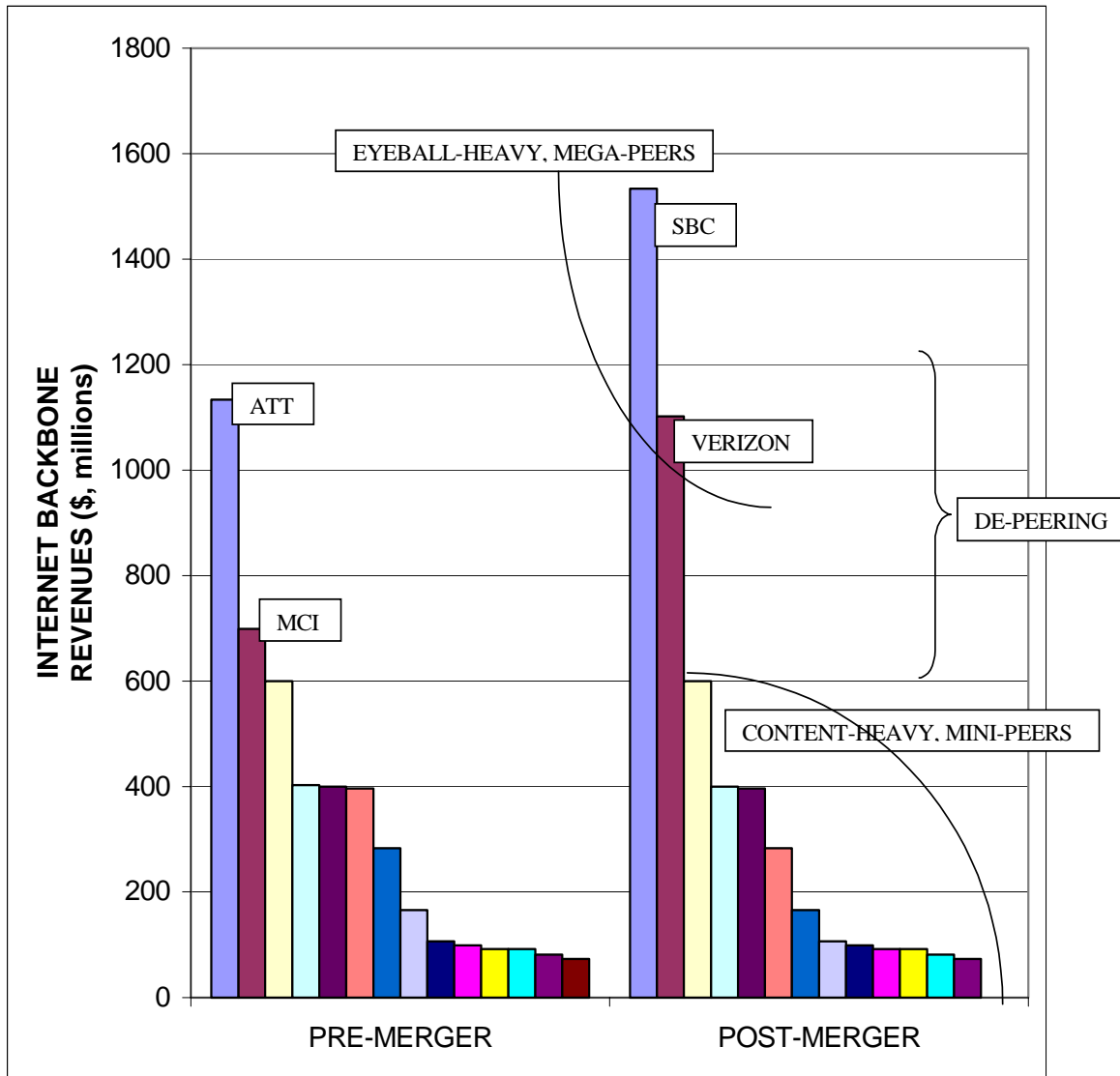


Figure 4. The Widening Special Access Price/Cost Gap - SBC. (See Attachment 1 for data sources and data.)

Source: Returns from: Ad Hoc Telecommunications Users Committee, *Competition in Access Market: Reality or Illusion* (Economics and Technology, Inc., August 2004), p. 30; “Reply Comments of BT Americas Inc. and BT Infonet USA, *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Federal Communications Commission, WC Docket No. 05-65, May 10, 2005, p. 10.

input and are more likely to go out of business.<sup>47</sup> Post-merger, SBC and Verizon would have an incentive to abuse their control over those assets to diminish competition for their retail businesses, rather than maximize the revenue flowing over those assets.

**Exhibit 7:  
Mega-Peers Created by the Mergers**



Source: Declaration of Marius Schwartz,

As shown in Exhibit 7, these mergers destroy the balance in the Internet backbone market. Today there are a half dozen or so Internet backbone service providers who exchange traffic as peers. They are relatively equal in size and all are independent of the BOCs. As a

result, their traffic flows are relatively balanced – eyeballs downloading and consumers uploading content. They exchange traffic in a seamless manner on an unbilled basis.

The mergers radically change this balance. Not only do SBC and Verizon become much larger than the other backbone service providers, but also they would dramatically alter the relative balance of traffic flows. They could become eyeball-heavy, mega-peers. They would immediately refuse to peer with the other carriers and begin insisting on payment to exchange traffic. As AT&T noted in its opposition to the MCI-Sprint merger, “One of the key antitrust issues raised by the proposed merger is whether the merged entity will be able to exercise market power by terminating settlements-free private peering and raising transit fees and fees for paid-for private peering above competitive levels.”<sup>48</sup>

AT&T explained the issue in detail.

IBPs with unbalanced traffic, then, are expected to become customers rather than be peers.<sup>49</sup> They can do so by entering into a “transit arrangement” pursuant to which, for a fee, an Internet Backbone Provider (like MCI WorldCom) agrees to transport the traffic to terminating points on its network or on the networks of other IBPs with whom it has a private peering relationship. Alternatively, a large IBP might agree to a “paid-for” private peering relationship allowing traffic to be terminated on its network, but the IBP paying for such an interconnection cannot represent to its customer that it has a private peering relationship. This significantly hampers its ability to compete with those that do have settlements-free private peering relationships.

This dramatic size advantage would provide MCI WorldCom/Sprint with the ability and incentive adversely to affect competition in the backbone market. Size is crucial in this market. First, only the largest backbone providers have sufficient scale to enter into complementary “peering” arrangements, through which some networks agree to carry one another’s traffic without charge.<sup>50</sup>

AT&T was not the only entity to express concerns about the problem of a backbone provider that gained size and leverage over customers. SBC expressed its concerns.

The size of a backbone is critical because a backbone’s value to its users lies in its ability to provide connectivity to the entire Internet. Again using Sprint’s words, where one backbone achieves a substantial size advantage over its rivals, it necessarily “reduces the value of, and therefore the demand for, the rivals’ products.” At some point, “the market may ‘tip,’ with customers abandoning the rivals altogether because their networks are too small to be viable.”<sup>51</sup>

Bell Atlantic, Verizon’s predecessor, expressed similar concerns.

Due to the network effects inherent in the backbone services market, the enormous size of WorldCom's post-merger network would give it power to set prices and control quality of service to its own advantage, leading more and more customers to defect to its own network. Such developments would spell the end of settlement-free peering arrangements among backbone providers.

[M]oving from peering arrangements to transit arrangements, as Sprint itself has in the past recognized, would be to "make competition difficult, or even impossible," by raising the costs of smaller providers and deterring entry.<sup>52</sup>

In the case of the SBC-AT&T and Verizon-MCI mergers, the leverage results from a combination of sheer size and last mile control over eyeballs. This combination of factors was recognized by AT&T in its earlier opposition to an Internet backbone merger. "Market power for backbone services is best measured by (a) "eyeballs" or the volume of Internet traffic traversing an Internet backbone's network; (b) size of the network; (c) the number, type, and significance of each network's customers (its ".com" websites); and (d) number and size of peering connections."<sup>53</sup>

The effect of the market power is to remove the smaller, de-peered Internet backbone service providers as substantial competitor. As AT&T recognized:

[T]he hierarchical nature of the business makes it possible for top-level suppliers who become dominant in terms of installed base to turn erstwhile "competitors" (e.g. secondary peering backbones) into "customers." Any competitor that can be transformed into a customer when it becomes convenient to do so is a poor candidate for the type of alternative supplier that could defeat a monopolistic price increase.<sup>54</sup>

Anticompetitive price discrimination (raising a rival's cost) is only part of the problem. Attorney General Spitzer identifies another problem that could emerge as the mega-peers dominate in-region business, anticompetitive quality discrimination.

The core risk in this regard is that, post-merger, Verizon will have an Internet backbone that carries its own products in first class, while competitors ride in coach – or, indeed, never get to ride at all. As noted above, Verizon plans to utilize the Internet backbone to provide "IP connectivity for VoIP services today and other IP-based services tomorrow." This approach dovetails with MCI's own pre-merger strategy of "converging Internet, data, and voice onto a common IP backbone..."

The sort of products envisioned by this Verizon/MCI strategy consume relatively large amounts of Internet bandwidth. And a combined Verizon/MCI entity would be well positioned to create an Internet infrastructure that could severely diminish the capacity available to competitive providers of these services that need to use Verizon's Internet backbone. By way of example,

there exists today a process known as “tagging,” which allows a provider to use rule-based and policy-based filtering to limit the flow of data packets... Using tagging, Verizon could assign a higher transit priority – first class status – to data packets originating on its own system, while relating a lower priority – coach status – to data packets from outside traffic that needs to access to Verizon’s backbone.<sup>55</sup>

## **Local Switching**

Switching capacity exhibits similar characteristics. Incumbent local exchange carriers account for over 90 percent of the central office switches in the nation. By the Bell companies’ own count, 85 to 90 percent of the wire centers in the nation do not have even one competitor with a switch collocated in the central office.<sup>56</sup> Although competitors tend to bunch in central offices in the downtowns of major metropolitan areas,<sup>57</sup> AT&T and MCI were the largest owners of switches by far. Moreover, anticompetitive policies on transport and remote switching make it difficult or impossible for competitors to aggregate traffic to the central offices where they do have switches located.<sup>58</sup>

## **THE BABY BELLS’ HATE-HATE RELATIONSHIP WITH COMPETITION**

An important reason that past behaviors must be examined carefully is the fact that these mergers are radically different than past mergers involving these RBOCs. The previous five mergers constituted horizontal extensions of the RBOC monopolies. The argument made was that two contiguous (or noncontiguous) monopolies are not any worse than one larger monopoly. That proposition was challenged, since the larger size conferred advantages of scale and raised barriers to entry, while the availability of nearby assets to enter markets was lost.<sup>59</sup> Be that as it may, these mergers pose much more serious problems. These mergers involve the elimination of in-region competition and the vertical integration of critical assets both in-region and out-of-region. The ability to leverage these assets for anticompetitive purposes and the failure of these RBOCs to compete outside of their home territories indicates that the anticompetitive effects will be severe. Past behaviors are a good indicator of future actions. The anticompetitive effects of previous mergers will be magnified if these mergers are allowed to go forward.

Moreover, because merger analysis is essentially predictive, an appraisal of what is likely to happen should a merger be allowed, examination of past behaviors and the results of previous mergers is important. Performance of the post-merger market will reflect the structure of competition, the incentives the new companies have, and the conduct that they engage in. On all three counts, the prospects are dim, should these mergers be approved.

## **BROKEN PROMISES OUT-OF-REGION: THEY DON’T COMPETE ABROAD**

The last two ILEC mergers – SBC/Ameritech and Verizon-GTE – created such huge ILECs that the FCC could no longer ignore the possibility that impenetrable regional



monopolies were being created. The FCC demanded that the two behemoths compete outside their regions. They promised to do so, but failed miserably. Indeed, their failure to successfully enter out-of-region markets is now used as a justification for these mergers.

Witnesses for AT&T drew the proper conclusion. “[T]he lessons that can be drawn from the RBOCs’ decisions to avoid out-of-region entry are that: (a) the RBOCs understand the moves would be unsuccessful given the state of RBOC compliance and (b) that there is no real competitive threat from those CLECs that have tried to establish national footprints.”<sup>60</sup>

The failure to successfully enter markets outside their service areas reflects a combination of factors, one of which is that they did not try very hard. They did not even do the minimum that they had committed to,<sup>61</sup> not to mention throw their energies into competing out of region.

[T]he Commission painstakingly negotiated an agreement whereby SBC agreed to invest in local telecom facilities and compete as a CLEC out-of-region as a partial offset to the anti-competitive effects of an SBC-Ameritech merger – the so-called “National-Local Plan.” SBC deployed minimal local network facilities in approximately ten out-of-region markets. But with few exceptions, SBC never took the next step of actually marketing competitive local services in those areas.<sup>62</sup>

In granting the merger application, the Commission determined that, in the context of Verizon’s out-of-region expansion strategy, *the single primary benefit* of the merger was that the 21 targeted markets would receive the benefits of competition more rapidly as a result of the merger than without. But Verizon’s promise to invest in competitive telecom facilities was little more than a sleight-of-hand intended to obtain approval for their merger of ILECs... While Verizon reportedly extended its high-speed data transport services to large business customers in select portions of the greater Los Angeles metropolitan area the following year, it soon scaled back its competitive efforts against SBC, efforts which it has not subsequently sought to revive.<sup>63</sup>

The failure to aggressively pursue out-of-region competition violates the spirit, if not the letter of the agreements made to secure approval of the last round of mergers. However, the broken promises went farther, in the sense that both companies did not live up to the merger conditions they agreed to promote competition in-region. Violations of merger conditions include repeated failure to submit accurate performance data,<sup>64</sup> to meet condition on shared transport,<sup>65</sup> and to provide collocation<sup>66</sup> on nondiscriminatory terms subject to merger conditions.

The failure to enter out-of-region markets under the merger conditions extends the long-standing decision to avoid competitive entry. Under the 1996 Act, the Baby Bells could have become out-of-region CLECs immediately. They chose not to do so. They could have

begun selling out-of-region long distance service. “Notably, SBC does not even offer long distance services to local customers of CLECs or other ILECs in states where it has received section 271 authorization.”<sup>67</sup>

By and large, they chose not to do so. After they were allowed into the long distance market, and began buying out of region special access services, they could have become vigorous advocates for reduced special access charges, but it was not in their interest to do so. They make much more by using their market power to run up their own special access charges, than leading the fight against excess charges out-of-region.

Given the opportunity to enter the video market with open video systems, they declined. The ILECs that did attempt to compete head-to-head in the cable video business were bought up by SBC and promptly taken out of the business. Of course, they are now making noises about getting into the video business, but as usual, they are demanding another set of concessions in order to do so.

This pattern of behavior also casts doubt on the claims that the post-merger mega-RBOCs will be more vigorous innovators. They have consistently held back on implementing innovations. The obvious and currently relevant examples are ISDN and DSL.

There also seems little reason to expect that they will change their out-of region behavior. In this proceeding, they have provided an extensive explanation of why they did not try very hard to compete out-of-region, even though they promised to. As a result, the logic of building stronger regional fortresses seems compelling.

Accepting Mr. Kahan’s “sweet spot” explanation for SBC’s focus on in-region enterprise customers, the merger will afford SBC/AT&T a formidable – perhaps *insurmountable* – competitive advantage in serving both SBC and AT&T enterprise customers within the SBC region, but will do little or nothing to improve the *out-of-region* situation for SBC or AT&T...

Verizon will have the same type of economic incentive to concentrate its efforts in the Verizon region, as SBC/AT&T will have for concentrating its efforts in the SBC region. At the same time, the persistence of supracompetitive special access prices will operate to keep other competitors – including CLECs and the other two RBOCs (i.e. Bellsouth and Qwest) – out of both the SBC and the Verizon states...

[G]eographic market allocation is the most likely outcome of the combined SBC/AT&T and Verizon/MCI mergers even in the absence of a deliberate policy on the part of each firm to stay out of the other’s territory.<sup>68</sup>

The evidence on this failure to compete across regional boundaries is stunning. In a detailed analysis of the Los Angeles area, where service territories of SBC and Verizon abut one another at numerous points, competitive entry out of region is almost non-existent in

precisely the market that was supposed to be most competitive – the business market. Verizon and SBC are competitors in less than 2 percent of the 20,000 buildings served by CLECs. Similarly, the data reviewed from Connecticut and Texas where the service territories are interwoven indicated a remarkable lack of out-of-territory competition. The evidence reviewed above on Ohio shows that Verizon is far from a vigorous competitor in SBC's neighboring service area.

The mutual non-aggression pact that has existed between SBC and Verizon will be easy to extend. The geographic lines of demarcation are easily recognizable and the regional giants are well matched in size. They both have discreet products that are critical bottleneck facilities in-region, like special access. These currently yield huge profits and barriers to entry remain high. The mutual interest in not undercutting this source of rents and the ease of identifying cheating on the tacit agreement make it highly unlikely that the unholy alliance will be broken. Post-merger, they will have even more to gain by avoiding competition and a more to lose by aggressive entry into neighboring markets than they have had in the past. The almost total lack of out-of-region competition will persist.

#### **BAD ACTS IN-REGION: THEY STRANGLE COMPETITION AT HOME**

To say that these two companies have a miserable track record when it comes to dealing with competitors does not do justice to the extent and nature of their efforts to undermine competition. Dozens of violations of various provisions of the 1996 Act have resulted in formal rebukes and fines levied against SBC and Verizon. Well over a billion dollars of fines have been levied, with SBC accounting for the majority of the total.<sup>69</sup>

Violations and fines under section 271, which required the incumbent Bell companies to open their networks to local competition before they could begin selling in-region long distance include complaints of selling long distance before they were authorized,<sup>70</sup> withholding information about the availability of collocation space availability,<sup>71</sup> mishandling of competitors' orders for service,<sup>72</sup> failure to make service available as required for collocation,<sup>73</sup> and to provide interconnection on nondiscriminatory terms.<sup>74</sup> The merging parties have also been found to be in violation of the structural, transactional and nondiscrimination safeguards of section 272 of the Act.<sup>75</sup>

Persistent abuses of competitors that are sufficiently egregious to result in formal complaints, consent decrees and fines are only a part of the problem. They represent only the worst examples of a pervasive pattern of resistance to market opening. The incumbents also use their pricing power to undermine competition. For example, we have already noted the extremely high prices being charged for special access that places a price squeeze on competitors.

The incumbents have combined market power with premature pricing flexibility to create barriers to entry. As AT&T noted in the Triennial Review, "history provides a powerful

example of the RBOCs' ability to change overnight its rate structure from one that allowed competition to flourish to one that forecloses competition altogether."<sup>76</sup>

Specifically, they have created huge volume discounts on a region-wide basis, even though the cost savings from mass ordering do not justify such discounts. They have also imposed percentage of business conditions (not just volume of business discounts), to force competitors to use their services. Thus competitors must commit to high volumes and high percentages of services purchased from the incumbent on a region-wide basis to get the discount. This increases the scale necessary to economically enter the market. It also reduces the market for the purchase of services from competitors. Competitors are forced to purchase incumbent services throughout the region (to achieve the minimum threshold for volume and percentage), even though there may be services available at lower prices in specific markets or on specific routes.

Sprint summarized the impact on interexchange carriers, but the problem afflicts all services that compete against the incumbents, but rely on them for special access.

The BOCs are the only providers that can offer that geographic and service scope. In an effort to get any discount on interstate special access services, the IXC must sign up for these broad discounts. To meet the discount terms, the IXC must leave most if not all of their services with the BOCs. The IXC is thus obligated to the BOC services and cannot switch to the competitor, even in the unlikely event that one exists. With the large IXCs locked into the BOC, and competitors locked out, there is no economic reason for a competitor to attempt to build facilities that would provide a competitive alternative to the BOC.<sup>77</sup>

The abuse of the pricing flexibility reached new heights after the SBC-AT&T merger was announced. Having argued vociferously that UNE-P TELRIC rates were far too low to convince the Commission to raise UNE-P rates and eliminate UNE-P altogether, soon after the takeover of AT&T was announced, SBC announced a discount plan with a threshold of 750,000 customers at prices that were far below what it claimed its costs were.<sup>78</sup> The only CLEC that could conceivably qualify for this steep discount is AT&T, the acquisition target. If AT&T had been offered this rate prior to the Triennial order, it might well not have decided switch to VoIP as its primary approach to competing for local service.

In the second tier of the discount structure, between 450,000 and 750,000 lines, SBC is running a price squeeze. The cost of reconstituting the UNE-P set of facilities appears to be well over \$30 per month, region wide.<sup>79</sup> SBC is offering rates to customers who have switched to competitors at substantially less than that for extended periods of time. SBC will not doubt claim these are just "win-back" promotions, but given the combination of their aggressive campaign to increase UNE prices and their immediate undercutting of the higher prices, the only outcome that this price squeeze will promote is the further demise of the CLECs.

## COMPETITORS IN THE CROSS HAIRS

The remaining competitors, dwarfed by the regional mega-firms will be caught in the cross hairs of an uncompetitive market structure dominated by anticompetitive strategies.

The market for wholesale inputs with which to build unaffiliated competing services will disappear. SBC and Verizon must purchase services when they go outside their regions to deliver long distance calls, for example. They buy these from CLECs. This market will disappear, as it is pulled inside the mega-firms. At the same time, AT&T and MCI not only have the largest holding of CLEC facilities, they also have the size to purchase services at discounts from the ILECs, which they then resell to other CLECs. In other words they are large wholesale suppliers to the CLEC sector. This will disappear as well.

At the same time that the business activity in the unaffiliated sector shrinks dramatically, the merged companies will have a huge increase in their incentive and ability to discriminate against in-region rivals. The new incentives for price discrimination would threaten competition. BT Americas makes the case with respect to global telecommunications services (GTS), but a similar argument has been presented with respect to traditional residential,<sup>80</sup> enterprise<sup>81</sup> and interexchange services,<sup>82</sup> as well as wireless<sup>83</sup> and Internet,<sup>84</sup> since all are dependent on the ILECs for special access.

Pre-merger, SBC has the ability to and ample opportunity to overcharge AT&T and everyone else for special access – and AT&T has been in the forefront of those complaining about that to regulators, courts, and legislators. But because SBC was not yet substantially involved in GTS, SBC has no reason to favor any one GTS provider over others. They were all charged supracompetitive prices...

The “true” marginal cost of special access to AT&T will be SBC’s marginal cost of supply no matter what transfer price SBC may charge AT&T for special access. The marginal cost of special access to AT&T’s competitors will be the supra competitive price that SBC actually charges those competitors....[I]t would be economically rational and profit maximizing for AT&T to adjust downward its prices on non-special access element of the GTS package to reflect the true “marginal cost” of special access to AT&T... The price discrimination would enable AT&T to steadily expand its market share at the expense of its GTS competitors, which would reduce innovation, competition, and investment. Ultimately, consumers will face higher prices and poorer service.<sup>85</sup>

We have already noted the possibility that the merger will lead SBC and Verizon to de-peer with other Internet backbone service providers and thereby raise the cost of their rivals or lower quality. This will enable them to gain an advantage over competitors who are dependent on them for these services.

## **REMEDIES**

Measured by facilities at granular level, customer accounts or total revenue, the removal of AT&T and MCI as competitors is a devastating blow to competition in both local and long distance markets and for all services that depend on the ILECs for connections to the network. The remedy for such anticompetitive effects, where as here they are so pervasive and the acquisitions target companies are economically viable, is to reject the merger.

Alternatively, it may be possible to impose structural conditions, such as the divestiture of assets and conduct conditions, as with a requirement to offer service on a non-discriminatory basis, to repair the harm to competition and prevent abusive practices from occurring. Where, as here, the anticompetitive potential is so great, the conditions must be extensive. Given the track record of the failure of past conduct remedies, structural measure should play a prominent role, if this approach is taken. Recounting the remedies that would be necessary to prevent harm to consumers and competition, should the merger be allowed to go forward, underscores why the more prudent course is to just say no.

### **DIVESTITURE**

If the mergers are allowed to go forward, the DOJ should require that all overlapping assets and customer accounts within region, which provide services in competition with the incumbent BOC, to be divested. This should include fiber and collocated switches.

Customers that are being served with the unbundled network element platform, should be divested at UNE-P prices that are held at current levels for three years, to allow CLECs to acquire the account and replace the UNE-P with alternative provisioning arrangements.

### **NON-DISCRIMINATION**

Even with divestiture, the super-BOCs will retain the out of region assets and non-overlapping in-region assets of the acquired company. The super-BOCs will have a dramatically increased ability and incentive to discriminate against the much smaller rivals. Additional steps to prevent the anticompetitive abuse of vertical leverage are necessary to protect and promote competition. Therefore, conditions to prevent discrimination should be imposed. With the two largest in-region competitors removed, and as much as 75 percent of the on-the-ground competition eliminated, the DOJ and the FCC must pay great care in crafting conditions that provide a genuine opportunity for the small CLEC industry that is left to grow. Bereft of its leaders and dwarfed by the super-RBOCs, extensive constraints on RBOC, in region behavior must be imposed.

Contracts between the incumbents and CLECs and must be open and terms and conditions made available to all competitors. The selective, region-wide discounting and percentage of business conditions that the BOCs have imposed lack any cost justification. Instead they are purely intended to create anticompetitive barriers to entry. In other words,

most favored nation status should be offered to all competitors. This should include current discounts made available to AT&T and MCI.

All section 271, market opening, issues should be subject to negotiation/arbitrage. The RBOCs have used delay and litigation to stifle competition. The ability of the super-BOCs to use the tactics to undermine their much smaller rivals will be greatly increased with the removal of the two largest competitors.

Pricing of critical network functions and services must be at long run incremental costs. Special access and Internet backbone services are critical levers that the super-BOCs and mega-peers can use to bludgeon competition in the long distance, wireless, enterprise and IP-service markets. The phenomenal rates of return being earned in special access and the critical importance of peering in the Internet backbone demand that regulators remove the pressure points as a source of anticompetitive leverage.

The potential for these choke points to be used in an anticompetitive manner extends beyond price. Service quality and performance must also be ensured on a non-discriminatory basis. Therefore, performance-monitoring mechanisms must be put in place.

The utter failure of prior disciplining approach to elicit proper behavior from the incumbent suggests two changes in approach are necessary. To the greatest extent possible, conditions must be self-enforcing. Discrete quantifiable performance metric must be put in place and penalties flow automatically from a failure to meet targets. The state public utility commissions should be brought into the enforcement process, as they have the expertise and resources necessary to oversee the process.

Penalties should be paid to the competitors who suffer the harm, not the treasury. Penalties must be more than a simple cost of doing business for the incumbents. By setting high penalties and paying them to the CLECS who are abused, the enforcement mechanism will both provide a disincentive for the ILEC to misbehave and give the CLECs the ability to overcome the effects of anticompetitive barriers.

## **REVISITING PRIOR REGULATORY DECISIONS**

These two mergers represent a stunning reversal of logic and argument from just six month ago, when the FCC was considering the issue of impairment in the Triennial Review. The conclusion that competitors are not impaired without access to the incumbent facilities is absurd in light of the claims now being made about out-of-region entry by the acquiring RBOCs. It is doubtful that the FCC would have concluded that access to incumbent facilities is not necessary for competition if AT&T and MCI were not available as examples of successful entry.

Reconsideration petitions have been filed in the Triennial Review. The Commission should move quickly to reconsider and, once the evidence is reviewed, reverse it prior decision to eliminate UNE-P.

In a post-merger market that is dominated by these two super-BOCs, the Commission should also consider other measures that are necessary to ensure competition can survive. These include measures that competitors have long argued are necessary to lower barriers to entry including OSS improvements, such as real time access to databases, roof-top-collocation, SIP nondiscrimination, preservation of section 272 requirements and extension of 272 requirements to IP-backbone.

The Commission must also recognize that the bundling of DSL and voice – the refusal to sell naked DSL – is fundamentally anticompetitive. Further, network neutrality principles for Internet access must be made mandatory.

Finally, the finding that local markets were open to competition in Section 271 proceedings, which allowed the Bell operating companies to re-enter the in-region long distance business, was based upon the availability of UNE-P. UNE-P accounted for the vast majority of residential consumers who had switched to competitors. With the removal of UNE-P and the refusal of Bell operating companies to provide access to the local network in a manner that makes electronic aggregation of loops in central offices available, the Commission should conclude that local markets are no longer open to competition.



## ENDNOTES

<sup>1</sup> Petition to Deny of the Consumer Federation of America, Consumers Union, and USPIRG, *In the Matter of Applications of SBC Communications Inc., and AT&T Corporation for Consent to Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing Licenses*, WC Docket No. 05-65, April 25, 2005, Petition to Deny of the Consumer Federation of America, Consumers Union, and USPIRG, *In the Matter of Applications of Verizon Communications Inc., and MCI Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, May 9, 2005; Application 05-02-027, Before the California Public Utilities Commission, Protest of the Utility Reform Network, Utility Consumers' Action Network, Disability Rights Advocates, Consumers Union of U.S., Inc., The Greenlining Institute, and Latino Issues Forum, April, 14, 2005. Application 05-04-020, Before the California Public Utilities Commission, Protest of the Utility Reform Network, Utility Consumers' Action Network, Disability Rights Advocates, Consumers Union of U.S., Inc., The Greenlining Institute, and Latino Issues Forum, May 25, 2005; "Comments of Consumer Federation of America, Consumers Union, and New York Public Interest Research Group Calling for Review and Denial of the Plan for Merger," *In the Matter of Joint Petition of Verizon New York Inc. and MCI for a Declaratory Ruling Disclaiming Jurisdiction Over or in the Alternative, for Approval of Agreement and Plan of Merger*, Public Service Commission, State of New York, Case No. 05-C-0237, April 29, 2005.

<sup>2</sup> "Memorandum Opinion and Order," *In the matter of Application of AT&T Wireless Service, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorization*, WT Docket No. 04-07, 04-254, 04-323, October 26, 2004, ¶¶ 237-238; *In the Matter of 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, ¶ 39 and n. 118 (on VoIP), ¶¶ 193, 231 (fixed wireless and satellite for residential broadband and enterprise); "Competitive Impact Statement, *United States of America, State of Connecticut and State of Texas b. Cingular Wireless Corporation, SBC Communications Corporation, Bell South Corporation and AT&T Wireless Services Inc., United States District Court for the District of Columbia*, Civil No. 1:04CV01859, October 29, 2004.

<sup>3</sup> "Application for Transfer of Control," *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Federal Communications Commission, WC Docket No. 05-75, March 11, 2005 (hereafter Verizon Application), *Declaration of Husser, et al.*

<sup>4</sup> Ellen Muraskin, "AT&T's VOIP Rollout Heats Up Price War," Eweek, July 8, 2004, available at: <http://www.eweek.com/article2/0,1759,1620387,00.asp>

<sup>5</sup> Ben Charny, "AT&T to Launch VoIP nationwide," CNET News.com, February 25, 2004, available at: [http://news.com.com/AT38T+to+launch+VoIP+nationwide/2100-1037\\_3-5164973.html?tag=nl](http://news.com.com/AT38T+to+launch+VoIP+nationwide/2100-1037_3-5164973.html?tag=nl)

<sup>6</sup> Id.

<sup>7</sup> Muraskin.

<sup>8</sup> Application 05-02-027, Before the California Public Utilities Commission, Protest of the Utility Reform Network, Utility Consumers' Action Network, Disability Rights Advocates, Consumers Union of U.S., Inc., The Greenlining Institute, and Latino Issues Forum, April, 14, 2005, p. 35.

<sup>9</sup> "AOL Rolls Out Net Phone Service," Contact.com, April 18, 2005, available at: [http://www.conntact.com/article\\_page.lasso?id=38898](http://www.conntact.com/article_page.lasso?id=38898)

<sup>10</sup> "AT&T Chairman Says Communications Industry Restructuring Will Heighten Competition, Drive Renewed Interest and Stability," PR Newswire, March 24, 2005, available at: [www.prnewswire.com](http://www.prnewswire.com)

<sup>11</sup> "AT&T Corp. Form 8-K, Current Report Pursuant to Section 13 or 15 (d) of the Securities and Exchange Act of 1934, (filed April 21, 2005), cited in "Comments of ACN Communications Services, Inc, et al.," *In the Matter of Applications of SBC Communications Inc., and AT&T Corporation for Consent to Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing Licenses*, WC Docket No. 05-65, April 25, 2005, p. 10.

<sup>12</sup> Carolyn Duffy Marsan, "MCI Beefs up VoIP offerings", Network World ISP News Report Newsletter, March 31, 2004, available at: <http://www.nwfusion.com/newsletters/isp/2004/0329isp2.html>

<sup>13</sup> <http://consumer.mci.com/cablevoice/faqs.jsp>

<sup>14</sup> <http://consumer.mci.com/cablevoice/timeWarnerPR.jsp>.

<sup>15</sup> Ivan Seidenberg, Verizon CEO, Goldman Sachs Research Communicacopia XIII Conference, October 6, 2004, cite in "Petition to Deny of Qwest Communications International, Inc., *In the Matter of Verizon Communications Inc and MCI, Inc. Application for Transfer of Control*, WC Docket No. 05-75, May 9, 2005, p. 15. Verizon was on the record citing this competition in its "Reply Comments of Verizon," *In the Matter of 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, October 19, 2004.

<sup>16</sup> Verizon Application, Exhibit 1, pp. 10... 18.

<sup>17</sup> Comments of Doreen Toben, Verizon CFO, First Quarter 2004 Earnings Conference Call, April 27, 2005, cited in "Petition to Deny of Qwest Communications International, Inc., *In the Matter of Verizon Communications Inc and MCI, Inc. Application for Transfer of Control*, WC Docket No. 05-75, May 9, 2005, p. 22.

<sup>18</sup> *Id.*, p. 25.

<sup>19</sup> "Comments of SBC Communications Inc., *In the Matter of 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 No. 01-338, CC Docket No. 96-98, CC Docket No. 98-147, October 4, 2004, cite in "Reply Declaration of Lee L. Selwyn on Behalf of CompTel/Alts, *In the Matter of AT&T Corp. and SBC Communications Inc Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the commission's Rules for Consent to the Transfer of Control of AT&T Corp. to SBC Communications Inc.*, WC Docket No. 05-65, May 10, 2005, p. 25.

<sup>20</sup> "Declaration of James S. Kahan," Federal Communications Commission, WC Docket No. 05-65, February 22, 2005, p. 10.

<sup>21</sup> "Comments of AT&T Corp., *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, p.6.

<sup>22</sup> *AT&T Corp. Petition For Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Reply comments of Worldcom, Inc.*, RM No. 10593, January 23, 2003, p. 6.

<sup>23</sup> *Id.*

<sup>24</sup> Cooper, Mark, *Expanding the Digital Divide and Falling Behind in Broadband Falling Behind in Broadband*, (Consumer Federation of America and Consumers Union, October 2004), shows that penetration of the Internet into homes has stalled below 60 percent, while just over half of all Internet households have broadband.

<sup>25</sup> Spitzer, p. 11.

<sup>26</sup> Richtel, Matt "Dangling Broadband from the Phone Stick," *New York Times*, February 2, 2005.

<sup>27</sup> Letter to Michael Powell, September 16, 2004.

<sup>28</sup> See note 2.

<sup>29</sup> June 2, 2005, p. B1.

<sup>30</sup> Federal Communications Commission, *Local Telephone Competition: Status as of June 31, 2004*, December 2004, Tables 6, 11, show this figure at just over 80 percent of SBC and just under 80 percent for Verizon. This is prior to the impact of the UNE-P decision. Facilities-based competition accounted for only about one-fifth of total competition (Local Competition, Table 10). Most of this competition was in the medium or large business market.

<sup>31</sup> "Protest of the Utility Reform Network, Utility Consumer's Action Network, Disability Rights Advocates, Consumer Union of the U.S., Inc., The Greenlining Institute, and Latino Issues Forum," *In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. (AT&T) for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454), to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Merger Sub Corporation*, before the Public Utilities Commission of the State of California, Application 05-02-027, February 28, 2005.

<sup>32</sup> New York was the first state to open its market to competition, so that competitors had penetrated substantially by December 2002. The increase thereafter was modest. Thus, the year-end 2002 data gives a reasonable indication of the state of competition and the impact of the merger.

<sup>33</sup> See note 30 above.

<sup>34</sup> *Local Telephone Competition*, Tables 6, 11.

<sup>35</sup> Precursor, *Telecom Vital Statistics: Pillars of the Bell 2005 Competitive Respite Thesis*, January 24, 2005, put Verizon and SBC long distance market shares at close to 40 percent at year-end 2004, and predicted a gain of another 10 percent, without the mergers. AT&T and MCI national market shares were approximately 30 percent and 20 percent, respectively, as reported in Industry Analysis and Technology Division, *Trends in Telephone Service* (Washington, D.C.: Federal Communications Commission, May 2004), p. 9-5. Because of their respective geographic foci, the in-region market share of the long distance companies being acquired respectively is likely to be higher than the national average. Thus, a 70 percent residential market share is a cautious estimate.

<sup>36</sup> Consumer Federation of America and Consumers Union, Letter to Chairman Michael Powell, September 16, 2004.

<sup>37</sup> See Cooper, Mark, *The Public Interest in Open Communications Network* (Washington, D.C.: Consumer Federation Of America, July 2004), Chapter IV, for a discussion of past anticompetitive practices of telephone companies against CLEC and ISPs. For a discussion of the problem of vertical leverage against intermodal competitors see "Petition to Deny of Consumer Federation of America and Consumers Union," *In the Matter of Application for the Transfer of Control of Licenses and Authorizations from AT&T Wireless Services Inc., and Its Subsidiaries to Cingular Wireless Corporation*, WT Docket No. 04-70, May 3, 2004 and "Reply of Consumer Federation of America and Consumers Union," *In the Matter of Application for the Transfer of Control of Licenses and Authorizations from AT&T Wireless Services Inc., and Its Subsidiaries to Cingular Wireless Corporation*, WT Docket No. 04-70, May 20, 2004.

<sup>38</sup> *Local Telephone Competition*, Tables 6 and 11.

<sup>39</sup> Richtel, Matt "Valuing MCI in an Industry Awash in Questions," *New York Times*, February 2, 2005, C-4, puts AT&T's national market share for the "corporate telecommunications market" at 15 percent and MCI's at 12 percent.

<sup>40</sup> UNE Fact Report, p. III-4.

<sup>41</sup> Reply Declaration of Lee Selwyn, *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, ¶ 18 (FCC RM No. 10593 (filed on behalf of AT&T Corp. Jan. 23, 2003)).

<sup>42</sup> Reply Comments of Ad Hoc Telecommunications Users Committee, *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Federal Communications Commission, WC Docket No. 05-75, DA 05-762, May 24, 2005, pp. 10-11.

<sup>43</sup> Ex Parte of BT, "SBC Communications, Ind. And AT&T Corp. Applications for Approval of Transfer of Control," May 6, 2005.

<sup>44</sup> Reply Declaration of Lee Selwyn, *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, ¶ 18 (FCC RM No. 10593 (filed on behalf of AT&T Corp. Jan. 23, 2003)).

<sup>45</sup> That the geographic overlap of assets is more concentrated in specific regions and products than the national average has been noted in the press accounts of the proposed mergers. Almar Latour and Dennis K. Berman, "Qwest Presses Its Bid for MCI," *Wall Street Journal*, February 4, 2005, C-4, the *Wall Street Journal* described Verizon and MCI as follows: "A tie-up between Verizon and MCI also could face cultural challenges: The companies have been fierce competitors and have been at loggerheads in court." The map accompanying Matt Richtel, "Valuing MCI in an Industry Awash in Questions," *New York Times*, February 2, 2005, C-4, shows a concentration of MCI data centers in the Northeast.

<sup>46</sup> Reply Comments of AT&T Corp., *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, ¶ 18 (FCC RM No. 10593 (filed Jan. 23, 2003)).

<sup>47</sup> The vertical problem in the cable video and high speed Internet markets are discussed in Cooper, Mark, *Cable Mergers and Monopolies: Market Power in Digital Communications Networks* (Washington, D.C.: Economic Policy Institute, 2002), Chapters 4 and 5; see also *The Public Interest in Open Communications Networks*, Chapter IV; Petition to Deny and Reply, not 9 above.

<sup>48</sup> Ex Parte of AT&T, CC Docket No. 99-333, Declaration by John Preston at 12 (May 26, 2000).

<sup>49</sup> Petition of AT&T Corp. to Deny Application, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T at ¶9 (Feb. 18, 2000) (footnotes omitted).

<sup>50</sup> Opposition of SBC Communications Inc., CC Docket No. 99-333 at 40-41 (Feb. 18, 2000).

- <sup>51</sup> Opposition of SBC Communications Inc., CC Docket No. 99-333 at 41 (Feb. 18, 2000).
- <sup>52</sup> Bell Atlantic Corporation's Petition to Condition Approval on Adequate Divestiture of Internet Backbone Assets, CC Docket No. 99-333, at 5-6 (Feb. 18, 2000).
- <sup>53</sup> Petition of AT&T Corp. to Deny Application, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T at ¶15 (Feb. 18, 2000) (footnotes omitted).
- <sup>54</sup> Petition of AT&T Corp. to Deny Application, CC Docket No. 99-333, Affidavit of Rose Klimovich on Behalf of AT&T at ¶15 (Feb. 18, 2000) (footnotes omitted).
- <sup>55</sup> Spitzer, pp. 21-22.
- <sup>56</sup> UNE Fact Report 2004, p. III-7.
- <sup>57</sup> "Direct Testimony Of Dr Mark N. Cooper On Behalf Of Texas Office Of Public Utility Council," Impairment Analysis Of Local Circuit Switching For The Mass Market, before the Public Utility Commission of Texas, PUC Docket No. 28607, February 9, March 19, 2004.
- <sup>58</sup> Id.
- <sup>59</sup> "Comments of the Consumer Federation of America and Consumers Union: The Impact of Megamergers on the Prospects for Competition in Local Markets," *Proposed Transfer of Control SBC and Ameritech*, Federal Communications Commission, CC Docket No. 98-141, October 15, 1998.
- <sup>60</sup> Testimony of Joseph Gillan on Behalf of AT&T Communications of Ohio and TCG Ohio, Sept. 20, 2001, *In the Matter of the Further Investigation Into Ameritech Ohio's Entry into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996*, Case No., 00-942-TP-COI (PUC of Ohio), at 21.
- <sup>61</sup> Petition to Deny of Cbeyond, et al., *In the Matter of Applications of SBC Communications Inc., and AT&T Corporation for Consent to Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing Licenses*, WC Docket No. 05-65, April 25, 2005, citing *Core Communications, Inc. and Z-Tel Communications, Inc. v. SBC, Memorandum Opinion and Order*, 18 FCC Rcd. 7568; *Global NAPs v. Verizon, Memorandum Opinion and Order*, 17 FCC Rcd. 4031 (2002).
- <sup>62</sup> Id. p. 18.
- <sup>63</sup> "Petition to Deny of Cbeyond, et al.," *In the Matter of Verizon Communications, Inc. and MCI Corp. Application for Approval of Transfer of Control*, WC Docket No. 05-75, DA 05-762, May 9, 2005, pp. 55-56.
- <sup>64</sup> *In the Matter of SBC Communications, Inc.*, Order, FCC 99-153, June 28, 1999; *In the Matter of SBC Communications, Inc.*, File Nos. EB-01-IH-0339, et al., Order FCC 02-153. *In the matter of SBC Communications, Inc., Apparent Liability for Forfeiture*, File No. EB. 00-IH-0432, Order on Forfeiture, DA 01-680, March 15, 2001, Order on Review, FCC 01-184; *In the Matter of SBC Communications, Inc.*, File No. EB-02-IH-3082, Order 03-825, March 20, 2003; *In the Matter of Matter of Verizon Communications, Inc.*, File No. EB-01-IH-0519, August 20, 2002.
- <sup>65</sup> *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-003o, Forfeiture Order, FCC 02-282, October 9, 2002; *In the Matter of CoreComm Communications, Inc., et al v. SBC Communications*, Memorandum Opinion and Order, FCC 03-08, April 17, 2003.
- <sup>66</sup> *Global NAPs, Inc. v. Verizon Communications, Inc.*, File No. EB-012-IH-0519, February 28, 2002; Order, DA 0-2017, August 20, 2002; GTE Service Corp., *Order and Consent Decree*, August 2002; Verizon Communications, Inc., *Order and Consent Decree*, September 2001.
- <sup>67</sup> Comments of AT&T Corp. *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, page 26.
- <sup>68</sup> Selwyn, para 76-81.
- <sup>69</sup> Compare Petition to Deny of Cbeyond Communications, et al., in the SBC and Verizon comments.
- <sup>70</sup> *In the Matter of MCI Telecommunications v. Illinois Bell Telephone Company, et al.* Memorandum and Order, FCC 00-371, October 19, 2000, *In the Matter of SBC Communications Inc.*, Order FCC 03-229, October 1, 2003; *In the Matter of Verizon Telephone Companies*, File No. EB-02-IH-0568, Order, March 4, 2003;
- <sup>71</sup> *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-00-IH-0326a, Order of Forfeiture, DA 01-1273, May 24, 2001, Order on Review, FCC 02-61, February 25, 2002; *In the Matter of Verizon Communication Inc.*, File No. EB-01-IH-0236, Order DA 01-2079, September 14, 2001;

<sup>72</sup> *In the Matter of Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, File No. EB-00-IH-0085, Order, FCC 00-92, Marc 9, 2000;

<sup>73</sup> *In the Matter of GTE Service Corporation*, File No. EB-00-IH-0113, Order, FCC 00-281, August 1, 2000; *GlobalCom, Inc. Illinois Commerce Commission*, Illinois Appeals Court, No. 1-02-3605, 2004 WL 487948, March 21, 2004.

<sup>74</sup> *In the Matter of Core Communications, In v. Verizon Maryland, Inc.*, File No. EB-01-MD-007, April 23, 2003; *Starpower Communications Inc., Memorandum Opinion and Order*, FCC Rcd., 23265, November 7, 2003.

<sup>75</sup> *In the Matter of Verizon Telephone Company, Inc.*, File EB-03-IH-2045, Order FCC 04-180, July 27, 2004.

<sup>76</sup> “Declaration of Lee L. Selwyn on behalf of AT&T,” FCC Docket No. 04-313, CC Docket No. 01-338, October 4, 2004, p. 71.

<sup>77</sup> *Comments of Sprint Corporation*, Federal Communications Commission, Docket NO. RM 105930, p. 5.

<sup>78</sup> *Comptel/Alts*, pp. 52-58.

<sup>79</sup> *Comptel/Alts*, p. 58.

<sup>80</sup> “Comments of Cox communications Inc.,” *In the Matter of Applications of Verizon Communications Inc., and MCI Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, May 9, 2005 “Reply comments of Advance/Newhouse Communications,” *In the Matter of Applications of Verizon Communications Inc., and MCI Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, May 24, 2005; Reply Comments of Cablevision Lightpath, “*In the Matter of Applications of Verizon Communications Inc., and MCI Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, May 24, 2005; “Comments of ACN Communications Services, Inc, et al., *In the Matter of Applications of SBC Communications Inc., and AT&T Corporation for Consent to Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing Licenses*, WC Docket No. 05-65, April 25, 2005, “Comments of ACN Communications Services, Inc, et al., *In the Matter of Applications of Verizon Communications Inc., and MCI Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, May 9, 2005.

<sup>81</sup> “Comments of Global Crossing North America, Inc.,” *In the Matter of Applications of SBC Communications Inc., and AT&T Corporation for Consent to Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing Licenses*, WC Docket No. 05-65, April 25, 2005.

<sup>82</sup> “Opposition of Broadwing Communications LLC, and Savvis Communications Corporation to the Merger Application Filed by Verizon Communications Inc, and MCI, Inc., “Opposition of Broadwing Communications LLC, and Savvis Communications Corporation to the Merger Application Filed by SBC Communications Inc, and AT&T Corp., *In the Matter of Applications of SBC Communications Inc., and AT&T Corporation for Consent to Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing Licenses*, WC Docket No. 05-65, April 25, 2005.

<sup>83</sup> “Response of T-Mobile USA, Inc.,” *In the Matter of Applications of SBC Communications Inc., and AT&T Corporation for Consent to Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing Licenses*, WC Docket No. 05-65, May 10, 2005.

<sup>84</sup> “Opposition of Vonage Holdings Inc., *In the Matter of Applications of SBC Communications Inc., and AT&T Corporation for Consent to Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing Licenses*, WC Docket No. 05-65, April 25, 2005.

<sup>85</sup> BT, AT&T, May 10, 2005, pp. 18-19.