Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Inc. and BellSouth Corporation	)	WC Docket No. 06-74
Applications for Approval of	)	
Transfer of Control	)	

REPLY COMMENTS OF THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

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I. INTRODUCTION.

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") hereby responds to the initial comments submitted in response to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") in the above referenced proceeding.[1] There is an air of resignation to the comments about the proposed acquisition by AT&T Inc. ("AT&T")[2] of BellSouth Corporation ("BellSouth")[3] ("Applicants"). Although virtually all oppose

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[1] / Commission Seeks Comment on Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corporation, WC Docket No. 06-74, Pleading Cycle Established, DA 06-904, April 19, 2006.

[2] / The Commission approved legacy SBC's acquisition of legacy AT&T seven months ago. *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, *Memorandum Opinion and Order*, released November 17, 2005 ("SBC/AT&T Merger Order"). SBC then adopted AT&T's name for the new merged entity.

[3] / BellSouth is the sole regional Bell operating company ("RBOC") among the original seven RBOCs that has not yet merged with another major telecommunications carrier, and is also the sole RBOC to retain "Bell" in its name. Ameritech, Pacific Telesis, and Southwestern Bell (as well as Southern New England Telephone Company and AT&T) merged into SBC (which has taken on AT&T's name); NYNEX and Bell Atlantic (as well as GTE and MCI) merged into Verizon; and US West merged with Qwest.

the merger and recommend that the Commission deny the Application,[4] parties also seem to view Commission approval as a fait accompli. Parties propose numerous conditions, which merit serious consideration by the Commission, yet parties also express pessimism about the likelihood that conditions will prevent the Applicants' post-merger anticompetitive behavior or ensure that the Applicants flow through benefits to consumers. There is also an almost universal concern regarding the sheer size (as measured by access lines, geography, and product market) and regarding the effect of this merger on wireline competition, intermodal competition, and net neutrality. One commenter suggests that the merger "would result in a level of concentration in the telecommunications marketplace not seen since the break-up of the Bell system in the early 1980s"[5] while another concludes that the proposed merger would "reverse nearly three decades of pro-competitive U.S. telecommunications policy codified in the Telecommunications Act of 1996 ("1996 Act") and raise substantial competitive issues . . ."[6]

Based on its review of initial comments, the Ratepayer Advocate reiterates the concerns it raised in initial comments:

- The merger is not in the public interest: the proposed transaction benefits shareholders and executives and fails to benefit mass market consumers.
- The Commission should deny the proposed merger because the Applicants have failed to meet their burden to prove that, on balance, AT&T's acquisition of BellSouth is in the public

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4 / The Alliance for Public Technology ("APT") supports the merger and welcomes the anticipated introduction of innovative wireline and wireless products and services. APT, at 1-5.

5 / Mobile Satellite Ventures Subsidiary LLC ("Mobile Satellite Ventures"), at ii.

6 / Global Crossing North America, Inc. ("Global Crossing"), at 3.

interest.

- Regulators have granted incumbent local exchange carriers ("ILECs") regulatory relief based on insufficient and ephemeral competition for mass market consumers that has all but evaporated; the proposed transaction will further seal consumers' fate.
- If the Commission does approve the proposed transaction, it should adopt clear, enforceable, conditions that do not expire unless and until the Commission affirmatively determines that they are no longer necessary to protect the public interest.

Furthermore, the Ratepayer Advocate urges the Commission to consider the effect of this merger and recent other mergers on the structure of telecommunications markets when it makes conclusions in several ongoing related proceedings such as the special access, intercarrier compensation, and high cost fund dockets. Also, the comments that competitive local exchange carriers ("CLECs") submitted in this docket demonstrate that the theoretical concerns that the Ratepayer Advocate raised in its initial comments regarding the Applicants' anticompetitive behavior have empirical corroboration in the market.

II. IMPACT OF MERGER ON COMPETITION AND THE PUBLIC INTEREST

The proposed merger is not in the public interest because it will enhance the incumbents' near-monopoly position in the local market and fails to provide adequate benefits or protections to mass market consumers.

AT&T's acquisition of BellSouth would further diminish the prospect of mass market competition**.** The ILECs have been granted substantial regulatory relief based on expectations of competition in the local market that have failed to materialize. It is now essential for the FCC and state public utility commissions to re-assert regulatory oversight to protect mass market consumers, particularly those who are most vulnerable to monopoly practices, *e.g.*, those in rural areas, those

who do not seek "bells and whistles," those who do not want bundled services, and those with low and moderate incomes.[7] The merger exposes consumers to various harms (*e.g.* service quality deterioration, excessive rates, aggressive sales practices, the loss of competitive choice, cross-subsidization, and threat to net neutrality), yet provides no benefits or protections.[8] As stated by the Ratepayer Advocate and numerous other commenters, the merger is not in the public interest, and, therefore, should be denied.

If, however, the Commission approves the merger, it should condition such approval on conditions although the Ratepayer Advocate doubts that there exists a set of conditions that could transform the merger sufficiently so as to make it satisfy the public interest, an opinion expressed by many.[9] The Consumer Federation of America ("CFA"), Consumers Union ("CU"), Free Press, and U.S. Public Interest Research Group ("U.S. PIRG") (collectively "CFA *et al.*") raise concerns similar to those raised by the Ratepayer Advocate and assert that "unless the merger is rejected outright or, at a minimum, dramatically altered, consumers will witness the steady march of the telecommunications industry back toward a de facto deregulated monopoly where competitive forces are held at bay by a dominant firm, leading to inflated prices, shoddy service and inadequate

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7/ Ratepayer Advocate, at 5; Declaration of Susan M. Baldwin and Sarah M. Bosley ("Baldwin/Bosley Declaration"), at para. 12.

8/ Ratepayer Advocate, at 5; Baldwin/Bosley Declaration, at para. 13.

9/ Ratepayer Advocate, at 1, 5; Sprint Nextel Corporation ("Sprint Nextel"), at 1; Global Crossing, at 2; Fones4All Corporation ("Fones4All"), at 1; Mobile Satellite Ventures, at ii; Center for Digital Democracy, at 1; Concerned Mayors Alliance ("CMA"), at 4; Comptel, at 4; Access Point *et al*, at 2; Time Warner Telecom Inc. ("Time Warner"), at 20; SwiftTel Communications Inc. ("SwiftTel"), at 1-2. The Communications Workers of America ("CWA") asks the Commission to ensure the public interest by ensuring that the merger does not "sacrifice quality customer service by reducing employment and closing facilities to meet synergy targets." CWA, at 4. The CWA has yet to reach an agreement with AT&T and BellSouth regarding employment security in the wake of the merger.

innovation."[10] Cbeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc., XO Communications, and Xspedius Communications (hereinafter referred to as "Cbeyond *et al*.") eloquently state the concerns of many:

> Should the Commission permit AT&T to swallow BellSouth as proposed by the Applicants, the resulting enterprise would control approximately 50% of all switched access lines in the nation, and the largest wireless company as well. Unless the Commission takes strong action on this application, it seriously risks breaching a tipping point in which AT&T's market power is sufficiently enormous that it can effectively forestall any intramodal wireline competition and much intermodal competition in its enormous operating footprint.[11]

As noted in the Ratepayer Advocate's initial comments, incumbent carriers dominate more than 80 percent of the nation's local markets,[12] and CLECs' demand for unbundled network element platform ("UNE-P") is declining, in the wake of the expiration of UNE-P offered at prices based on total element long run incremental cost ("TELRIC").[13] ILECs continue to control the "last mile" to customers and the prospect for local competition is bleak. If AT&T acquires BellSouth, the Herfindahl Hirschman Index ("HHI") (calculated on a broad-brush level) would increase from 3,075 to 4,199, an increase that vastly exceeds the 100-point threshold of concern set forth in the U.S.

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[10] / CFA *et al.*, at 3. The CFA, CU, Free Press, and U.S. PIRG collectively submitted a joint petition to deny the application, supported by the Joint Declaration of Mark Cooper and Trevor Roycroft.

[11] / Cbeyond *et al*., at 2.

[12] / Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of June 30, 2005* (April 2006), at Table 7. CLECs provided 34,114,396 end-user access lines nationally, the vast majority (19,188,870) provided through the use of UNEs. CLECs also relied on resold lines (5,853,928) and provided just 9,071,598 facilities-based lines. *Id.*, at Table 11. Approximately 50% of the facilities-based lines were provided by CLECs over coaxial cable connections. *Id.*, at 2.

[13] / The FCC reports that the number of UNE loops with switching (*i.e.,* UNE-P) fell 12% between December 2004 and June 2005. *Id.* AT&T's UNE-P lines plummeted 20% in one year, from 6,886,338 in June 2004 to 5,499,890 in June 2005. BellSouth's UNE-P lines declined 17%, from 2,949,388 in June 2004 to 2,454,335 in June 2005. Ratepayer Advocate, at 8-9; Baldwin/Bosley Declaration, at para. 69.

Department of Justice and Federal Trade Commission Horizontal Merger Guidelines.[14]

Fones4All concludes that "[w]hat little competition that exists in the low income universal service market today will be irreparably harmed by the merger, especially in the wireline market."[15] However, according to the National Association of State Utility Consumer Advocates ("NASUCA"), Commission action may be too little, too late, as the minimal competition that existed prior to the RBOC mergers "has been choked almost out of existence."[16]

At the time of the 1996 Act, seven RBOCs (of comparable size), AT&T, and MCI supplied telecommunications services. If the Commission approves the proposed transaction, two gargantuan firms (AT&T and Verizon) and one other RBOC (Qwest) would dominate the nation's telecommunications markets. The Bells' efforts to compete out-of-region have been minimal and unsuccessful. Moreover, the decisions of AT&T and MCI to merge with Bells suggest that competing in ILEC-dominated local markets is more difficult than the Applicants would have the Commission conclude.[17]

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[14] / U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, issued April 2, 1992, revised April 8, 1997 ("Horizontal Merger Guidelines"). *See*, Ratepayer Advocate, at 17-18; Baldwin/Bosley Declaration, at paras. 177-178.

[15] / Fones4All, at 2, *See*, *also*, Image Access, Inc. ("Image"), at 2; CFA *et al.*, at 5, stating that the merger will "have profoundly anticompetitive effects across the full range of product and geographic markets touched by the merging parties."

[16] / NASUCA, at 4.

[17] / Ratepayer Advocate, at 17; Baldwin/Bosley Declaration, at paras. 166-175. *See*, *also,* Mobile Satellite Ventures, at 8; Earthlink, at 2. Comptel observes that BellSouth and AT&T possess a unique capability to compete with one another. Comptel, at 18-24. If the Commission finds that the proposed transaction does not eliminate a potential competitor, then the Commission must surely find that no wireline CLEC can compete in RBOC markets. *Id*., at 22. Access Point, *et al.*, suggest that AT&T, BellSouth, and Verizon possess unique expertise that makes them the best-positioned to enter rival markets. Access Point, CAN, DeltaCom, FDN, GlobalCom, Lightyear, McLeodUSA, Pac-West Telecomm, Smart City, US LEC ("Access Point, *et al.*"), at 7-13.

The deck is stacked against competition. The Bells have leveraged their unique position in the local market to enter new markets by bundling local and long distance services for consumers and the FCC eliminated the requirement of regional Bell operating companies to share their broadband.[18] As stated in initial comments, "[w]ithout detailed accounting, which is subject to regulatory audit, it is difficult to detect and to prevent cross-subsidization of Bells' entry into broadband and IPTV markets with revenues from non-competitive services."[19] With this merger, AT&T is expanding its footprint and stands to gain a large, embedded base of local customers to which it can market its profitable bundles.[20]

The Applicants' assertions that they are "losing" access lines daily and that they face "intense" intermodal competition ring hollow.[21] As shown in the Ratepayer Advocate's initial comments and accompanying Baldwin/Bosley declaration, the Applicants fail to provide evidence

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18/ *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review –Review of Computer III and ONA Safeguards and Requirement*, CC Docket Nos. 95-20, 98-10; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242; *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, *Report and Order and Notice of Proposed Rulemaking*, rel. September 23, 2005 ("Broadband Sharing Order").

19/ Ratepayer Advocate, at 10, citing Baldwin/Bosley Declaration, at para. 64.

20/ *See* Baldwin/Bosley Declaration, at paras. 73-74, 128. Sprint Nextel discusses the expansion of AT&T's footprint in the context of the special access market in its comments. Sprint Nextel, at 7. Fones4All correctly recognizes that the enlargement of the geographic area over which AT&T provides service increases its "incentive and ability to discriminate against carriers competing in retail markets . . . " Fones4All, at 17. *See*, *also*, Mobile Wireless Ventures, at 12.

21/ Kahan (AT&T), at para. 11; Carlton and Sider (AT&T/BellSouth), at para. 31; Boniface (BellSouth), at para. 32.

that they do not wield market power.[22] Evidence suggests that the Applicants are the beneficiaries of customer migration from landline to other technologies, particularly digital subscriber line ("DSL") and AT&T's own voice over Internet Protocol ("VoIP") product.[23] The Bells certainly tout this migration as a benefit to investors.[24] Furthermore, the Applicants have failed to show that intermodal technologies are currently economic substitutes for basic wireline service across all market segments.[25] In many cases, intermodal technologies are consumed as complements to wireline services and are provided by the incumbents themselves as part of a bundle of services. The Applicants' marketing and business plans suggest that they view many of these services as complements" post-merger they plan to jointly market wireline and wireless services to consumers.[26]

The Georgia Public Service Commission ("Georgia PSC") reminds the Commission that BellSouth does not offer DSL on a stand-alone basis.[27] Finally, commenters in this proceeding have raised concerns regarding the concentration of the RBOCs' already significant market power and control of bottleneck facilities and services required to compete in the intermodal market.[28]

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[22] / The Ratepayer Advocate provides a detailed rebuttal in its initial comments at 10-12 and Baldwin/Bosley Declaration, at paras. 95-98 and paras. 125-129.

[23] / *See*, *e.g.*, Comptel, at 17.

[24] / AT&T *Investor Briefing,* April 25, 2006, at page 5.

[25] / Ratepayer Advocate, at 11-14; Baldwin/Bosley Declaration, at 110-138. *See*, *also*, Access Point, *et al*., at 41-47.

[26] / Carlton and Sider, at para. 10. *See*, also, *Id.*, at para. 52, stating "The proposed transaction eliminates impediments to developing innovating marketing strategies involving wireless services. Such bundles enable customers to have a single point of contact for a broader range of services." Baldwin/Bosley Declaration, at paras. 118-124.

[27] / Georgia PSC, at 2. "The anticompetitive impact of this policy is exacerbated in an environment where major competitors merge and customers have fewer competitive options." *Id.*

[28] / *See*, *e.g.*, Mobile Satellite Ventures, at 3; Sprint Nextel, at 9-11; NASUCA, at 5; Center for Digital Democracy, at 4-5; Access Point, *et al*., at 39.

The theoretical concerns that the Ratepayer Advocate raised in initial comments are echoed by numerous commenters and borne out by CLEC filings in this proceeding.[29]

Competition and mass market consumers.

The Ratepayer Advocate supports Fones4All's proposal that the Commission examine the relevant product market for a subset of mass market consumers: universal service eligible low income consumers.[30] As noted by the Ratepayer Advocate above, intermodal alternatives and bundles do not discipline the price and ensure the quality and availability of basic wireline telephone service. Fones4All highlights the fact that in the Verizon/MCI and SBC/AT&T merger orders, the Commission focused on intermodal alternatives and notes that "not a single mention was made of the availability of any traditional non ILEC wireline providers."[31] Image contends that BellSouth's use of cash-back promotions and bundling is discriminatory and that the merger would exacerbate this anticompetitive behavior.[32] The Ratepayer Advocate concurs with NASUCA's conclusion that the prior mergers approved by the Commission "actually harmed wireline competition and the prospects for consumer benefits that competition could bring."[33]

Other than those supplying niche markets, such as Fones4All (which serves Lifeline customers) and Image (which resells BellSouth's services), the competitors submitting comments

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[29] / *See*, *e.g.*, comments filed by Image, Access, SwiftTel, Fones4All, and Saturn Telecommunication Services, Inc. ("STS").

[30] / Fones4All, at 2, 8-10.

[31] / *Id.*, at 9.

[32] / Image, at 4. *See*, *also*, *Id.*, at 7-10. According to Image, by not making these bundles available through resale, BellSouth discriminates against its resale competitors. *Id.*, at 8.

[33] / NASUCA, at 5.

serve mainly or exclusively business customers. The dearth of competitors that focus on the residential market suggests that, with the exit of MCI and legacy AT&T, competitors are unable to serve households profitably except those high-revenue customers that supplement their wireline service with intermodal services. There is no evidence, however, either in the Application or in the comments, of significant residential wireline competition.

Several commenters raise concerns regarding AT&T's incentive and ability to discriminate against competitors as a result of AT&T's expanded footprint.[34] Fones4All correctly recognizes that the enlargement of AT&T geographic areas where it provides service as the incumbent increases its "incentive and ability to discriminate against carriers competing in retail markets . . . "[35] Time Warner posits that the merger "would give the merged entity a greater incentive to overprice, deny, delay or degrade competitors' access to needed inputs than is the case with either AT&T or BellSouth today."[36] Time Warner and Sprint Nextel cite to the Commission's findings in the *SBC/Ameritech Merger Order* and in the *Bell Atlantic/GTE Merger Order* in support of their concerns about potential discrimination, the difficulty of detecting such discrimination, and the "spillover" effects (*i.e.*, that, as the Commission has previously found, discrimination in one region affects competition in other regions).[37] Access Point, *et al.*, raise similar concerns that the merger

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[34] / *See* Baldwin/Bosley Declaration, at paras. 73-74, 128. Sprint Nextel discusses the expansion of AT&T's footprint in the context of the special access market in its comments. Sprint Nextel, at 7. *See*, *also*, Mobile Wireless Ventures, at 12; CFA *et al.*, at 4.

[35] / Fones4All, at 17.

[36] / Time Warner, at 32-33.

[37] / *See, e.g.,* Time Warner, at 37, 40, 42-45; Sprint Nextel, at 6-8, citing *SBC/Ameritech Merger Order*, at paras. 207-211.

will increase the incentive and ability of the merged entity to discriminate.[38] Discrimination against competitors, even in special access markets, harms the ability of mass market consumers to avail themselves of alternative telecommunications services.

Comments suggest that CLECs are experiencing anticompetitive practices on the part of AT&T and BellSouth, which the merger would exacerbate. Access Integrated Networks, Inc. ("Access") serves 90,000 customers throughout BellSouth's region, originally via UNE-P. Access is gradually converting its UNE-P base to a new "IP-based" network.[39] According to Access, it was the first "substantial CLEC" to enter a commercial agreement with BellSouth, which will expire on December 31, 2007.[40] The Commission should heed Access's statement that it "has serious concerns about the willingness of a consolidated AT&T/BellSouth to negotiate with it, in good faith, to reach a new Commercial Agreement which provides the loops, ports, and switching needed by Access at just and reasonable rates."[41] Access urges the Commission to exert necessary authority and to delegate any necessary authority to ensure that the merged entity negotiates in good faith and renews agreements at just and reasonable rates. According to Access, "[w]ithout such oversight Access fears that a consolidated AT&T/BellSouth will overreach and force small competitors to accept

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[38] / Access Point, *et al.*, at 20-24.

[39] / Access, at 1. *See*, *also*, the concerns raised by Saturn Telecommunication Services, Inc. ("STS") regarding its efforts to negotiate in the post-UNE-P environment with BellSouth regarding the conversion of its UNE-P-based customers and for access to BellSouth's network. Contrary to BellSouth's representations otherwise, BellSouth did not have a bulk migration process in place and STS faced exorbitant "market-based" rates. STS characterizes BellSouth's conduct as "anticompetitive and monopolistic, and deliberately designed to harm a telecommunications competitor." STS, at para. 38.

[40] / Access, at 2.

[41] / *Id.*.

pricing and terms which are designed to drive them out of business."[42] Access also observes that during the 18 months since it signed a commercial agreement with BellSouth, BellSouth lowered its retail price below wholesale prices in certain zones, driving Access sales representatives out of these markets.[43] STS describes similar difficulties in negotiating with BellSouth to transition its business from a UNE-P based business to facilities-based services. STS describes the "transition period" that the FCC envisioned post-TRRO in the following way:

> BellSouth used this transition period to induce STS to spend substantial money to build a network, which was proposed, designed and constructed by BellSouth. STS committed substantial resources to comply with the TRO and TRRO. BellSouth then pulled the rug out from under STS by creating commingling rules that unfairly restrict competition, violate the TRO and make STS unable to utilize its network for the intended purpose. To further attempt to drive STS out of business, BellSouth then subjected STS to market based rates, as BellSouth refused or was unable to transition STS's embedded base and new customers to STS' network. This is simply wrong. BellSouth is clearly profiting through its own fraudulent conduct. Permitting BellSouth to merge with AT&T will only create an atmosphere in which these types of abuses will increase.[44]

SwiftTel asserts that its experience dealing with BellSouth (which is now the subject of a lawsuit that SwiftTel filed) "is illustrative of broader public policy issues raised by the proposed merger."[45] At one point, SwiftTel served 12,500 customers, but "after a half dozen BellSouth-related

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[42] / *Id.*, at 3.

[43] / *Id.*, at 3, and Exhibit A. Based on its experience attempting to compete with BellSouth, Access contends that state commissions are better equipped than the FCC to oversee contract and rate issues under Section 271 and that the "pending merger is an excellent opportunity to resolve the question of whether the FCC or the state commission shall have this opportunity." *Id.*, at 4.

[44] / STS, at para. 43. In further discussing the fact that BellSouth apparently had no process in place to migrate large numbers of customers from UNE-P, STS states: "BellSouth claimed that it could provide for Batch Hot Cuts and commingling of services [in the TRO proceeding]. BellSouth and the other ILECs used these false claims to persuade the Courts and this Commission to eliminate UNE-P. BellSouth's track record should cause this Commission concern whether BellSouth's current promises are once again false." STS, at para. 46.

[45] / SwiftTel, at 2.

outages," SwiftTel has only 5,000 customers.[46] Swiftel suggests that "the Telecommunications Act of 1996 is not sufficient to protect competitors like SwiftTel from adverse actions by companies as large as BellSouth and AT&T because the resulting damages suffered by SwiftTel, while significant to SwiftTel, are not worth the bother of BellSouth."[47] SwiftTel's allegations that BellSouth has failed to satisfy its interconnection agreement obligations should be of significant concern to the Commission because they illustrate the Applicants' monopoly power and the ease with which the Applicants can eliminate their competitors. The experiences of SwiftTel, Access, and STS raise serious concerns about how a small CLEC can possibly "negotiate" on equal footing with a behemoth company.

Plain old telephone service.

Commission approval of the proposed merger will sanction further RBOC neglect of basic telephone service. The Applicants failed to address declining service quality and telephone subscribership in their regions. The Concerned Mayors Alliance ("CMA") contends that AT&T's service quality in low-income or minority neighborhoods is lower than in affluent and predominantly white suburban areas.[48] Fones4All expresses concern for the "shockingly low telephone penetration rates for the Commission's Lifeline/LinkUp programs."[49] Such problems indicate that competition at the margins is insufficient to discipline the Applicants' behavior and prices. As stated by the Ratepayer Advocate in initial comments: "The proposed transaction will provide yet further

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46 / *Id.*, at 3-4.

47 / *Id.*, at 5.

48 / CMA, at 14.

49 / Fones4All, at 2.

incentive for AT&T to relegate basic telephone service to the back seat as it pursues new lines of business."[50] Fones4All makes a similar conclusion:

> Unfortunately, despite AT&T's horn-blowing about is decision to in some distant day provide low income consumers with IPTV, this focus creates the potential for low income consumers to be abandoned (much like SBC's out of region competition strategy) along with the of [sic] legacy telephone facilities now serving them, while AT&T completes its multi-year or, perhaps, multi-decade build-out of a fiber network. During this time, many end users, particularly those located in low income, low-revenue producing, residential areas face the prospect of diminished access to basic communications services.[51]

CMA similarly suggests that the Applicants fail to address how the merged entity will "promote universal service through the equal deployment of basic and enhance telecommunications services."[52]

Duopoly.

The Commission should not be placated by the apparent emerging rivalry between cable and telco companies to offer customers bundles of video, data, and voice. Such a rivalry, where it exists, represents at best a duopoly. A duopoly is not an effective form of competition.[53] The competition provided by cable companies is not effective in disciplining the prices, quality, and terms of conditions of basic telecommunications services offered to customers that do not seek bundles. Furthermore, the transaction costs associated with changing providers suggests that such competition may provide little discipline in terms of quality and price even for those customers who do purchase

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50 / Ratepayer Advocate, at 20-21; *See*, *also*, Baldwin/Bosley Declaration, at paras. 235-241.

51 / Fones4All, at 20 (footnote omitted).

52 / CMA, at 7.

53 / Ratepayer Advocate, at 14; Baldwin/Bosley Declaration, at paras. 139-147. *See*, *also*, Time Warner, at 21.

bundled offerings.[54]

Comptel aptly concludes that if "the Commission were to find that AT&T is not likely to compete out-of-region, that would amount to a Commission finding that the current broadband duopoly is a persistent structural characteristic of the nation's telecommunications infrastructure. That, in turn, would require a fundamental re-evaluation of the Commission's recent rulings on broadband UNEs, special access pricing, and common carrier regulation of DSL."[55] Some commenters further suggest that in many areas, particularly rural areas and business markets, even a duopoly does not yet exist, as cable company offerings are not available.[56] Finally, Time Warner indicates that customers are increasingly seeking full integration of their communications needs, which increasingly cause Time Warner to rely on ILECs' networks.[57] This suggests that even the cable companies rely on the BOC networks to compete.

Loss of Stakeholder and Benchmark.

The loss of BellSouth as an ILEC stakeholder in various telecommunications proceedings would be significant. As stated by the Ratepayer Advocate in initial comments: "As the number of major carriers in the telecommunications markets dwindles, the Commission loses important perspectives that could otherwise inform policy making and regulation."[58] Furthermore, as stated in

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[54] / Ratepayer Advocate, at 14-17; Baldwin/Bosley Declaration, at paras. 139-147.

[55] / Comptel, at 19.

[56] / NASUCA, at 4; Earthlink, at 12; Access Point, *et al*., at 41-47.

[57] / Time Warner, at 2.

[58] / Ratepayer Advocate, at 18. *See*, *also*, Baldwin/Bosley Declaration, at paras. 199-212; Cbeyond *et al*, at 84-85

initial comments, the presence of several RBOCs in the local markets has assisted regulators in the detection of market abuses and in regulatory benchmarking.[59]

Parties amply rebut the Applicants' assertion that the Commission should not be concerned about the impact of the merger on benchmarking. Time Warner identifies numerous examples where regulators have relied on benchmarking in their oversight of ILECs. Time Warner also demonstrates that the merger would seriously damage benchmarking and would facilitate collusion among the few remaining carriers.[60] Among many examples, Time Warner compares the differing provisions in AT&T's and BellSouth's special access tariffs, and details the more onerous provisions of AT&T's tariffs relative to BellSouth's tariff.[61] Mobile Satellite Ventures provides the example of comparing ILECs' special access rates to determine whether the rates are just and reasonable.[62] Mobile Satellite Ventures further suggests that "competitive benchmarks are crucial not just to the Commission in exercising its role as a regulator, but also to competitors who are better able to negotiate competitive terms when competitive benchmarks are available."[63]

Access Point, *et al*, citing to the *SBC/Ameritech Merger Order,* states that the "loss of BellSouth 'as an independent source of strategic decisions and experimentation' is even more grievous than the loss of Ameritech, because it comes at a time when there are significantly fewer

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[59] / Ratepayer Advocate, at 18-19.

[60] / Time Warner, at 51-70.

[61] / *Id.*, at 70.

[62] / Mobile Wireless Ventures, at 9. *See*, *also*, Earthlink, at 2.

[63] / Mobile Wireless Ventures, at 11.

points of comparison than there were at the time of the SBC/Ameritech merger."[64] Access Point *et al.* also observes that "the smaller the number of participants, the more likely collusion can be maintained and succeed."[65]

Net Neutrality.

Despite the Applicants' assertions otherwise, the proposed transaction bears directly on large carriers' ability to restrict open, nondiscriminatory access to the Internet. The concentration of market power gives the incumbents a monopoly over transmission *and* potentially content and could harm the evolution of Internet related applications.[66] The Ratepayer Advocate continues to support net neutrality as a condition of any approval of the proposed merger, as do other commenters.[67] Time Warner suggests that the increased concentration resulting from the merger "threatens to tip the market into one in which the merged firm acquires the incentive and ability to refuse to peer, increases prices and/or degrade the quality of its interconnections with rival networks."[68] CFA *et al.* predict that if the merger is approved, consumers can expect "a full-scale attack on competition and innovation in markets for Internet content, service, and applications."[69] The Center for Digital Democracy observes that although the Commission conditioned its approval of the SBC/AT&T

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[64] / Access Point *et al.*, at 14, *see* generally, *Id.*, at 13-19.

[65] / *Id.*, at 19.

[66] / Ratepayer Advocate, at 19-20, citing Baldwin/Bosley Declaration, at paras. 214-226.

[67] / Georgia PSC, at 1; Center for Digital Democracy, at 2; Access, at 3-4, Access Point *et al.*, at 29-34.

[68] / Time Warner, at 25.

[69] / CFA *et al.*, at 5.

merger upon compliance with the Commission's *Broadband Policy Statement*, the *Broadband Policy Statement* "falls far short of true Net Neutrality principles."[70]

Special Access.

Several commenters presented evidence of the overwhelming market power that AT&T and BellSouth possess in the special access market. The Commission should consider carefully the implications of the loss of AT&T as the primary competitor in the special access market in BellSouth's territory.[71] Sprint Nextel, Mobile Satellite Ventures, and Comptel, for example, highlight wireless providers' reliance on special access services and the potential for anticompetitive behavior on the part of AT&T, as the parent of Cingular.[72] Global Crossing expresses concern regarding increasing concentration in the special access market, stating "[t]his concentration, combined with increasing pricing flexibility, raise serious concerns regard AT&T/BellSouth's pricing power and willingness to deal."[73] Paetec Communications, Inc. ("Paetec") asserts that it depends upon ILEC special access connections for 95% of its "last-mile connections to end-users."[74] Paetec expresses concerns regarding the interoffice transport market in addition to the high capacity loop market[75] and asserts that the "competitive situation in the special access market" in AT&T's and

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70 / Center for Digital Democracy, at 2.

71 / *See*, Comptel, at 7; Time Warner, at 3-4; Access Point *et al.*, at 7-13.

72 / Sprint Nextel asserts that it has no alternative providers to AT&T or BellSouth for 99% of its cell sites that are served by special access services. Sprint Nextel, at 9-11; Mobile Satellite Ventures, at 3; Comptel, at 9-11.

73 / Global Crossing, at 3-4. *See*, *also*, Mobile Satellite Ventures, at 1.

74 / Paetec Communications, Inc. ("Paetec"), at ii.

75 / *Id.*, at 5-6.

Verizon's territory has "deteriorated substantially" since the mergers.[76] Fones4All provided evidence in the form of several *ex parte* filings with the Commission that AT&T is discriminating against competitors.[77] Time Warner includes significant amounts of proprietary information about its business, which demonstrate its significant dependence on the Applicants' wholesale inputs (loops, etc.).[78] Time Warner demonstrates comprehensively that it relies on ILEC inputs to serve many customer locations.[79]

III. CONDITIONS

If, despite the preponderance of evidence which demonstrates that the merger would harm the public interest and competition, the Commission nonetheless intends to approve the merger, it should condition such approval upon specific, measurable, and enforceable commitments that do not sunset.

If, despite evidence to the contrary, the Commission finds the proposed transaction to be in the public interest, it should adopt conditions to mitigate the potential harms to consumers, competitors, and telecommunications markets.[80] Such conditions should be "specific, measurable, and enforceable commitments that do not sunset, but rather that expire only at such time as the Commission explicitly determines that they are no longer necessary."[81] The Ratepayer Advocate

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[76] / *Id.*, at 7.

[77] / Fones4All, at 10.

[78] / *See* generally Declaration of Graham Taylor on behalf of Time Warner Telecom, Inc. ("Taylor Declaration").

[79] / Time Warner, Taylor Declaration, at paras. 19-30

[80] / *See*, *e.g.*, SBC/*AT&T Merger Order*, at Appendix F; *Verizon/MCI Merger Order*, at Appendix G; *In re: Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control*, FCC CC Docket No. 98-141, *Memorandum Opinion and Order*, released October 8, 1999 ("SBC/Ameritech Merger Order"), at paras. 398-399, Appendix E.

[81] / Ratepayer Advocate, at 21, citing Baldwin/Bosley Declaration, at para. 264.

submits that the proposed transaction is not in the public interest for the reasons outlined above, in the Ratepayer Advocate's initial comments and in the accompanying Declaration of Susan M. Baldwin and Sarah M. Bosley. However, if the Commission nonetheless approves the transaction, it should condition such approval upon the following conditions (which are also set forth in the Ratepayer Advocate's initial comments):

- The Commission should ensure that the Applicants make firm commitments to increase telephone subscribership.

- The Applicants should commit to the deployment of affordable broadband throughout their region.

- Absent compelling information to the contrary, based on the substantial merger synergies and the Commission's recent decision to extend the separations freeze (which results in overstated intrastate costs), the FCC should require AT&T to provide broadband at POTS prices throughout its serving territory commencing immediately and have it available to all POTs customers within three years of the merger closing.

- Net neutrality conditions are essential to protect consumers and competitors from undue control of access to the Internet.

- The Applicants should commit to unbundled DSL until such time as AT&T demonstrates to the Commission that the market has evolved to a point where the commitment is no longer necessary.

- The Applicants should offer UNE-P at TELRIC rates until markets are sufficiently competitive.

- The Commission should require an audit of AT&T's interaffiliate transactions and sales practices and provide comprehensive customer education.

- The Commission should require AT&T and BellSouth to submit service quality data and should adopt sanctions for reductions in service quality.

- AT&T should relinquish competitive classification of basic local exchange service unless and until concerted out-of-region entry and effective competition materializes.

- The FCC should impose conditions to ensure consumers benefit from merger synergies and should establish an adequate X-factor, consider rate regulation and take account of estimated merger synergies in its forthcoming decisions in ongoing proceedings.

- The Applicants should not receive assistance from the non-rural high-cost fund.

- The Commission should ensure that legacy AT&T customers in BellSouth's territory are not harmed.

- The Applicants should submit quarterly reports that provide, on a geographically disaggregated basis (*i.e*, wire center basis) quantities of total retail lines; UNE-P lines; UNE-L lines; resale lines; demand for each of the bundled services they offer; demand for DSL; demand for unbundled DSL; and price changes.

A review of initial comments in this proceeding shows that many commenters support the adoption of conditions if the Commission approves the proposed merger.[82] In fact, many commenters concur with the Ratepayer Advocate that the conditions adopted in the *SBC/AT&T Merger Order*, should be considered a bare minimum.[83] Sprint Nextel states that the conditions adopted in the SBC/AT&T and Verizon/MCI merger orders "are not sufficient to address the increased risk of harm posed by the proposed merger" and states further that the "combination of two of the three largest remaining BOCs further reduces both the actual and potential competition for wireline services."[84]

The Commission should carefully review the additional conditions proposed by parties to this proceeding. Although the Ratepayer Advocate does not purport to have done an exhaustive review nor does it intend for the following list to be exhaustive, the Commission should consider the

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82 / *See*, *e.g.*, Sprint Nextel, at 1; Global Crossing, at 2; Paetec, at 10; Mobile Satellite Ventures, at 1; Cbeyond *et al*, at 99-109; Access, at 3-4; Fones4All, at 1; Center for Digital Democracy, at 1; Concerned Mayors Alliance, at 4; Comptel, at 4; Access Point *et al*, at 2; Time Warner, at 20.

83 / Sprint Nextel, at 14.

84 / *Id.*, at 14. Sprint Nextel proposes additional conditions related to the special access services market at 14-15.

following proposed conditions that parties raised in initial comments *in addition to those it adopted in the SBC/AT&T Merger Order*:[85]

- For a period of 60 months after the merger closing the merged company should provide access to unbundled local switching and basic two-wire residential loop products at the most recently applicable state commission-approved TELRIC rates to carriers serving single-line residential users who are eligible for state of federal universal service program (Fones4All, at 2).

- The merged company should repair substandard copper loop plant when reported by CLECs (Fones4All, at 3).

- Continued availability of BellSouth's special access tariffs outlined in the Application and the extension of such tariffs to present AT&T territory (Mobile Satellite Ventures, at 17).[86]

- Prohibit merged company form discriminating against non-affiliated carriers in favor of Cingular with respect to the provision of special access services (Mobile Satellite Ventures, at 17) or extend the "most favored nation" provision adopted in the *SBC/AT&T Merger Order* to wireless carriers (Mobile Satellite Ventures, at 18).

- Extension of "naked" DSL requirements to BellSouth's operating territory (Georgia PSC, at 2-3).[87]

- Divestiture of AT&T and BellSouth 2.3 GHz and 2.5 GHz licenses (Center for Digital Democracy, at 6; CFA, at 9).

- Ensure that bundles are available on fair terms for resale (Image, at 10-11).

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[85] / *See* Baldwin/Bosley Declaration at paras. 251-263 for a summary of the SBC/AT&T merger conditions. CFA proposes several modifications to the AT&T/SBC merger conditions. For example, CFA recommends that AT&T-BellSouth be prohibited from seeking any increase in state-approved rates for unbundled network elements ("UNEs") currently in effect for a *five-year* period (rather than two years), subject to certain exceptions. Also, CFA recommends a five-year rather than three-year settlement free peering arrangement. CFA, at 8-9.

[86] / CFA recommends that the Commission direct AT&T to divest its out-of-region operations in the BellSouth service area, including facilities used to provide local exchange and special access service. CFA, at 8.

[87] / CFA proposes that "[w]ithin one year after closing, AT&T-BellSouth must deploy and offer within the BellSouth portion of its in-region territory ADSL service to ADSL-capable customers without requiring such customers to also purchase voice services, and continue to offer this service in the entire AT&T service area for five years after the date which the last BellSouth state complies with this provision."

- Take a "fresh look" at its key decisions predicated on the existence of competition in local markets where AT&T and BellSouth were present. To the extent that regulatory relief has been afforded to BellSouth based on analysis of competition that included any of AT&T customers or assets, those decisions, particularly those decisions affecting the availability of UNEs, must be revisited. Customers of AT&T and BellSouth should also be given the opportunity for a "fresh look" at existing contractual relationships without penalty or early termination fees (CFA, at 9).

- For five years following the closing, AT&T-BellSouth must file annually a declaration by an officer of the corporation attesting that AT&T-BellSouth has substantially complied with the terms of these conditions in all material respects (CFA, at 9).

The CMA raises concern about racial discrimination and redlining[88] and reminds the Commission, among other things, that Congress directed the Commission "to affirmatively prevent race discrimination when it regulates telecommunications services."[89] CMA asserts that the Commission "must impose requirements on a merger of this type that foster access to basic and enhanced telecommunications services, including high-speed Internet service, for rural and low-income America."[90]

Before approving the proposed merger, the Commission should require AT&T to demonstrate that it has complied fully with the conditions set forth in previous merger orders.

The Commission should also determine whether AT&T has complied with the conditions of its earlier mergers. Global Crossing observes that this merger proposal comes so soon after the closing of the SBC/AT&T merger that it is difficult to determine whether AT&T has complied with those conditions. For example, AT&T filed its first Service Quality Measurement Plan on May 15,

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[88] / CMA defines redlining as "denying or delaying the deployment of advanced or even basic telecommunications services to areas populated by low-income or minority residents." CMA, at 14.

[89] / *Id.*, at 9-10, cite omitted.

[90] / *Id.*, at 10.

2006. Global Crossing notes, however, that the Applicants have failed to provide any evidence that it is complying with conditions.[91] CMA similarly suggests that the Commission should allow adequate passage of time to determine whether the purported benefits of SBC's acquisition of AT&T actually occur.[92]

Others echo the Ratepayer Advocate's concern[93] about legacy SBC's empty promises: "Over the past 10 years, SBC, now AT&T, has made many promises in the context of mega-mergers that have not become reality."[94] NASUCA suggests that the benefits of the conditions imposed on previous mergers "were minimal and short-lived."[95]

The Applicants' merger application suffers from a paucity of information and the Commission should allow adequate time to complete its investigation.

The Applicants' filing consists of generalities and fails to provide data and details about its operations.[96] The Ratepayer Advocate supports CMA's concern that the application fails to address major public interest issues concerning redlining, antitrust, network neutrality, and video franchising.[97] Access Point, *et al*. also fault the application because it lacks details about how differences in the Applicants' operating procedures would be reconciled.[98] At least one commenter

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[91] / Global Crossing, at 7.

[92] / CMA, at 21.

[93] / Ratepayer Advocate, at 17; Baldwin/Bosley Declaration, at paras. 166-175.

[94] / CMA, at 20. *See*, *also*, Image, at 20.

[95] / NASUCA, at 3.

[96] / *See*, *e.g.*, CMA, at 6-7.

[97] / *Id.*, at 6-7.

[98] / Access Point, *et al.*, at 4.

suggests that the Commission should issue information requests.[99]

The Commission should not rush to approve the merger or to complete the investigation. The merger has far-reaching implications for consumers and competitors. A decision to allow AT&T to acquire BellSouth would be irrevocable. There are numerous critical unanswered questions ranging from AT&T's redlining, AT&T's commitment to copper-wire based DSL, the Applicants' integration of those operations that affect interconnection arrangements with CLECs, its commitment to net neutrality, the Applicants' efforts (if any) to increase telephone penetration and service quality, etc.

The Ratepayer Advocate concurs with CMA that the Commission should delay its evaluation of the merger and should require the applicant to supplement their filing.[100] An extended review period would allow the Commission to examine such issues as whether AT&T and its predecessors engaged in redlining with its cable and high speed data and Internet services.[101]

The Ratepayer Advocate is dismayed that, apparently, the Commission has not yet issued an information and data request to the Applicants.[102] The absence of such a request (or the delay in issuing such a request) is troubling. Given the magnitude of the proposed transaction, the Ratepayer

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[99] / EarthLink "urges the Commission to instruct AT&T and BellSouth to produce all documents such as studies, plans, proposals, feasibility studies, e-mails, economic analyses, market studies, etc., that would shed light on the Applicants' plans to compete out-of-region with respect to broadband transmission services. EarthLink attaches as Exhibit B a list of suggested questions and document requests for the Applicants." Earthlink, Inc. ("Earthlink"), at 15.

[100] / CMA, at 11.

[101] / *Id.,* at 12.

[102] / By comparison, Verizon and MCI submitted their merger application to the FCC on March 11, 2005. WC Docket No. 05-75. The FCC issued a detailed information and data request on May 5, with responses due May 26. Meanwhile, initial comments were filed May 9 and reply comments May 24. Verizon and MCI submitted dozens of boxes of information to the Commission in response to the requests.

Advocate remains hopeful that the Commission intends to require the Applicants to substantiate their proposal with detailed information. The Ratepayer Advocate urges the Commission to provide the Ratepayer Advocate and other interested parties adequate time in the procedural schedule for interested commenters to submit *ex parte* filings based on their review of the Applicants' response. The stakes of this multi-billion dollar transaction for consumers are substantial, and the FCC's consideration of the merger should be deliberate and unrushed.

IV. CONCLUSION

For the numerous and serious reasons that parties raise in initial comments, the Commission should reject the merger. Based on the fact that merger conditions have accomplished too little in the past, the Ratepayer Advocate is not optimistic about conditions and commitments as a way to transform the merger. Nonetheless, if the Commission intends to approve the transaction, it should consider the various conditions that are proposed.

The dwindling number of participants in the merger proceedings should not be construed as evidence of support for the transaction. The regulatory arena is getting quieter because CLECs have exited the market (notably the outspoken MCI and legacy AT&T), and CLECs and consumer advocates are resigned to pro-Bell decisions. The Commission should carefully consider the conclusion of NASUCA: "This merger should not be approved. But then again, at least in retrospect, none of the mergers of the RBOCs should have been approved."[103]

[103] / NASUCA, at 5.

Respectfully submitted,

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