COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT APPLICATION FOR APPROVAL OF THE INDIRECT TRANSFER OF CONTROL RELATING TO THE MERGER OF AT&T, INC. AND BELLSOUTH CORPORATION	)))))	CASE NO. 2006-00136

POST-HEARING BRIEF OF INTERVENORS NUVOX AND XSPEDIUS

NuVox Communications, Inc. ("NuVox"), and Xspedius Management Company Switched Services, LLC and Xspedius Management Company of Louisville, LLC (collectively referred to herein as "Xspedius") (with NuVox and Xspedius being referred to herein collectively as the "Intervenors"), by counsel, hereby respectfully submit their Post-Hearing Brief in accordance with the Commission's April 12, 2006 Order.

Introduction

On March 31, 2006, BellSouth Corporation ("BellSouth") and AT&T, Inc. ("AT&T") (collectively referred to herein as the "Joint Applicants") filed an application with the Commission for the approval of the transfer of control of BellSouth to AT&T. Thereafter, the Commission entered a procedural schedule by Order dated April 12, 2006. NuVox filed a motion for full intervention on April 24, 2006, and Xspedius filed a motion for intervention shortly thereafter, on May 2, 2006. This Commission granted the motions by Order dated May 31, 2006.

NuVox is a facilities-based competitive local exchange carrier ("CLEC") with its principal place of business located in Greenville, South Carolina. NuVox provides telecommunications services throughout the territories serviced by BellSouth, including Kentucky, and in seven (7) states in which AT&T does business. Both Xspedius entities are CLECs with their principal places of business located in O'Fallon, Missouri, and together with other Xspedius affiliates, provide telecommunications services throughout the territories serviced by BellSouth, including Kentucky. NuVox and Xspedius directly deal with the Joint Applicants frequently in the conduct of their business. Thus, this case involves issues which are directly relevant to Intervenors' respective business and on-going operations, particularly, the impact that the anticipated merger of Joint Applicants will have on the ability of the Intervenors to compete in the marketplace post-merger (and likewise, the undue competitive advantages that the Joint Applicants will enjoy in the marketplace as a result of the anticipated merger).

It does appear, based on the testimony at the June 7, 2006 hearing ("Hearing"), that AT&T and BellSouth (and their shareholders) stand to benefit from the merger. Joint Applicants have failed utterly, however, to demonstrate that the merger satisfies Kentucky's **public interest** standard as established under KRS 278.620(1). As discussed herein, not a single one of the five justifications offered for how the merger allegedly advances the public interest actually sets forth something that will advance the interests of even a substantial number of Kentuckians.[1] Additionally, Joint Applicants failed to demonstrate that permitting the largest telecommunications merger in the history of the Commonwealth, by allowing BellSouth to merge with its largest competitor, and reassembling a substantial portion of the Bell system in Kentucky will not harm competition. Joint Applicants' case in this regard relies on broad generalizations, rather than any sort of structured analysis, providing no assurance that the proposed merger will not lead to a significant reduction in competitive alternatives, an increase in market concentration, a subsequent increase in market power in the markets for some services, and, most

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1 The American Heritage® Dictionary of the English Language, Fourth Edition defines "public interest"

importantly, substantial price increases for business customers throughout the state. Such price increases are not just some theoretical possibility. As the CEO of AT&T indicated on Wall Street just one month ago, since its merger last year, prices in the enterprise market, which had been decreasing, are now stabilizing, and there are even signs they maybe increasing.[2]

Joint Applicants' case also lacks consistency. Mr. Eddy Roberts, President of BellSouth Kentucky, asserts that the merger is needed because it will make BellSouth "a better and more efficient competitor."[3] Presumably this will be accomplished by implementation of many of the network and operational changes discussed by AT&T's witnesses, Mr. Christopher Rice and Mr. James Kahan. Yet in an apparent attempt to convince this Commission that it need not look too closely at the details of the merger and its impact on specific markets, Mr. Roberts also asserts that BellSouth "will continue to operate just as before in Kentucky."[4] Which of these claims is true? If significant changes are in store, then this Commission should look very carefully at the potential impact of the merger across all product and geographic markets. If BellSouth will truly operate "just as before," then where are the alleged synergies and efficiencies that ostensibly justify this merger under the public interest standard?

Despite these clear failures of Joint Applicants' case, Intervenors, in larger part because outright opposition to the merger would appear to be futile, are not requesting that this Commission deny the application of BellSouth and AT&T. Rather, by testimony presented during the Hearing, and as discussed herein, Intervenors request that the Commission impose several modest conditions on the proposed merger as a very inexpensive insurance policy to ensure that competition in the Kentucky

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as "The well-being of the general public; the commonweal."

2 *See* Statement of Ed Whitacre, *Transcript, AT&T at Sanford C. Bernstein & Co. Strategic Decisions Conference*, May 31, 2006 ("Bernstein Transcript," Exhibit A hereto) at 9.

3 *See* Prefiled Testimony of Eddy Roberts ("Roberts Prefiled"), at 2.

4 Roberts Prefiled at 3.

marketplace (and particularly, Intervenors' ability to compete in the marketplace post-merger) can continue.

Argument

I. Overview

AT&T's acquisition of BellSouth effectively completes the raising of the old Bell System in Kentucky like a phoenix out of the ashes.[5] AT&T's proposed acquisition of BellSouth will extend to Kentucky the cumulative competitive harm of four prior mergers, including SBC's acquisition of Pacific Telesis, Southern New England Telephone, and, most especially, Ameritech and AT&T.[6] This acquisition furthers legacy SBC's "national-local" ambitions -- not by **competing** with BellSouth for customers, but by purchasing the incumbent and transforming the Southeast into another of its in-region markets. This acquisition will further entrench AT&T's position in the multi-location business market and block other carriers from achieving similar scale. It will further concentrate the business marketplace, providing AT&T with an enormous ***80% share*** of the Kentucky business market.[7]

As the Commission may have begun to recognize as it looked out over the sea of Joint Applicants' representatives at the Hearing and the paltry few assembled to oppose any aspect of the merger, the merger will extend to the Southeast a critical resource imbalance between competitors and the incumbent. This imbalance will add greatly to the difficulty of ensuring competition in Kentucky's local markets. By seeking to become the incumbent rather than offer service in Kentucky as a CLEC,

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[5] Even after this acquisition, AT&T will not control some components of the former Bell System, most importantly those components consolidated by Verizon and Qwest. However, given its 22 semi-independent local operating companies, the former Bell System was in some ways less concentrated than the centralized management structure of the "new AT&T." *See* Prefiled Testimony of Joseph Gillan ("Gillan Prefiled") at 3 n.1.

[6] *See* Gillan Prefiled at 3-4.

AT&T confirms just how difficult it is to compete in local markets. The post-acquisition AT&T ("New AT&T") will enjoy annual revenues exceeding $100 ***billion*** dollars, derived from a broad array of wireline (4 Regional Bell Operating Companies -- known as "RBOCs" -- plus SNET), wireless (Cingular) and interexchange/CLEC (AT&T) assets.[8] To work as intended, the structure of Telecom Act demands some semblance of parity between the entrant and the incumbent in that it relies on arbitration and the private enforcement of wholesale obligations and contracts. The proposed acquisition will dramatically increase the resources available to BellSouth well beyond that of any competitor (whether acting alone or through a coalition), which will create severe disparities in the negotiation and arbitration process and will have a debilitating effect on CLECs like Intervenors.

In short, the merger is likely to harm competition in Kentucky. It is essential that the Commission impose conditions that will mitigate (though not fully eliminate) the concerns presented by the merger. Such conditions would help minimize the Joint Applicants' growing litigation advantage against CLECs like the Intervenors, an advantage which enables Joint Applicants to evade the policies of the Federal Act.

Intervenors' expert, Joseph Gillan, an economist specializing in the telecommunications industry, proposed five conditions that Intervenors believe the Commission should require in connection with the proposed acquisition: a price cap plan for UNEs, strengthening the §271 performance plan, permanently retiring the pre-TRO EELs "Safe Harbors," enabling fresh look, and state enforcement of any federal conditions. The Commission should condition its approval of the merger on at least these five conditions.

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7 *See* Gillan Prefiled at 4.

8 *See* Gillan Prefiled at 5.

II. Joint Applicants' "Public Interest" Claims Are Illusory.

The Joint Applicants claim five principal "public interest" benefits of AT&T's consumption of BellSouth. Specifically, Joint Applicants claim that the merger will: (1) create management efficiencies at Cingular through unification of ownership and more quickly permit Cingular to offer "converged services," (2) facilitate video competition in Kentucky, (3) position BellSouth to better serve government and respond to natural disasters, (4) permit the integration of BellSouth's local network with AT&T's backbone, and (5) bring customers innovations from AT&T Labs.[9] What is incredible about this list is that it does not contain a single "benefit" that will demonstrably accrue to residential, business or wholesale telecommunications consumers in Kentucky, whether through higher quality, greater choices, lower prices or other quantifiable benefits. Is this the best Joint Applicants can do? Indeed, as to pricing, Joint Applicants freely admit that they have no intentions of passing any merger-related saving on to Kentucky's consumers.[10] Moreover, not a single item on this short list -- other than the unification of Cingular ownership -- makes a merger necessary for BellSouth, particularly not one of this magnitude.

A. Merger "Benefits" Relating to Cingular Are Not "Public Benefits" At All.

According to AT&T witness James Kahan, one of the reasons that Cingular "must be brought under unified ownership" is to reconcile the potentially different priorities presented by the current joint venture between AT&T and BellSouth.[11] While this goal may well serve AT&T's business interests, the Commission has no basis to conclude that eliminating BellSouth's "potentially different priorities" is in the public interest of Kentucky consumers. Zero evidence was presented that this management

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9 Joint Application for Approval of Indirect Transfer of Control ("Joint Application") at 4.

10 Hearing testimony of Eddy Roberts, Hearing Tr. at 44.

11 *See* Prefiled Testimony of James Kahan ("Kahan Prefiled") at 7; Hearing testimony of James Kahan,

unification will benefit a single consumer in any capacity. Indeed, given that Cingular is already the second-largest provider of wireless services in the United States, the management "inefficiency" claimed by Joint Applicants has not seemed to hinder Cingular's ability to compete in the market to date.

The elimination of the claimed management barrier is a ***private*** benefit to AT&T, not a ***public*** benefit to consumers of Kentucky's telecommunication services. Furthermore, to the extent that BellSouth has different priorities than AT&T, it is likely that its priorities have been more closely aligned with those of its regional customers.[12]

One alleged benefit of the proposed merger is that Cingular would be positioned to more easily offer converged wireless and wireline services,[13] even though the Joint Applicants simultaneously claim that wireless service is a competitor to its wireline services.[14] The Commission need not determine which of AT&T's conflicting claims is accurate (*i.e.*, whether wireless and wireline services are converging or competing) because nothing in the record provides a shred of evidence either that the merger will enhance Cingular's ability to offer converged services or that such services will benefit the public in Kentucky.

B. Deployment Of Video Services In Kentucky Is Speculative At Best.

The Commission should place no weight on the Joint Applicants' claim that the acquisition *might* lead to the deployment of video services in the BellSouth region.[15] Joint Applicants point to AT&T's plan to deploy Project Lightspeed to 18 million homes by the end of 2008,[16] implying that it stands ready to expand the project more broadly. However, as Mr. Kahan testified, AT&T already

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Hearing Tr. at 95.

12 *See* Gillan Prefiled at 15.

13 Joint Application for Approval of Indirect Transfer of Control ("Joint Application") at 4.

14 *See, e.g.*, Prefiled Testimony of Debra J. Aron ("Aron Prefiled") at 18.

15 *See* Kahan Prefiled at 11-13.

16 Joint Application at 37.

serves approximately 33 million households,[17] suggesting that its current plans only call for it to deploy Project Lightspeed to only 50% of its subscribers. AT&T has made no commitment whatsoever to bring video services to this region or to Kentucky soon or **ever**. Given this lack of any commitment, Joint Applicants have offered no evidence that the merger will bring competition in video services any sooner than would be the case without the merger.

More importantly, the Commission should step back and let the marketplace provide the incentive for BellSouth to offer video services to residential consumers. The fact is that if BellSouth intends to keep its local, long distance, and broadband customers in the face of competition from cable competitors, BellSouth will ***have*** to provide such video services. There is therefore no need to put the Bell monopoly back together just years after the federal government found that it had to be broken up to restrain anticompetitive activity – with all the attendant problems and disadvantages of larger concentration in the business market – in order to provide incentives for BellSouth to offer new services.

AT&T even goes so far as to claim that one of the "public interest" benefits of its acquisition of BellSouth is that it will provide more negotiating leverage with video entertainment providers.[18] How can Joint Applicants tell this Commission, with straight faces, that it should approve this mega-merger and sanction the virtual recreation of the Bell System merely so that New AT&T can better negotiate with video content providers? This bizarre claim demonstrates just how far afield the Joint Applicants must tread in search of even an arguable "public interest" justification for the acquisition.[19]

17 *See* Kahan Prefiled at 12.

18 *See* Kahan Prefiled at 13.

19 *See* Gillan Prefiled at 16-17.

C. Disaster Response Is Unlikely To Improve With The Merger.

While enhanced disaster response is desirable and is the closest to an actual public interest benefit detailed by Joint Applicants, the merger is unlikely to change much in this regard. As they should do, AT&T and other telecommunications companies like CLECs and independent ILECs already assist BellSouth and all other telecommunications providers when disaster strikes. To the extent one company has resources to spare such as the good disaster response resources noted by AT&T in its testimony, such resources are routinely shared with those companies that have been stricken by natural and other disasters – as they should be. The FCC recently issued a report on Hurricane Katrina from a committee of carriers, manufacturers, and public interest groups, and all carriers agreed that increased communication and cooperation is a necessity. Merging two of the four remaining RBOCs cannot be justified on the theory that one of them has better disaster response equipment than the other, or that having two of the myriad competing carriers acting as one will make a significant improvement in disaster recovery efforts.

D. Network Integration Would Present Anti-Competitive Harm.

AT&T points to a number of possible advantages from integrating AT&T's backbone network with BellSouth's local network,[20] which instead of strengthening its public interest case, rather present cause for concern.[21] The fundamental premise of the AT&T divestiture (which would be effectively reversed now all across the Southern half of the United States from Los Angeles to Dallas to Atlanta (and North to Chicago, as well) was that nondiscriminatory interconnection to the incumbent's local network was needed for competition to thrive. Here, however, AT&T asserts the exact *opposite*

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[20] *See* Joint Application at 51-52.

[21] Regarding Joint Applicants' claim that AT&T's backbone network is relevant in Kentucky, *see* Joint Applicants' Confidential Responses to NuVox and Xspedius Data Requests 8 and 10, for potentially useful

premise -- that AT&T must enjoy an *exclusive* integration with the BellSouth network to compete effectively in the future.[22]

This proposition is absurd and troubling. The BellSouth local network is a unique asset that provides the connectivity to end-users that nearly all of its competitors likewise require.[23] This aspect of AT&T's testimony should be of utmost concern to the Commission, in that it clearly signals AT&T's belief and intention to integrate BellSouth's local network into its retail services through interconnection arrangements that will be denied to its competitors.[24] For this reason and others, this merger should be permitted to proceed only if accompanied by conditions that will ensure the ability of other providers to compete with the New AT&T despite its massive size, broad footprint, and inherited advantages of incumbency.

E. Merger Is Unnecessary For AT&T Labs To Sell Innovative Technologies To BellSouth.

One would think that, to the extent AT&T Labs develops innovative new technologies, it would seek to maximize profits by selling or licensing these to other telecommunications providers, as all other such technology companies do. To the extent AT&T Labs does not already market and sell its new technologies to BellSouth, the fact that it does not do so cannot be considered a reasonable basis to justify this merger.

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information concerning the accuracy of the claim.

22 *See* Gillan Prefiled at 18.

23 *See* Gillan Prefiled at 18.

24 *See* Gillan Prefiled at 18.

III. The Proposed Acquisition Presents Significant Harm To Competition.

Given the illusory nature of the public interest "benefits" proffered by Joint Applicants, it should come as no surprise that the proposed acquisition will actually cause harm to market competition. In an effort to deflect such criticism, BellSouth and AT&T representatives cast the merger merely as a "holding company transaction." The Commission and Intervenors are asked to believe that BellSouth will operate in Kentucky just as before. This begs the question whether the true impact of the merger will be to eliminate existing and potential competition in the market.

Likewise, the Commission is being assured that BellSouth will still be bound by existing interconnection agreements, as if this were the primary concern of CLECs like Intervenors. The concern is not whether the contracts will continue in force, but *how they are to be administered*. After the New AT&T assumes the new position of parent to BellSouth, there is no guarantee that CLECs will be treated fairly. Indeed, Mr. Roberts disavowed any knowledge (and doubted the veracity of) Intervenors' concerns that even current staffing levels for dealing with CLECs have diminished in quantity and quality.[25] Moreover, as the Commission is well aware, interconnection agreements are incredibly voluminous contracts that are replete with arcane language and verbiage of questionable clarity. To the extent an ILEC wishes to provide good service to a CLEC pursuant to such an agreement it can certainly do so; conversely, an ILEC looking to evade some of its responsibilities should not have much trouble finding novel interpretations of ICA provisions that it no longer wishes to follow (thereby forcing CLECs into costly, time and resource draining complaints before this and other Commissions.)

25 *See* Hearing testimony of Eddy Roberts, Hearing Tr. at 41-42.

A. The Adverse Effect Of The Acquisition On Competition In The Business Market

The proposed acquisition will further entrench BellSouth's dominance in the business market.[26] This market is already highly concentrated, and adding AT&T's share to that of BellSouth will bring the incumbent share ***to nearly 80%***, exacerbating already-existing market concentration.[27]

Through merging, AT&T seeks to establish a grip on the nation's business customers, dwarfing the competitive presence of any other carrier. The number of business lines served by each incumbent provides a useful measure of the relative proportion of the business market that resides within the in-region footprint of the various incumbents. Post-merger, AT&T's incumbent footprint will include nearly 50% of the nation's business market -- a much broader geographic footprint than any other carrier can hope to achieve.[28] The only way that meaningful competition can succeed against a carrier having a ubiquitous local network (such as the post-acquisition AT&T) is if CLECs are able to effectively use that same network to provide service to its customers as well.

As support for the merger, Joint Applicants rely on the testimony of Dr. Debra Aron. Her suggestion that the BellSouth's business market is in significant decline is based on an analysis limited to switched business lines, without considering the fact that the driver of most demand in the business market is for non-switched lines (which BellSouth records as "special access" lines).[29] In 2000, the number of special access lines eclipsed the number of multi-line business lines[30] and, as shown in Mr. Gillan's testimony, special access is continuing to fuel rapid growth in the number of lines being provided

26 *See* Gillan Prefiled at 20.
27 *See* Gillan Prefiled at 20.
28 *See* Gillan Prefiled at 22.
29 *See* Gillan Prefiled at 23.
30 *See* Gillan Prefiled at 23-24 (citing ARMIS 43-08, Multi-line business lines excluding lines used to provide payphone service).

by BellSouth in Kentucky.[31] When ***all*** types of lines used to serve business customers are included in the analysis, BellSouth's line growth is actually continuing.[32]

BellSouth's "woe is me" story of flat access line growth is also highly misleading in that it suggests that BellSouth cannot find growth without merging with another RBOC. In addition to ignoring special access, BellSouth conveniently ignores all the product lines where you would ***expect*** to see growth. In the face of new local competition permitted by the Federal Act, BellSouth reasonably could have expected to see declines in the local market. In fact, as demonstrated, and ***despite*** the introduction of local competition, BellSouth's local growth is continuing. But BellSouth neglects to mention its exponential growth in long distance service in recent years, as well as its substantial gains in high speed data services, the very markets that their own witnesses emphasized as key growth areas. So the story of BellSouth ostensibly struggling to keep up in the local market – apart from being untrue when special access is included – also looks at BellSouth's business with blinders on.

Dr. Aron's testimony is especially troublesome in its reliance upon an alleged "significant transition" in the telecommunications marketplace. Such sweeping, high level statements cannot be considered a substitute for a careful market-by-market analysis on the effects of the merger on competition in the various telecommunications product markets in Kentucky. Such an analysis is utterly lacking from Joint Applicants' case, and the reason is not surprising: it would demonstrate that this merger will eliminate a crucial actual and potential facilities-based competitor (AT&T) for business customers.

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31 *See* Chart "The Growth of Business Lines: Special Access and Multi-line Business Lines," Gillan Prefiled at 24.

32 *See* Gillan Prefiled at 24.

B. The Adverse Effect Of The Accelerating Resource Imbalance

The proposed acquisition of BellSouth by AT&T threatens the Federal Act's mandate that local network facilities be available to competitors. A basic goal of the Federal Act (as noted by the Supreme Court) was "to reorganize markets by rendering … monopolies vulnerable to interlopers," giving "aspiring competitors every possible incentive to enter local retail telephone markets."[33] For all practical purposes, the Federal Act ***privatized*** responsibility for the regulation of the RBOCs' wholesale services with their competitive customers, relying on the competitive entrants to arbitrate and enforce their rights.[34] The concentration of incumbent resources into a single entity, as well as the elimination of AT&T as a competitor in Kentucky, negates the premise under which the "privatization of wholesale regulation" should operate -- that a reasonable resource balance must exist between entrants and incumbents so that the negotiation and arbitration process can produce just and reasonable wholesale arrangements.[35]

When the Federal Act was enacted in 1996, Congress had reason to believe that the field was level -- both sides (entrant and incumbent) had the requisite resources needed for the negotiation and arbitration process to produce just and reasonable outcomes.[36] As Table 2 of Mr. Gillan's testimony shows,[37] resources were roughly balanced between the monopoly and competitive sectors. The largest expected local entrants were established interexchange carriers[38] that were well-financed and (at least

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33 *See* Gillan Prefiled at 25 & n.39 (citing *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 152 L. Ed. 2d 701, 122 S. Ct. 1646 (2002)).

34 *See* Gillan Prefiled at 25.

35 *See* Gillan Prefiled at 25.

36 *See* Gillan Prefiled at 27.

37 *See* Table 2, "Incumbent-Competitor Resource Balance When Act Passed," Gillan Prefiled at 28 (citing 1995 10K Reports).

38 A fourth interexchange carrier (Sprint) was also an incumbent LEC and has not been included in the above table as either a member of the competitive or monopoly sectors of the industry. *See* Gillan Prefiled at 28 & n.46.

presumably) positioned to become effective local competitors.[39] The single largest carrier was AT&T, which at the time included the resources of NCR and (what would ultimately become) Lucent.[40]

As Table 3 to Mr. Gillan's testimony demonstrates,[41] the New AT&T's national resource advantage will swamp the limited resources necessary for CLECs to arbitrate reasonable wholesale arrangements on plausibly equal terms. The New AT&T will be 100 times larger than the largest national CLEC (XO), and nearly 1000 times larger than its largest regional competitor (ITC DeltaCom). It is hard to imagine that the Commission would ignore the creation of a resource imbalance on this scale. The Commission should adopt parallel reforms ensuring that competitors will continue to receive stable and predictable access to the BellSouth network under reasonable terms and prices, and eliminating, as much as possible, the points of leverage where the New AT&T can exploit its sizable resource advantage.

In short, if the New AT&T desires to inhibit the ability of CLECs to provide quality service, it can probably find excuses to do so, absent regulatory oversight by this Commission and access to meaningful remedies. The platitudes offered by representatives of the Joint Applicants during the Hearing, characterizing Intervenors as "important customers," are cold comfort, and moreover, unenforceable without imposing appropriate conditions to ensure that the New AT&T's future deeds are as good as its word given at the Hearing. As discussed below, the history of AT&T's past acquisitions make such conditions necessary.

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[39] *See* Gillan Prefiled at 28.

[40] *See* Gillan Prefiled at 28.

[41] *See* Table 3, "Incumbent-Competitor Resource Balance Post BellSouth Acquisition," Gillan Prefiled at 29 (citing 2004 10K Reports).

IV. The History And Effect Of The Ameritech Acquisition Demonstrates The Need For Merger Conditions.

In light of the history and effect of prior acquisitions predating AT&T's current quest to acquire BellSouth, this Commission should conclude that the conditions proposed by Intervenors are appropriate and necessary.[42] Although the Joint Applicants suggest that SBC's acquisition of AT&T is the "closely analogous merger,"[43] the proposed merger is actually much more – involving not only a BOC to CLEC/IXC merger but also a BOC-BOC merger. As such, it is similar to SBC's acquisition of other RBOCs, and particularly its acquisition of Ameritech. Like the Ameritech acquisition, the BellSouth acquisition will expand SBC's footprint and incumbent advantages into yet another territory, thereby promoting its "national-local" ambitions in the multi-location business market. The competitive implications of this acquisition are compounded by the additional advantages that SBC now enjoys having acquired the "old AT&T," which includes not only its long distance network but also its base of national businesses and local facilities.

The Commission should review SBC's prior claims when it acquired Ameritech for several reasons. First, comparing the New AT&T's explanations as to why prior mergers were in the public interest helps provide the Commission a benchmark to judge its credibility and sincerity in this proceeding. Second, it is useful to contrast SBC's characterization of what it takes to successfully compete in the enterprise market when it acquired Ameritech, with how it describes conditions in that market here.[44] Finally, it is worthwhile to consider the effectiveness of SBC's prior commitments to determine whether vigorous Commission oversight will be needed as this massive new incumbent is

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[42] This Section IV discussion of the pertinent history of previous transactions is supported by the testimony of Joseph Gillan. *See generally* Gillan Prefiled at 7-13, "Lessons from the Ameritech Acquisition."

[43] *See* Kahan Prefiled at 15.

[44] The Joint Applicants offer no analysis of market conditions for enterprise customers in Kentucky (*see*

created. When considering the history of failed commitments, the Commission should conclude that such oversight is necessary to serve the public interest post-merger.

When it last expanded its incumbent footprint through the purchase of Ameritech, SBC argued that the acquisition would spur competition in the Ameritech region through the process of "retaliatory competition." This unusual theory, in which competition is ***enhanced*** by the incumbent becoming stronger and more dominant, was based on two seemingly contradictory claims. The first was that local entry against an incumbent RBOC requires enormous financial strength and scale -- strength and scale that neither Ameritech nor SBC individually enjoyed, but if joined together, would permit SBC to compete out-of-region. As explained by then-SBC witness James Kahan:[45]

> One of the primary reasons for this change [the ability to pursue the National-Local Strategy] is that neither company [Ameritech or SBC] on its own has a sufficiently large customer base to follow outside of its region.[46]
>
> Neither SBC nor Ameritech currently has the scale, scope, resources, management and technical ability to implement the proposed national and global strategy on its own.[47]

The second part of SBC's "public interest" theory was that once SBC entered out-of-region, the remaining large carriers would have no choice but to retaliate by competing with SBC within the (expanded) SBC territory:

> [T]he success of our National-Local strategy will, in our judgment, compel other carriers to compete even more aggressively with Ameritech and SBC in all of our states.
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> As SBC successfully competes for these large business customers, as we will be able to do as a result of our strategy, carriers such as BellSouth, Bell Atlantic and U S WEST will be faced with a decision: do they simply lose these customers to a company that is better able to provide service to customers with multiple locations or do they compete for all those

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Application at 58), omitting any analysis which focuses on the loss of AT&T as a competitor to BellSouth (or vice versa). Gillan Prefiled at 7 n.6.

[45] Mr. Kahan is the same legacy SBC executive who testified before this Commission.

[46] Direct Testimony of James Kahan, SBC-Ameritech Exhibit 1.0, Illinois Commerce Commission Docket No. 98-0555 ("Kahan Illinois Direct") at 6-7.

[47] Description of Transaction, Public Interest Showing and Related Demonstrations, Federal Communications Commission Docket CC Docket No. 98-141 at 51.

customers?[48]

Two aspects of Mr. Kahan's prior testimony have immediate relevance to this proceeding. The first is that Mr. Kahan recognized that there are large business customers that desire service ***across multiple locations***. Secondly, and more relevant to this case, the only carriers sufficiently sized to compete with SBC (even ***before*** it acquired AT&T), were the ***other*** RBOCs, including BellSouth. To the extent that footprint matters (as Mr. Kahan previously testified), the BellSouth acquisition will further ***reduce*** competition for large business customers in Kentucky by eliminating one of a very few carriers with a footprint even remotely close to that of the New AT&T. The very justification for the Ameritech acquisition is thus turned on its head in this Docket.

Despite the years that have passed without vigorous RBOC against RBOC competition in Kentucky, one would have to conclude from Mr. Kahan's SBC-Ameritech testimony that the New AT&T cannot stand idle in the Southeast even if does not acquire BellSouth:

> If SBC and Ameritech were simply to cede these [large business] customers to our integrated interexchange and CLEC competitors, we would quickly find ourselves operating with a shrinking base of large business customers which would result in very heavy upward pressure on the cost of the network being borne by our remaining small business and residential customers.[49]
>
> ... SBC must develop the capability to compete for the business of large national and global customers both in-region and out-of-region. We cannot remain idle while our competitors capture the huge traffic volumes generated by a relatively small number of larger customers.[50]

More interestingly here, however, it is painfully obvious to even a casual observer that SBC has not followed through on its "National-Local" strategy in the manner claimed at the time of the Ameritech merger:

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48 Direct Testimony of James Kahan, SBC-Ameritech Exhibit JSK, Indiana Utilities Regulatory Commission Cause No. 41255 ("Kahan Indiana Direct") at 40.

49 Kahan Rebuttal Testimony, SBC-Ameritech Exhibit 1.1, Illinois Commerce Commission Docket No. 98-0555 at 17-18.

50 Affidavit of James Kahan, filed with the Federal Communications Commission, CC Docket No. 98-141 ("Kahan Affidavit") ¶ 13.

> [T]he National-Local Strategy is far more intensive and comprehensive than the standard CLEC business model. Whereas those companies tend to target a small and specific number of markets to enter, first through resale directed solely at large business, and then establishing facilities to serve those businesses only after building some market share, the National-Local Strategy will be a broadscale facilities-based strategy providing both business and residential service.[51]

The Commission should draw three conclusions from SBC's prior testimony regarding the Ameritech acquisition. The first is that an important segment of the business market is comprised of customers with multiple locations, a matter previously ***admitted*** by AT&T, though the Joint Applicants do not explain the implications for multi-location business customers with respect to ***this*** merger. Second, the fact that SBC never meaningfully pursued its National-Local Strategy is compelling evidence that barriers to entry in local markets are high and persistent, whether or not its regulatory witnesses believe (or acknowledge) that to be true. Even after SBC ***committed*** to entering and competing against BellSouth as a condition of its acquisition of Ameritech, it has chosen instead to buy and, thus, become the incumbent rather than the entrant. Third, the Ameritech acquisition proves that merger conditions need to be as self-effectuating as possible to be useful.

As several witnesses acknowledged (indeed, implored) at the Hearing,[52] companies change their plans and their priorities, and desire a regulation-free environment. Accordingly, the regulatory priority must be to ensure that Joint Applicants not be permitted to issue empty promises for the sake of achieving approval of this colossal merger. Indeed, it is apparent that the Joint Applicants are aware of this past history, as the Hearing testimony was rife with a reluctance (or outright refusal) to make *any*

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[51] Kahan Rebuttal SBC-Ameritech Exhibit 1.1, Illinois Commerce Commission Docket No. 98-0555 (Kahn Illinois Testimony) at 48 (emphasis added).

[52] *See* Hearing testimony of Eddy Roberts, Hearing Tr. at 62-65 (rejecting proposed conditions of CWA); Hearing testimony of James Kahan, hearing Tr. at 125-127 (rejecting proposed conditions of Intervenors).

promises regarding the merger.[53] Joint Applicants' unwillingness to do so is frankly amazing in light of the statement made by SBC's (now AT&T's) CEO Edward Whitacre in November 2005 -- while SBC's acquisition of AT&T was still awaiting approval -- that an acquisition of BellSouth by SBC "doesn't have much chance of happening because of market power, size, etc. … I don't think the regulators would let that happen, in my judgment."[54] At the time, Mr. Whitacre stated that he was not going to make an overture to acquire BellSouth, though overtures had been made in the past.[55]

Simply put, AT&T (in a brisk turnaround from Mr. Whitacre's November 2005 statement to the contrary) has now decided that it is far simpler to buy its way into the market (by purchasing incumbents) than to enter and compete directly, as legacy SBC previously claimed. AT&T appears to have no lingering doubts regarding the potential regulatory obstacles Mr. Whitacre so publicly identified **less than eight short *months* ago**! Perhaps even more shocking is that, not only does the New AT&T no longer believe that regulatory hurdles might be insurmountable for the New AT&T-BellSouth merger to be permitted, New AT&T actually now believes that approval of this merger will be easier than falling off a log:

> [I]n any case, I don't think it makes any difference in the BellSouth merger. And number two, and I'm reasonably confident of this, is I don't think we'll have to give back anything. **I don't think we'll have to give back one thing to gain approval of the BellSouth merger.** And we really did not on the AT&T merger; I think the same conditions exist here, I don't expect to give back anything.[56]

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53 *See* Hearing testimony of Eddy Roberts, Hearing Tr. at 41-42 (staffing levels for providing service to CLECs); Hearing Tr. at 44 (pricing).

54 *See* BusinessWeek Online, November 7, 2005, *At SBC, It's All About "Scale and Scope"* (Exhibit B hereto, "BusinessWeek Article").

55 *See* BusinessWeek Article, Exhibit B hereto.

56 *See* Bernstein Transcript, Exhibit A hereto, at 6 (emphasis added).

If the Ameritech acquisition teaches anything, it is that if this Commission hopes to preserve competition, it must adopt conditions that will last, unswayed by the hollow promises of those seeking an unfair "competitive" position in the marketplace.

V. The Commission Should Impose Conditions On The Proposed Acquisition.

The proposed acquisition of BellSouth by AT&T creates two general areas of concern. As discussed above, the acquisition will vastly expand AT&T's market power, giving it unprecedented ability to leverage business customers. So that true and fair competition in the business market can continue post-merger, the Commission should ensure that CLECs retain stable and predictable access to the existing network, so that other carriers can continue to provide competitive alternatives to Kentucky's small and medium sized businesses.[57] These proposed conditions were a subject of Mr. Gillan's prefiled testimony and live testimony at the Hearing, which support imposition of these conditions by the Commission.

Despite multiple witnesses, the Joint Applicants failed to address any of the conditions proposed by the CLECs in any meaningful way. They did not, for example, make any voluntary commitments (*e.g.,* "we commit not to raise UNE prices for the next three years," or "we will voluntarily increase our performance penalties"). Nor did they deny that the issues raised by CLECs are going on in the marketplace. For example, they could not deny that BellSouth – unlike other RBOCs such as even AT&T – has initiated multiple harassing and baseless EEL audits against a wide variety of CLECs in the

[57] The Commission is no doubt aware that other policies are vital for CLECs to be able to commercially offer service across as broad a footprint as possible. Such policies specifically include the establishment of just and reasonable §271 rates for network elements, and holding BellSouth to its commingling obligation so that EELs and other combinations of §271 and §251 network elements are available. These issues are presently before the Commission in Case No. 2004-00427.

region. The Joint Applicants instead tried to complain that the conditions were somehow "unrelated" to the merger at issue.

Yet, as a threshold matter, it is worth noting that the Intervenors chose conditions that are in fact precisely targeted to address the increasingly unlevel playing field that will exist post-merger, both in terms of the increased incumbent market share in the business market and the increased resources available to Intervenors' new $100 billion plus competitor. Consistency in UNE pricing was an issue that the FCC itself addressed by freezing UNE pricing in the AT&T merger conditions recently passed. Ensuring that Section 271 metrics plans are effective is directly linked to continuing to protect local competition in the face of a much larger, deeper-pocketed incumbent. Discouraging EEL audits that are made antiquated by this merger (and are conducted by the larger company to disrupt the smaller ones) again are directly related to the changes being brought about by this merger. Likewise, "fresh look" and state enforcement are specifically linked to the harms of the merger throughout the CLEC testimony. Given that there was no substantive response to these conditions, and in light of the Joint Applicants' failure to embrace any of them, the Commission should protect the public interest post-merger by adopting the handful of simple conditions proposed by the CLEC Intervenors.

In this regard, the Staff's Position Statement in the Louisiana Public Service Commission docket (issued just yesterday)[58] is worthy of note. Though Joint Applicants may well point to this statement as supporting their position in this Docket, a careful reading reveals that such claims would not be well-grounded. Although the Louisiana PSC Staff undertook a cursory public interest analysis and did not impose merger conditions, they ***did*** at least recognize and give credence to several issues raised by Intervenors by suggesting to the Louisiana Commission that these matters be addressed through

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58 *See* Staff Position Statement, Louisiana Public Service Commission, June 29, 2006 (Exhibit C

separate dockets. Furthermore, the Louisiana PSC Staff stated that the conditions required by other states (such as Kentucky) will be taken into account.

In other words, while the Position Statement might appear to support the Joint Applicants' "no conditions" position at first blush, it only signals the beginning of a process of deeper analysis and consideration of the Intervenors' concerns. The inequity of this approach, however, appears to have been lost on the Louisiana PSC Staff, in that it actually exacerbates the resource imbalance which Intervenors seek to resolve in advance in this Docket by the implementation of merger conditions in Kentucky. Essentially, all the Intervenors have asked this Commission to do is to use its lawful authority to impose conditions on the merger on a fully-developed record. There is little reason to believe that the Louisiana PSC will do any less, albeit at far greater cost to Intervenors and other CLECs (who will also be arguing for improvements against the same oversized, deep-pocketed corporation the pre-conditions were designed to restrain!), a cost this Commission has the power to mitigate through the proactive imposition of Intervenors' proposed conditions.[59]

A. The Commission Should Apply Price Caps To UNEs[60]

The need to ensure stable access to the local network makes it necessary to address the dramatic resource imbalance that threatens to undermine the negotiation/arbitration process presently relied upon to establish the terms of wholesale arrangements. Surely many at the Commission can recall which CLECs took the lead role in the past TELRIC dockets. While competitive associations and

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hereto).

[59] To the extent that Joint Applicants may refer to dockets in other states such as North Carolina and Florida, it is worth bearing in mind that, unlike this Commission, the North Carolina PSC has very limited authority to review the merger or to impose conditions on it. In Florida, the PSC has issued an Interim Order which did not undertake any public interest analysis and which, moreover, is now subject to intervention by interested parties such as Intervenors and other CLECs.

[60] This proposed condition on the merger is supported by the testimony of Joseph Gillan. *See generally* Gillan Prefiled at 30-39.

some CLECs did participate, the leaders on the competitive side were legacy (CLEC and IXC) AT&T and MCI. Neither will be any help to the CLECs should another round of resource-intensive cost cases darken the horizon. The Commission should foster a more efficient system that relies less on litigation, yet can be expected to produce reasonable and stable prices. One way to accomplish this is to apply a proven idea, price caps, to this context. Under this incentive framework, prices for BellSouth's wholesale offerings would be governed much in the same way that its retail and access offerings have been regulated in the past. The application of price caps in this context makes logical sense. As alternatives to BellSouth's network slowly emerge, the price cap mechanism balances flexibility with non-intrusive oversight, and is thus well-suited to markets in transition. As the FCC has explained, "price caps act as a transitional regulatory scheme until the advent of actual competition makes price cap regulation unnecessary."[61]

The advantage of a price-cap system is that it can be used to avoid protracted litigation over cost studies. To establish a price-regulation plan to govern BellSouth's UNE rates, the Commission necessarily would address two basic areas.[62] The two basic steps to establishing a price cap plan are: (1) deciding the initial rates that should be used to initialize the plan, and (2) adopting the price-adjusting parameters that would limit BellSouth's UNE prices in the future.

The **initial** rates are simple to adopt; the existing UNE rates should be used to initialize the plan. The basic parameters that would govern **future** prices are the applicable inflation rate (which permits gradually increasing price levels to compensate for inflation) and the productivity factor (that reduces

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61 Special Access NPRM, Federal Communications Commission, WC Docket No. 05-25, January 31, 2005, ¶11.

62 Although Mr. Gillan focused his testimony on standard UNE rates, he notes that a price-cap system could also be used to regulate §271 prices for delisted UNEs (once the initial just and reasonable rates are established). *See* Gillan Prefiled at 32 & n.50.

prices based on expected productivity improvements). Together, these factors would ensure that the nexus between initial prices and costs is maintained. In addition, the Commission could determine how to apply these indices to prices themselves, and whether to group certain services together in "baskets" to provide some degree of flexibility.

To establish measures of inflation and productivity, the Commission can and should adopt the basic parameters that the FCC has adopted with respect to access services. These are the Gross Domestic Product Price Index (GDP-PI) for inflation and a productivity factor of 5.3%. The facilities used to provide access services (*i.e.,* local loops, switching and transport) are the same facilities that BellSouth uses to provide wholesale network elements. Consequently, the same rationale that supports applying these factors to BellSouth's access services can be used to govern changes in network elements prices.

Adopting the appropriate productivity factor (a/k/a the X-factor) is somewhat more complicated because the FCC, in 2000, temporarily supplanted its formal price regulation system with an industry-negotiated plan sponsored by the CALLS Coalition.[63] In that negotiated plan, there was no productivity factor *per se,* but instead, a negotiated schedule of reductions to move rates lower.[64] The CALLS plan is expiring, and the FCC has begun a review as to how to structure a replacement. Because of the increasing importance of special access services, the FCC is focusing on the post-CALLS regulation of that service.[65] In the Special Access NPRM, the FCC must confront the same issue as is being raised here -- how to efficiently adopt a productivity factor without the need for

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63 *CALLS Order*, 15 FCC Rcd 12962.

64 *Id.*, 15 FCC Rcd at 13028, para. 160.

65 The second broad category of interstate access services is "switched access." The FCC is separately reviewing those policies as part of a comprehensive review of intercarrier compensation. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (*Intercarrier Compensation NPRM*).

protracted proceedings.

Here, the Commission can and should adopt an initial productivity factor of 5.3%[66] and revisit the productivity issue at the conclusion of the FCC's investigation. This appears to be the most reasonable middle-ground between adopting a plan with no productivity factor (which would ensure inflated wholesale rates) or the alternative of this Commission conducting an extensive investigation into productivity that would parallel the FCC's consideration of the same issue. By adopting the 5.3% productivity factor on an interim basis (which was the productivity factor used by the FCC until it agreed to implement, on a temporary basis, the negotiated CALLS plan), the Commission could wait until the FCC adopts a final order in the Special Access proceeding.

A price-cap plan can be used to ensure that UNE rates remain compliant with the FCC's TELRIC rules. While the FCC's rules require that prices satisfy the TELRIC standard, the rules do not detail any particular approach to maintaining that relationship over time. The FCC has consistently held that a price-cap system can assure that rates maintain the appropriate nexus to cost. For instance, when the FCC first embraced price regulation as a regulatory system,[67] it confronted this very question, concluding unequivocally that a price-cap system can be designed to ensure cost-based price changes:

> We proposed to adjust price caps each year according to a predetermined formula that is designed to ensure a continuing nexus between tariffed rates and the underlying cost of providing service.[68]

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66 "Given the complexities of the proceeding we initiate in this NPRM, there is a strong likelihood this proceeding will not be completed prior to July 1, 2005. This record contains substantial evidence suggesting that productivity has increased and continues to increase …. Under the CALLS plan, however, there is currently no productivity factor in place to require price cap LECs to share any of their productivity gains with end users…. One interim option would be to impose the last productivity factor, 5.3 percent, that was adopted by the Commission and judicially upheld." *Special Access NRPM*, Federal Communications Commission, WC Docket No. 05-25, January 31, 2005. ¶131.

67 *Report and Order and Second Further Notice of Proposed Rulemaking*, Federal Communications Commission, CC Docket No. 87-313, April 17, 1989 ("First Price Cap Order").

68 *First Price Cap Order*, ¶ 8.

> A carrier's services are grouped together in accordance with common characteristics, and the weighted prices in each group are adjusted annually pursuant to formulas designed to ensure that rates are based on cost …[69]
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> ***
>
> … the foundation of the price cap regulatory approach is to ensure that rates follow costs, while creating incentives to reduce costs…[70]

The FCC's conclusion with respect to the ongoing nexus between rates and costs is particularly important because it means that TELRIC-based rate relationships may be maintained by a price-cap plan similar to the federal plan.

Nothing in existing federal rules would prohibit the Commission from designing a price-cap framework to govern future changes in Section 251 rates. Federal rules are silent as to how changes in TELRIC-based rates should be reviewed.[71] To the contrary, the FCC recognizes that the timing of full UNE cost proceedings is within the state's discretion, and has requested comment on whether the FCC itself should mandate a price-cap system. In the Special Access NRPM, the FCC specifically asked:

> If the use of productivity factors to adjust rates periodically is feasible, should it be mandatory? Or should states <u>retain the ability to conduct a full UNE-pricing proceeding at their discretion</u>?[72]

Given the FCC's extensive history finding that price-regulation formulas *maintain* the appropriate nexus between costs and prices, it would be a complete reversal for the FCC to suddenly conclude that such formulas cannot be used. Moreover, as the above indicates, to the extent the FCC has expressed interest in a price-regulation framework, it has been to consider whether such a system should be made *mandatory*, not to suggest that a state-developed system would run afoul of federal rules. As the

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69 *First Price Cap Order*, ¶ 38.

70 *First Price Cap Order*, ¶ 865.

71 The FCC requested comment on whether the FCC itself should adopt a price-regulation framework in 1996 (in the context of its original Interconnection Order) and concluded that no such rules were needed at the federal level. *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Federal Communications Commission, CC Docket 96-98, August 8, 1996, ("*Local Interconnection Order*"), ¶ 838.

72 *Notice of Proposed Rulemaking*, Federal Communications Commission, WC Docket No. 03-

above citation makes clear, the FCC recognizes that under its existing rules, states have complete discretion as to when to conduct a full UNE-pricing proceeding.

The annual change in the price cap index (PCI) should be applied uniformly across all rate elements.[73] This approach would ensure a very tight nexus between costs and the rates for Section 251 network elements, consistent with federal rules. To allow BellSouth to adjust prices in compliance with the price-cap plan, an annual filing procedure should be established that is keyed to BellSouth's filing of ARMIS business line data. Whether high-capacity loops and/or transport are offered under Section 251 or Section 271 of the Federal Act is determined by a wire center's "tier assignment" as detailed in the TRRO. Thus, determining the split of annual network element demand between Section 251 and Section 271 arrangements requires that any potential change in tier assignment be made a part of the price cap filing process. Because one of the parameters used to assign wire centers to their various tiers are the number of business lines reported in ARMIS 43-08,[74] BellSouth's annual price cap filing could logically occur at that time (April 1st of each year).

B. The Commission Should Strengthen The Section 271 Performance Plan.[75]

The Commission should make other changes to the UNE regime as a condition of this acquisition. The price-cap plan described above is intended to replace cost studies with a formula that avoids case-by-case litigation. A similar concept underlies the Section 271 performance/penalty plans that are intended to provide a deterministic set of penalties to assure compliance with certain minimum standards. To ensure that this plan operates as intended, Intervenors urge three requirements:

173, September 15, 2003, ("*TELRIC NPRM*"), ¶ 140 (emphasis added).

[73] That is, if the PCI requires a reduction of 2%, then each rate element should be reduced by 2%.

[74] The other parameters used to assign wire centers to the tiers adopted by the TRRO are UNE Loop volumes and the number of fiber based collocators.

[75] This proposed condition on the merger is supported by the testimony of Joseph Gillan. *See generally* Gillan Prefiled at 40-41.

1. All penalty payments should be increased in proportion to the increase in Kentucky revenue (i.e., revenues earned in Kentucky) by the combined BellSouth/AT&T. Part of the rationale behind the performance plans was to provide a meaningful financial incentive for an RBOC to provide UNEs and related services (like repair) to CLECs at parity with what it provides itself. As BellSouth grows larger, the incentive provided by these penalties will diminish in relation to its greater revenues. This adjustment would ensure that the existing penalties remain proportional.

2. AT&T/BellSouth should be required to have the performance plan independently audited by an auditor selected by the Commission every three years. BellSouth is already obligated to undergo SEEM audits upon request of this Commission. As such, a traditional regulatory method of periodic audits should be established to ensure that BellSouth operates the performance plan correctly. This approach is necessary to reduce the adverse impact of the dramatic resource imbalance discussed above.

3. The Commission should make clear that the Kentucky Section 271 performance plan is a stand-alone obligation, unrelated to performance plans in other states. BellSouth has, in the past year, based on a Florida audit that revealed some overpayments, withheld all performance remedy payments throughout the region and in Kentucky as an offset.[76] The Commission should make clear that underperformance in Kentucky cannot be offset by the New AT&T's obligations in another state. The New AT&T cannot be permitted to use poor service in Kentucky to offset any overpayments in other states. It is clear that the incentives provided by permitting this are the wrong ones and could actually incent poor performance in the Commonwealth.

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[76] *See* Gillan Prefiled at 41.

C. The Commission Should Permanently Retire The Pre-TRO EELs Standards.[77]

The Commission should eliminate the overhang of intrusive audits associated with EEL-availability rules that have long been eliminated (and which, when adopted, were intended to protect BellSouth from long distance carriers like its soon-to-be parent, AT&T). Such action will diminish the litigation-advantage enjoyed by BellSouth. When the FCC implemented the UNE regime, it recognized the possibility that interexchange carriers (such as the old AT&T) could use high capacity loop and transport UNE combinations (EELs) in place of the special access services that had been used to connect to large users. Because the FCC was concerned that these interexchange carriers could engage in "regulatory arbitrage" by obtaining UNEs to provide long distance services (instead of the local services for which they were intended), the FCC adopted rules to ensure that EELs were not used in this manner.

The FCC's initial attempt to "wall off" the use of UNEs by interexchange carriers like AT&T was through a requirement that the carrier may only use UNEs if they provided "a significant amount of local exchange service" to the customer. The FCC attempted to provide guidance by adopting certain "safe harbors" that carriers could use to demonstrate sufficient local usage.[78] However, in the *TRO* -- adopted over three years ago -- the FCC abandoned this approach, specifically recognizing that CLECs had submitted "evidence that that the safe harbors and auditing procedures have proved to be unworkable and susceptible to abuse by the incumbent LECs."[79] Intervenors have indeed been subjected to and endured such abuse.

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77 This proposed condition on the merger is supported by the testimony of Joseph Gillan. *See generally* Gillan Prefiled at 41-44.

78 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification*, 15 FCC Rcd. 9587 (2000), ("*SOC*"), *pet. for review denied, CompTel v. FCC*, 309 F.3d 8 (2002).

79 *TRO* ¶ 5.

Though the FCC eliminated this "safe harbor" approach 3 long years ago, BellSouth continues to seek audits under the pre-TRO regime, which is giving rise (and will give rise) to continuing litigation. The Commission should end this dispute for three simple reasons. First, the entire "EEL qualification" regime was adopted to protect BellSouth from an interexchange carrier using "the incumbent's network without paying their assigned share of the incumbent's costs normally recovered through access charges."[80] It is anachronistic for BellSouth to seek to retain a system designed to protect BellSouth from AT&T, even as AT&T is buying BellSouth. Second, as noted above, BellSouth's desired EELs provisions were abandoned by the FCC (and rightly so) in February 2003. The pervasive theme of the Joint Applicant's testimony is that the Commission should recreate the Bell System because "things have changed." Though Intervenors disagree that markets have changed as fundamentally as the Joint Applicants assert, they will have changed sufficiently post-merger for audits pending under the old so-called "safe harbor" regime to be ended. Third, AT&T (formerly SBC) has not sought to conduct audits under the safe harbor rules of any CLECs operating in its region. If BellSouth's own soon-to-be parent has not engaged in this behavior, there is little reason BellSouth cannot conform its behavior, post-merger, to this example.

D. The Commission Should Require "Fresh Look" As A Merger Condition.[81]

The Commission should ensure that a "fresh look" window be provided to customers of BellSouth/AT&T. A "fresh look" requirement is certainly appropriate as a condition on this acquisition, where customers in Kentucky may have chosen BellSouth or AT&T because they were simply uninterested in obtaining service from the other. Because this acquisition effectively reverses that

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80 Supplemental Order Clarification, Federal Communications Commission CC Docket 96-98, June 2, 2000, ¶ 2.

81 This proposed condition on the merger is supported by the testimony of Joseph Gillan. *See generally*

consumer choice, customers who have decided not to do business with BellSouth and chose AT&T (or the reverse) will be forced back to the carrier they made a point of leaving without their consent. While some (perhaps many) of these customers may decide (if given the opportunity) to stay with the post-acquisition provider, they should at least be given the opportunity to vote again with their feet. Accordingly, the Commission should give all such customers relief from tariffed or contractual termination penalties and a one-year window to choose a new provider. Such a window would be in the public interest and would ensure that customer choice results from a competitive system rather than the vagaries of corporate mergers.

E. The Commission Should Undertake Enforcement of Federal Conditions.[82]

Finally, the Commission should require that BellSouth agree to permit the Commission to enforce the terms of any additional conditions that the FCC may adopt. The past decade of experience under the Federal Act has shown that the States are best positioned to oversee and implement the detail requirements even of federally-adopted policies. To the extent that the FCC ultimately approves this acquisition with conditions that protect and advance competition, it is important that CLECs have access to an efficient forum to address any disputes that arise under those conditions. Because state commissions are better positioned for dispute resolution -- particularly the resolution of any dispute that raises factual issues -- this Commission should require the Joint Applicants to agree that the Commission may enforce conditions adopted by the FCC.

Intervenors recognize that some conditions may not be amenable to state resolution. Nonetheless, the Commission (and the public interest) would be better served by a process whereby

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Gillan Prefiled at 44.

[82] This proposed condition on the merger is supported by the testimony of Joseph Gillan. *See generally* Gillan Prefiled at 45.

the New AT&T is called upon to raise such an argument as a defense to Commission action on a particular condition, rather than invoking the mere question of Commission authority as a shield against its oversight. Indeed, as demonstrated in live testimony at the Hearing, BellSouth would rather have the issue determined by fiat, by its mere assertion that the Commission has no such authority under any circumstances.[83]

Conclusion

For the reasons presented in the Intervenors' Prefiled Testimony, and through the Intervenors' witness at the Hearing (and Intervenors' cross-examination of Joint Applicants' witnesses), in the event the Commission is inclined to authorize the proposed merger of Joint Applicants then -- at the very least -- Intervenors' proposed merger conditions should be adopted.

83 *See* Hearing testimony of James Kahan, Hearing Tr. at 126-127.

Submitted to and filed with the Kentucky Public Service Commission this 30th day of June 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel for Intervenors, NuVox Communications, Inc., Xspedius Management Company Switched Services, LLC and Xspedius Management Company of Louisville, LLC, hereby certifies that a true and accurate electronic copy of this filing was transferred to the Commission via the Electronic Filing Center this 30th day of June 2006 and filed in hardcopy document form with the Commission also on the 30th day of June 2006. Further, consistent with the Commission's Order of April 12, 2006, notice of the filing of this Motion was served via electronic mail on all parties of record. Parties of record can access the information at the Commission's Electronic Filing Center located at http://psc.ky.gov.efs/efsmain.aspx.

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