PUBLIC INTEREST STATEMENT

Bell Atlantic and NYNEX have decided to position themselves for the future by joining forces. Their merger promises to create a more efficient and stronger competitor in the rapidly changing and increasingly competitive telecommunications industry. The Commission, in exercising its authority, should find the merger to be in the public interest.

In reviewing the applications to transfer control of lines and licenses under Sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. §§ 214(a), 310(d), the Commission must undertake a consideration of the public-interest benefits expected from the merger and a "consideration of the effect . . . on competition" under antitrust principles. In re Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Co., 10 F.C.C.R. 13368, ¶ 16 (1995) (approving Bell Atlantic-NYNEX cellular merger).[1] A strengthened and more efficient competitor serves generally to help competition; harm to competition, on the other hand, would require the acquisition of market power.[2] Thus, the Commission, in addition to reviewing the efficiencies and other benefits created by this merger, must ask whether the combination of the two companies would be likely to "create or enhance market power or to facilitate its exercise."

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[1] See In re McCaw and AT&T, 9 F.C.C.R. 5836, ¶ 9 (1994) (approving AT&T-McCaw merger), aff'd sub nom. SBC Communications Inc. v. FCC, 56 F.3d 1484 (D.C. Cir. 1995); In re Contel Corp. and GTE Corp., 6 F.C.C.R. 1003, ¶ 17 (1991) (approving GTE-Contel merger); In re WilTel, Inc. and LDDS Communications, Inc., 9 F.C.C.R. 6810, ¶ 7 (1994) (approving WilTel-LDDS merger). In addition, Section 11 of the Clayton Act authorizes the Commission to "enforce Section 7 of the Clayton Act in matters involving common carriers." Bell Atlantic-NYNEX Mobile ¶ 16; AT&T-McCaw ¶ 9 n.25; 15 U.S.C. §§ 18, 21(a); see United States v. FCC, 652 F.2d 72, 83 (D.C. Cir. 1980) (en banc).

[2] See Contel-GTE ¶ 17 (competitive analysis focuses on "'the protection of competition, not competitors'") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)); United States v. Western Elec. Co., 900 F.2d 283, 296 (D.C. Cir.), cert. denied, 498 U.S. 911 (1990) ("the DOJ is surely correct that no damage to competition -- through 'leverage' or otherwise -- can occur unless the BOCs can exercise market power").

1992 Merger Guidelines § 0.1. In examining that question, "the agency's responsibility is to deal with 'probabilities' not 'ephemeral possibilities.'" SBC Communications, 56 F.3d at 1494, quoting United States v. FCC, 652 F.2d at 99.

The merger at issue here readily meets these standards. The merger presents many opportunities for benefiting the public through capturing efficiencies and creating a stronger industry participant to battle giants like AT&T and MCI/British Telecom in increasingly competitive telecommunications markets. And there is no plausible, real-world, nonspeculative concern that the combination of these two firms, consisting predominantly of regulated local exchange carriers, would impair the competitive character of any properly defined market, whether for local or long-distance telecommunications services. The joining together of the side-by-side but noncompeting wireline businesses of Bell Atlantic and NYNEX is just as beneficial to the public interest as the merger of their cellular businesses in the very same regions, approved by the Commission last year.[3]

I. The Merger Will Serve the Public Interest in Improved Telecommunications Markets

One year ago, Bell Atlantic and NYNEX combined their wireless operations. The Commission approved that consolidation, recognizing that many of the efficiencies effected through the transaction "would be materially more difficult and time-consuming without a merger" and that "the efficiencies in management and uniform marketing, pricing, and sales would be practically impossible without a merger." Bell Atlantic NYNEX Mobile ¶ 46. The

[3] There can be no doubt as to the "citizenship, character, financial, technical and other qualifications" of Bell Atlantic for holding the licenses and operating the lines to be transferred to it under the merger. See AT&T-McCaw ¶ 8. This aspect of the legal standard is not otherwise discussed here.

Commission thus opened the door for a competition-enhancing improvement in the operation of these substantial cellular properties.

The promise has been more than fulfilled. Since its formation on July 1, 1995, the Bell Atlantic NYNEX Mobile (BANM) partnership has experienced a 21% reduction in cash expense per subscriber, making BANM the lowest cost provider in the industry. See Bell Atlantic News Release, Bell Atlantic First Quarter Net Up 13.5 Percent (Apr. 18, 1996). In the same period, BANM has experienced a 42% growth in its subscriber base. Ibid. The "synergies the joint venture and much larger footprint" provided were, in fact, "[g]reater than expected."[4]

The full merger of the companies promises to extend those improvements and synergies across the range of related telecommunications services that Bell Atlantic and NYNEX offer today and will offer in the future. The two firms face escalating competition for their existing customers, even as they are competing to provide new services to new customers. Market barriers between currently distinct services are breaking down, and customers accustomed to buying separate services from multiple providers will increasingly turn to buying multiple services from single providers. Recently, for example, AT&T began offering internet-access service, launched a mass marketing campaign to sell Direct Broadcast Satellite video service, and prepared to offer local telephone service. In this world of converging markets, the provision of services is increasingly national or even international in reach, as a large customer base is

[4] Merrill Lynch Capital Markets, Industry Report No. 1705141--Telecom Services/RBOCs & GTE at 16 (Feb. 23, 1996); Prudential Securities Inc., Report No. 1659180, Bell Atlantic--Company Report at 3 (Oct. 31, 1995); see Smith Barney, Report No. 1740640, Bell Atlantic Corp.--Company Report at 3 (May 17, 1996); Merrill Lynch Capital Markets, Industry Report No. 1724347, Telecommunications Services: Global--Industry Report at 3 (Mar. 29, 1996); PaineWebber Inc., Industry Report No. 1718235, Telecom Services--Industry Report at 6 (Mar. 18, 1996).

needed to support large investments in innovation as well as efficient service. Bell Atlantic and NYNEX, through their merger, are seeking to create the larger scale and to capture the efficiencies that will enable the merged firm to improve service and to compete in this changing marketplace. See, e.g., Arnst, Ready, Set, Devour?, Business Week, July 8, 1996, pp. 118-20 (describing AT&T's aggressive steps toward local entry and bundled local, long-distance, data, video offerings); Exhibit 1.

Numerous aspects of the telecommunications business already operate on a scale far larger than that of either Bell Atlantic's or NYNEX's current regions. The leading long-distance carriers (AT&T, MCI, and Sprint) provide service over nationwide networks; others like LDDS WorldCom, MFS, and Frontier now own or have announced plans to build large-scale networks extending nationwide or throughout the Northeast. Various information (or enhanced) services, as well as 800 services, operate on a national or super-regional scale.[5] Various wireless services -- from data services to paging to new PCS services -- already have or are being planned to achieve virtually nationwide reach. Video programming -- from broadcast networks, cable programmers, or Direct Broadcast Satellite services -- is supplied overwhelmingly on a national basis, typically by satellites with nationwide coverage.

More and more, telecommunications services even cut across national borders. In recent years, a handful of very large globally oriented ventures have come into being. "World Partners"

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[5] See, e.g., In the Matter of 800 Database Access Tariffs and the 800 Service Management System Tariff, 8 F.C.C.R. 5132, ¶ 3 (1993) (800 service management system is centralized); In the Matter of Amendment of § 64.702 of the Commission's Rules & Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, ¶ 217 (1980) ("the provision of enhanced services . . . has been largely undertaken, and increasingly so, on a national basis"), aff'd sub nom. Computer & Communications Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

was formed by a combination of AT&T, Japan's Kokusai-Denshin-Denwa, Singapore Telecom, and Unisource (itself a joint venture involving the Netherlands, Spain, Sweden, and Switzerland). "Concert" was formed by a combination of MCI and British-Telecom. "Global One" was formed by a combination of Sprint, France Telecom, and Deutsche Telekom. See In the Matter of Policy Statement on International Accounting Rate Reform, Policy Statement, 11 F.C.C.R. 3146, ¶ 6 (1996) ("Over the past decade . . . global telecommunications markets have begun to shift from the traditional model to a more competitive market structure of multiple national carriers and international alliances."). This trend will undoubtedly accelerate; and global brand-name recognition and economies of scale and scope will give these global ventures unique advantages in meeting the telecommunications needs of business customers who themselves increasingly compete in a global economy. See Exhibit 1.

The merger of Bell Atlantic and NYNEX will create a more effective competitor in this emerging world; indeed, the merger may well prove essential to future competitive viability. As the unmistakable market trends confirm, economies of scale are critical for the financing and spreading of the substantial costs of research, development, and implementation required for innovation and progress in the telecommunications industry. Such scale is needed both on the "technological" side, as new infrastructure, products, and services must be created, and on the "business" side, as companies must learn how to enter and even to create entirely new lines of business in an environment of converging and novel services.

The merger of Bell Atlantic and NYNEX will improve the process of technological innovation generally. Significant scale for research and development is important: the centralized facilities of Bell Labs, Bellcore, and CableLabs show the need in this industry to spread inevitably high costs over large customer bases. Bell Atlantic and NYNEX in particular uniquely complement one another in their respective research-and-development abilities. NYNEX's research-and-development arm (its Science & Technology Unit) is widely regarded as one of the premier telecommunications research-and-development operations in the world. Bell Atlantic, for its part, will contribute a highly regarded applications-testing system. The two are broadly complementary in nature and will be put to even more extensive use in the merged company; at the same time, their costs can be distributed over a larger base. Combining the two firms thus broadly promises to produce more effective investment in innovation and hence greater improvements in what services are available.

In the coming years, a principal focus for innovation will be the continuing development of new broadband digital network facilities that can carry large amounts of data and video at high speeds. This infrastructure improvement is being spurred by increasing customer demand, increasing competition from previously distinct businesses, and the pervasive shift to digital technology. The investment required will be of monumental proportions: in 1995, for example, Bell Atlantic and NYNEX together invested nearly $5 <u>billion</u> in wireline network facilities, and the required investment is expected to grow rapidly in coming years.

The merged firm will be better able to undertake the required investments to create, and to learn how to make economic use of, the new physical transport facilities and switching technology. Substantial up-front costs will have to be incurred to develop the know-how required to construct and to operate reliable broadband systems, and then to make such systems efficient sources of valuable consumer services. The merger will allow the spreading of development and implementation costs over a larger customer base and thereby speed the creation of this vital infrastructure. The merged firm also will have increased financial wherewithal, gained from cost savings effected by the merger and from additional flexibility in access to capital markets, to meet the financial challenge of developing this new infrastructure.

The proposed merger not only will hasten the arrival of new services but will bring improvements in how existing services are delivered. The merged company will unite within itself the skills, talents, and know-how of researchers, network engineers, managers, and other employees working in each of the two merging companies. Each company's current "best practices" will be transferred to the other, spreading their value over a larger customer base and improving overall delivery of service, perhaps dramatically over time. Cf. Bell Atlantic-NYNEX Mobile ¶¶ 45-46. For example, Bell Atlantic will contribute its industry leadership in preventive maintenance and practices that have produced low costs per line and high penetration of new services, while NYNEX will contribute its expertise concerning systems re-engineering and one of the best disaster-recovery systems in the industry.

Aside from positioning themselves to produce improved services, Bell Atlantic and NYNEX will generate substantial direct cost savings through their merger -- in personnel, operations and information systems, and procurement; and in imminent long-distance operations as well as established local businesses. The merging companies have recently been released from the Modification of Final Judgment's prohibition on out-of-region long-distance service, and they expect to be permitted to offer in-region long-distance service in some States soon, perhaps by the end of this year. See 47 U.S.C. § 271 (added by Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 151). As they begin to offer out-of-region long-distance service on a resale basis, the merging companies will gain greater volume discounts on their wholesale purchases of service to be resold. They will also will be able to eliminate duplication of the substantial resources devoted to, for example, marketing and billing systems. And a single long-distance franchise, with a single brand name, will provide a synergistic increase in recognition by and attractiveness to consumers.

In their current local-exchange, wireless, and other related businesses, the merger of Bell Atlantic and NYNEX will result in consolidation of many currently duplicated functions. For example, substantial savings are expected from joining the merged companies' business-development and strategic-planning functions and their research-and-development and testing staffs and facilities. Procurement savings will come from combining the demand for network equipment and other products, resulting in larger discounts -- amounting perhaps to hundreds of millions of dollars -- than those currently available to the separate companies. Consolidation of procurement of corporate-level services, such as auditing and banking, also will produce savings, as will consolidation of the merging companies' advertising purchases.

The total savings generated by the merger (after several years of significant transition costs) will be substantial -- according to management's best estimates, recurring savings of \$850-900 million annually by the third year after the transaction. About \$300 million annually will come from a reduction in force of about 3,000 management positions, distributed evenly between the two merging companies. Another \$300 million annually will come from savings in operations and information systems, along with other administrative costs, as various redundant facilities are combined. Annual capital expenditures by the merged company should reflect approximately $250-300 million in incremental purchasing efficiencies.[6] Such lower costs will ultimately result in enhanced competition that will benefit consumers and the Nation's economy.

II. The Merger Will Not Adversely Affect Competition

A. Local Services

The fundamental fact about local telephone services -- whether local exchange service, originating access service, or terminating access service -- is that Bell Atlantic and NYNEX are not competitors. They do not offer any such local telephone service in each others' regions and do not even have any facilities for the offering of such local telephone service in each others' regions.[7] The merger, therefore, will not eliminate any actual competition between these two companies in such markets. This merger combines two firms offering similar services to different customers in different, partly adjacent regions of the country.[8] Accordingly, whatever

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[6] The figures set forth in this paragraph reflect internal estimates that were earlier made public. See Bell Atlantic/NYNEX Press Release, Bell Atlantic and NYNEX Agree to Merger of Equals 3-4 (Apr. 22, 1996). Some industry analysts' estimates have been slightly lower; for example, Lehman Brothers forecast savings and efficiencies to result in only up to $700 million ($400 million in savings and $300 million in procurement efficiencies) in annually recurring savings. Lehman Brothers, however, itself called its estimates "conservativ[e]." See Lehman Brothers, Bell Atlantic Corp.: Cost Savings in the Merger, Digging Deeper (May 31, 1996).

[7] Bell Atlantic has a passive ownership interest of less than 5% in CellularVision, which provides a "wireless cable" (LMDS) service in Brighton Beach in Brooklyn, New York. That company is not providing telephone service, though it has recently announced plans to provide an internet access service. See Telecommunications Reports, July 1, 1996, p. 42.

[8] The Commission has treated markets for local-exchange and local-access service as local in geographical scope. See, e.g., In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, 8 F.C.C.R. 6752, ¶¶ 6-8 (1993), vacated sub nom. Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995); In the Matter of Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, 85 F.C.C.2d 1, ¶¶ 62, 65 (1980). See also 47 U.S.C. §§ 153(43), (44), 251; In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-98, ¶¶ 1-13 (Apr. 19, 1996); In the Matter of Price Cap Performance Review for Local Exchange Carriers, Second Further Notice of Proposed

position each company may today have in the provision of local services within its own region, the merger does not enhance the position by removing any actual present competitor.

Any concerns about whether the merger may substantially lessen competition in local services are entirely about potential, not actual, competition between Bell Atlantic and NYNEX. Antitrust analysis has addressed two forms of such concerns, one focusing on current market conditions and the other on future conditions. First, a merger may eliminate a specially situated "perceived potential entrant" that is imposing current discipline from outside the market on firms not currently subject to sufficient discipline from others already in the market.[9] Second, and more controversially, a merger might be predicted to stifle future improvement in competitive conditions in a concentrated market if an acquiring firm, though not exercising any current influence on the "target" market, nevertheless actually has plans to enter (unsuspected by current market participants) as a significant procompetitive force "within the near future." In re B.A.T. Indus., Ltd., 104 F.T.C. 852, 925 (1984) (footnote omitted).[10] Notably, both theories, to be

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Rulemaking, 11 F.C.C.R. 858, ¶¶ 120-126 (1995).

[9] This may occur "if the target market is substantially concentrated, if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential de novo entrant, and if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market." United States v. Marine Bancorporation, Inc., 418 U.S. 602, 624-25 (1974).

[10] The Supreme Court, and several courts of appeals, have reserved judgment on the soundness of this theory. E.g., Marine Bancorporation, 418 U.S. at 639; United States v. Falstaff Brewing Corp., 410 U.S. 526, 537-38 (1973); Mercantile Tex. Corp. v. Board of Governors of the Fed. Reserve System, 638 F.2d 1255, 1265 (5th Cir. 1981); United States v. Siemens Corp., 621 F.2d 499, 504, 506-07 (2d Cir. 1980). The theory has in fact been vigorously criticized. E.g., H. Hovenkamp, Federal Antitrust Policy § 13.4b, at 513 (1994) (theory should be consigned to "the scrapheap of defunct merger theories") (footnote omitted). At least in principle, however, the theory has been recognized by some lower courts and by antitrust regulators. See Yamaha Motor Co. v. FTC, 657 F.2d 971, 977-78 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982); 1984 U.S. Dep't of Justice Merger Guidelines § 4.1; see also Anticipating the 21st Century:

applicable at all, require (i) that the market at issue already be concentrated and (ii) that the "potential competitor" be uniquely or at least specially situated so that its elimination as an independent firm removes a procompetitive force not supplied by other current or potential competitors.[11] If the market is already subject to internal competitive discipline, or if the acquiring firm would not likely have entered soon as a significant competitor, or if others are equally or more likely to enter, it cannot be concluded that market competitiveness is impaired by a merger removing the acquiring firm as a separate, outside-the-market entity.

Any "perceived potential competition" concern may be readily dismissed: the merger does not eliminate a perceived potential competitor that disciplines any current market power over local services. Bell Atlantic and NYNEX have been actively concerned about entry into their local markets by long-distance carriers, cable operators, competitive access providers, and wireless companies.[12] But they have not perceived each other as potential entrants into their

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Competition Policy in the New High-Tech, Global Marketplace ch. 7, at 9-10 (FTC Staff Report, Volume I, May 1996); In the Matter of Xerox Corp., 74 F.C.C.2d 471, ¶¶ 43-60 (1979); In the Matter of Xerox Corp. and MCI Communications Corp., 90 F.C.C.2d 547, ¶¶ 27-28, 41 (1982).

[11] See Marine Bancorporation, 428 U.S. at 630-31; B.A.T., 104 F.T.C. at 921 ("only a few firms must be capable of entry, so that the loss of a single firm as a prospective entrant may in fact injure prospective competition") (footnote omitted); P. Areeda & H. Hovenkamp, Antitrust Law 810-11 (1996 Supp.).

[12] There are numerous competitive local-service providers operating in the Bell Atlantic and NYNEX regions, particularly in the New York City area, where, the Commission has noted, "NYNEX's access and exchange competitors have real opportunities to enter various switched telecommunications service markets and are doing so." In the Matter of the NYNEX Tel. Cos. (LATA 132 Order), 10 F.C.C.R. 7445, ¶ 40 (1995); see also FCC Common Carrier Bureau, Common Carrier Competition 5 (spring 1996) ("23 competitive companies are certified [in New York]"). None of the numerous facilities-based local competitors in Bell Atlantic's region is affiliated with NYNEX, and none in NYNEX's region is affiliated with Bell Atlantic. Nationwide, only a handful of the numerous local carriers has any affiliation with any incumbent local exchange carrier. See Exhibit 2.

local markets exercising an otherwise-unavailable competitive discipline on their business decisions. See Affidavit of Jeffrey Bowden; Declaration of James Cullen. Neither company is "exert[ing] competitive pressure on th[e] market by being a perceived potential entrant." Xerox, 74 F.C.C.2d 471, ¶ 54. Notably, when the Commission recently waived certain pricing rules applicable to NYNEX for the New York City area because of the "increasingly competitive" character of that market (LATA 132 Order ¶¶ 26, 29), its discussion of the current and expected state of competition in the area did not even mention Bell Atlantic. Id. ¶¶ 34-40; see also NYNEX Petition for Waiver in LATA 132 Proceeding at 24 (Dec. 15, 1993) (mentioning Bell Atlantic only in connection with then-pending, but soon canceled, plan of merger with TCI).[13]

Any concern about "actual" but unperceived potential competition may likewise be eliminated based on the equally simple fact that neither Bell Atlantic nor NYNEX has plans to enter each other's local markets. It is well recognized that the "actual potential competition" doctrine, if valid at all, "must be applied with considerable care, lest it create more competitive problems than it solves" (B.A.T., 104 F.T.C. at 921), and that firms not perceived by the market as likely entrants usually are not, because "incumbent firms presumably understand industry conditions quite well" (ibid.). An outsider's analysis of "objective" evidence of market characteristics is a highly unreliable basis for predicting likely entry. See H. Hovenkamp,

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[13] As the affidavit of Jeffrey Bowden and declaration of James Cullen indicate, each company took essentially no notice of the other in its routine internal reviews of the state of existing and expected local competition. Of course, during the period between the announcement and cancellation of Bell Atlantic's plan to merge with cable operator TCI (late 1993-early 1994), NYNEX noticed that Bell Atlantic was, through that acquisition, about to become a potential competitor: TCI had substantial cable facilities in NYNEX territory, and cable facilities are perceived to be a likely source of local telephone service. And NYNEX has also noticed the public fact of Bell Atlantic's small ownership interest in CellularVision. See note 7, supra. The dominant cable provider in New York City, Time Warner, already is affiliated with U S West.

Federal Antitrust Policy § 13.4b, at 513 (1994) ("stock market analysts would give anything for the ability to predict when and how a particular firm was going to enter a new market"). Beyond that, any "[i]nternal plans that have not been approved at [the governing levels of corporate management] cannot be relied upon, regardless of how enthusiastically they promote independent entry, because they cannot be characterized as the concrete plans of the corporation itself." B.A.T., 104 F.T.C. at 930.[14] Here, quite simply, there are no such company-adopted plans for either Bell Atlantic or NYNEX to enter each other's local services markets, let alone to do so "within the near future" (B.A.T., 104 F.T.C. at 925). See Affidavit of Jeffrey Bowden; Declaration of James Cullen. Cf. Bell Atlantic-NYNEX Mobile ¶ 38 (because NYNEX had "exhibited no interest in unilaterally providing mobile services outside of the NYNEX home region," it was "not in any realistic sense a potential competitor" of Bell Atlantic's cellular business).

Even if a "potential competition" case could ever reliably be made out by an outsider's analysis of market conditions, that analysis here serves only to confirm why there are no perceived or actual plans for cross-border local entry. Bell Atlantic and NYNEX are not likely potential competitors who, without the merger, can be expected to have had an effect on the competitive character of one another's local service markets. Competition is likely to come instead from long distance companies, cable operators, competitive access providers (CAPs), wireless companies, and perhaps others already having on-site facilities (like electric utilities and

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[14] See United States v. Siemens Corp., 621 F.2d at 508 (refusing to attach weight to "a few memoranda of lower echelon employees"). "Clear proof" is required to find actual but unperceived potential entry. FTC v. Atlantic Richfield Co., 549 F.2d 289, 295 (4th Cir. 1977); see B.A.T., 104 F.T.C. at 925-26 (same).

railroads). The merger thus will not eliminate any economically or legally significant likely potential competitor.

Government regulators have repeatedly sized up the market in just this way. In discussion after discussion, government regulators have pointed to long distance carriers, cable operators, competitive access providers, and wireless companies as expected local entrants. In these analyses, the RBOCs do not even register as significant expected contributors to competition outside their regions for local telephone services.[15] Investment analysts have generally taken a similar view.[16]

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[15] See, e.g., In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-98, ¶¶ 5, 7 (Apr. 19, 1996) (mentioning competitive access providers like MFS and Teleport; interexchange carriers like AT&T, MCI, Sprint, and LDDS WorldCom; cable companies; and wireless companies -- but not other local exchange carriers); In the Matter of Telephone Number Portability, Notice of Proposed Rulemaking, 10 F.C.C.R. 12350, ¶ 5 (1995) (same); FCC, News Release--Common Carrier Competition (May 31, 1995); Memorandum of U.S. in Support of MFJ Modification to Permit Limited Trial of Interexchange Service by Ameritech at 36, United States v. Western Elec. Co., No. 82-0192 (D.D.C. 1995) (same); Comments of U.S. Department of Justice, CC Docket No. 96-98 (interconnection proceeding), at 36 (May 16, 1996) (same); Statement of Anne K. Bingaman before the Senate Commerce Committee, March 3, 1995; Remarks of Commissioner Susan Ness before NARUC Committee on Communications, July 25, 1995; Remarks of Commissioner Rachelle Chong, Personal Communications Industry Ass'n PCS '95 Conference (Sept. 21, 1995). Cf. United States v. Western Elec. Co., 797 F.2d 1082, 1091 (D.C. Cir. 1986) ("[T]he parties and the district court never considered the possibility that the BOCs might want to provide exchange services outside of their geographic regions.").

The same perception about the absence of expected LEC-LEC competition -- indeed, an affirmative expression of lack of concern about LEC-LEC mergers -- is evident in the Conference Report explaining the recent repeal of this Commission's authority to immunize telephone company mergers from antitrust review (1996 Act § 601(b)(2), repealing 47 U.S.C. § 221(a)). The Conference Committee first explained: "In the old world, the statute was usually used to confer immunity on mergers between non-competing Bell operating subsidiaries or mergers between Bells and small independents within their territories. Neither of these situations involved competitive considerations." H.R. Conf. Rep. 104-458, 104th Cong., 2d Sess. 200-01 (1996). It then immediately noted that, in the new world, "the conferees anticipate that cable companies will be providing local telephone service and the BOCs will be providing cable service. Mergers between these kinds of companies should not be allowed to go through without a thorough antitrust review under the normal Hart-Scott-Rodino process." Id. at 201 (emphasis added). Conspicuously missing is any perception that LEC-LEC competition would be forthcoming or that LEC-LEC mergers would be a problem.

[16] See, e.g., Salomon Brothers, Regional Bell Operating Companies--Opportunities Ring . . . While Danger Calls at 17-25 (Jan. 1996); Merrill Lynch Capital Markets, Cable Industry--Industry Report (No. 1720640) at 4 (Mar. 26, 1996); Lehman Brothers, RBOCs/GTE: Changing Industry Dynamics Part I--Industry Report (No. 1642168) at 8 (Sept. 29, 1995); Hambrecht & Quist, Wireless Communications Market--Industry Report (No. 1637440) at 2 (Sept. 14, 1995); PaineWebber Inc., RBOCs and GTE--Industry Report (No. 1537197) at 22 (Dec. 13, 1994).

There are good reasons for this assessment, beginning with the telling history of the past decade. These two companies, like other RBOCs, have been legally free for a number of years to enter each other's territory to provide local wireline services. Yet they, like other local telephone companies generally, have not done so -- a fact that contrasts with the record of RBOC-RBOC competition in certain non-wireline businesses, where the comparative economic opportunities have made the competition sensible.

Since 1986, it has been clear that the MFJ imposed no barrier to local service competition between Bell Atlantic and NYNEX. United States v. Western Elec. Co., 797 F.2d 1082, 1089-91 (D.C. Cir. 1986). For several years now, local exchange carriers have been required to allow interconnection for the provision of access to interexchange carriers.[17] And state-law restrictions on local competition have been falling rapidly over the past decade -- particularly in New York, where numerous competitors have rushed in to compete with NYNEX. See, e.g., LATA 132 Order ¶ 39; FCC Common Carrier Bureau, Common Carrier Competition 5 (spring 1996); Exhibit 2. Despite this legal freedom, and the fact that other companies have seized the opportunities to offer competing services, neither Bell Atlantic nor NYNEX has entered, or made plans to enter, the other's local wireline markets.

[17] See In the Matter of Expanded Interconnection, Report and Order, 7 F.C.C.R. 7369 (1992), vacated in part sub nom. Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994); In the Matter of Expanded Interconnection, Second Report and Order, 8 F.C.C.R. 7374 (1993). As early as 1985, the FCC announced that it would hold preempted any state regulation that posed a de jure or de facto barrier to entry for competitive access providers. See In the Matter of Cox Cable Communications, Inc. (Memorandum Order, Declaratory Ruling, and Order), 102 F.C.C.2d 110, ¶ 40 (1985), vacated as moot, In the Matter of Cox Cable Communications, Inc. (Memorandum Opinion and Order), 1 F.C.C.R. 561 (1986).

Bell Atlantic's and NYNEX's absence of focus on out-of-region local wireline opportunities, in favor of other more valuable business opportunities, is representative of the RBOCs generally. While finding it economically sensible to compete with each other in directory and wireless markets,[18] the RBOCs have not generally found it a prudent use of their resources to invest in out-of-region local competition.[19] Numerous other companies, by contrast, have made the decision to become competitive access providers or local exchange carriers. See Exhibit 2.

Consideration of the factors that appear important to local telephone service competition indicates why Bell Atlantic is not an especially likely source of market-disciplining local competition for NYNEX, or vice versa. The most thoroughgoing form of competition is competition provided through separate facilities.[20] The simple fact is that Bell Atlantic and NYNEX do not have such facilities in one another's areas, whereas others -- including AT&T, MCI, Sprint, Time Warner, TCG (Teleport), and MFS -- already have a range of local switches,

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[18] For example, SBC sells competing telephone directories in numerous areas outside its region; and among Bell Atlantic NYNEX Mobile's wireless competitors are SBC (in Boston, Washington, D.C., and elsewhere) and BellSouth (in North Carolina).

[19] Only U S West, through its affiliation with Time Warner, has pursued significant plans (using cable plant) to compete in out-of-region local markets. SBC's cable affiliates in Montgomery County, Maryland, and Arlington, Virginia, have not done so. SBC's affiliation with cable operator Cox Communications, like Bell Atlantic's proposed merger with TCI, collapsed.

[20] See, e.g., Comments of United States Department of Justice, CC Docket No. 96-98 (interconnection proceeding), at 23 (May 16, 1996); Memorandum of the United States in Support of its Motion for a Modification of the Decree to Permit a Limited Trial of Interexchange Service by Ameritech, at 18-19, United States v. Western Elec. Co., No. 82-0192 (D.D.C. May 1, 1995); Statement of Commissioner Chong, before Senate Commerce Committee, reported in Telecommunications Reports at 2 (June 24, 1996).

transport facilities, and rights of way in place. Bell Atlantic and NYNEX would start out behind with respect to relevant facilities.

That conclusion is not altered by the fact that Bell Atlantic and NYNEX have facilities across the Hudson River from each other in the New York City area -- the only site of significant geographic contiguity and, on the east side of the River at least, already the most competitive of local markets.[21] On one hand, these facilities, consisting of buildings and switches, do not affect the advantage of cable companies, CAPs, and long-distance companies in already having in place significant transport networks (e.g., miles of optical fiber or coaxial cable and associated equipment). On the other hand, switching facilities at a remove of several miles across a river -- as opposed to directly on-site (e.g., in office buildings, or co-located with the local exchange carrier) or even at substantial distances (reached over high-capacity fiber at the speed of light) -- offer Bell Atlantic and NYNEX no particular advantage for serving high-density traffic requiring substantial new switching capacity anyway.[22] Thus, with respect to facilities, the merger

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[21] Because of the substantial areas "within" Bell Atlantic's and NYNEX's regions that are served by independent local telephone companies, the two companies' service regions adjoin one another in only three places along the New York border, principally in the New York City area. See Exhibit 3.

[22] Population densities like those found in New York City mean that, even with entry on a small scale, the number of customers would rapidly generate a need for substantial new switching capacity not readily available at existing facilities in northern New Jersey. The population density of Manhattan is reflected in a high geographic concentration of switches: the average distance between customer and switch is only .65 miles in Manhattan, whereas the average is 1.8 miles in northern New Jersey. See CLARITAS, CD ROM Database, 1995 Wirecenter Boundaries for the State of New York (1995); CLARITAS, CD ROM Database, 1995 Wirecenter Boundaries for the State of New Jersey (1995). And the limited available capacity in northern New Jersey switches is reflected in the fact that, whereas the average digital switch throughout Bell Atlantic's region serves about 23,000 customers, the average among the switches in the five counties of northern New Jersey is 34,000, and the average among the switches within two miles of the Hudson River is already 42,000.

partners here are at a disadvantage relative to others as hypothetical new entrants into each other's local service markets.

Other factors that go into a competitive local service business likewise place Bell Atlantic and NYNEX in no special position as potential competitors. "Bundling" -- starting with an existing product sold to large numbers of customers and adding local service to the offering -- is widely viewed as one important tool of entry as a new local competitor, especially entry as a reseller.[23] The great bulk of telephone customers already have established relationships with the long-distance carriers and cable companies, among others.[24] Neither Bell Atlantic nor NYNEX has such an advantage.[25]

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[23] See, e.g., Comments of U.S. Dep't of Justice, CC Docket No. 96-98 (interconnection proceeding), at 37 (May 16, 1996); Speech by Chairman Hundt, "Implementing the Telecommunications Law of 1996: The Real Work Begins," Feb. 21, 1996; Robert Allen, "In the Wake of the Telecom Bill: A Cooperative Approach to a Competitive Market," Keynote Address to CompTel Convention, Miami, Florida (Feb. 26, 1996) ("Our approach at AT&T is to offer customers bundles of services . . . ."); Keller, AT&T Challenges the Bell Companies, Wall St. J., June 12, 1996, p. A3 (AT&T strategy of bundling); Critser, Heir to the Future, Wash. Post Magazine, June 16, 1996, at 21 (MCI strategy of bundling); Arnst, Ready, Aim, Devour?, Business Week, July 8, 1996, p. 118.

[24] AT&T, MCI, and Sprint all engage in nationally pervasive direct sales efforts. Moreover, in 1994, AT&T had roughly 70 percent of all presubscribed lines and 55 percent of all toll minutes in the Bell Atlantic/NYNEX region; MCI had roughly 15 percent of lines and 17 percent of minutes; Sprint had roughly 6 percent of lines and 10 percent of minutes. See FCC, Statistics of Communications Common Carriers at Tables 1.4, 8.12 (Dec. 1995). Time Warner serves more than 1 million subscribers and passes 1.7 million homes in the New York area. NCTA, Cable Television Developments 15 (Spring 1996); G. Woodlief, Dean Witter Reynolds, NYNEX (Report No. 1661898) at 14 (Nov. 1995). In addition, MFS advertises that it serves 2000 (business) customers in New York City; TCG advertises that it serves 55 of the 200 highest-volume customers and 600 customers overall in New York City. See J. Harwood & C. Masback, Dialing For Dollars 23 (1995).

[25] Bell Atlantic NYNEX Mobile (BANM) -- a separate entity (47 C.F.R. § 22.903) that is equally controlled by Bell Atlantic and NYNEX, but whose wireless systems (as in Manhattan) often are owned partly by others -- would present no comparable direct bundling opportunity for either Bell Atlantic or NYNEX in a hypothetical cross-border competition against the other in

Nor does brand recognition give Bell Atlantic or NYNEX any special entry advantages. Whatever cross-border brand recognition may exist, based on television advertising in the New York City area, appears to be limited in geographic scope and not particularly strong -- and unlikely to be as significant in any event as the other competitive factors affecting local entry. At least AT&T, MCI, and Sprint, with their national marketing, clearly have brand recognition that is both stronger and more pervasive throughout the regions. See Arnst, Ready, Aim, Devour?, Business Week, July 8, 1996, p. 119 (AT&T brand name supported by $700 million annual advertising budget; AT&T executives cite surveys showing that "30% to 40% of all consumers already believe they get their local-calling service from AT&T"). Time Warner also has strong brand recognition, and LDDS WorldCom is working hard to build national brand recognition. This factor cannot plausibly play a sufficient role to make Bell Atlantic and NYNEX particularly likely or unusual potential competitors in each other's markets.

The foregoing analysis demonstrates for multiply sufficient reasons that Bell Atlantic and NYNEX are not present or expected competitive factors in one another's local markets, so that their merger does not raise antitrust concerns even on the assumption of concentrated local markets. But that assumption is itself broadly wrong, particularly for substantial businesses and most particularly in New York City. And it is daily becoming ever more wrong, thus making clear that any postulated independent entry by Bell Atlantic or NYNEX into each other's local

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local wireline services. Only a fraction of all consumers have any wireless service, and BANM, though growing rapidly, has less than 7% penetration (see sources in note 4, supra) -- far less than the number of customers already signed up for AT&T, MCI, or Time Warner's other services. Moreover, any resale of BANM's wireless services would be equally available to any company, such as AT&T, MCI, or Time Warner.

markets would, by the time it occurred, be unlikely to have any significant procompetitive effects in the midst of all the other entry already occurring.

Access services in many parts of the country have become readily available to numerous businesses from a host of competing CAPs, and there are dozens of companies that already have or applying for authority to be competitive local exchange carriers (CLECs).[26] In the New York City area, the business market is already tremendously competitive, and a number of companies have by several years gotten a jump on any competitive entry that has not yet occurred. See, e.g., LATA 132 Order ¶¶ 34-35. More generally, the incumbent local exchange carriers are -- wholly without regard to any speculative entry by other out-of-region incumbent local exchange carriers -- already under serious, imminent, and pervasive competitive attack: in addition to the numerous CLEC applicants, AT&T has declared that it "'is going after the local service market with everything [it's] got'" and "plans 'to take at least a third' of the $90 billion local phone market within several years." Keller, AT&T Challenges the Bell Companies, Wall St. J., June 12, 1996, p. A3 (quoting AT&T Chairman Robert Allen). These developments, and the additional competition they augur, provide extra reason to conclude that the merger of Bell Atlantic and NYNEX will leave the future as well as current competitive state of local markets

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[26] See Connecticut Research, 1995/96 Local Telecommunications Competition at III-2 ("As the list of companies filing shows, everyone wants into the CLEC business. Sixty-six companies filed by Sept. 1[, 1995,] and more may file later."). Current information from Connecticut Research indicates that roughly 60 CAPs operate about 200 networks in more than 350 cities. In 1995, CAP networks doubled in extent, to reach 21,000 miles; the number of CAP switches tripled, to 65; the number of buildings connected to CAP networks increased 37%; and CAP revenue doubled, to $1.3 billion. See also In the Matter of Price Cap Performance Review for Local Exchange Carriers, Second Further Notice of Proposed Rulemaking, 11 F.C.C.R. 858, ¶ 28 (1995) ("competition in the access market is starting to emerge").

unimpaired. Cf. AT&T-McCaw ¶¶ 39-40 ("the trends toward competition in these markets" tend to "allay[] the concern we might otherwise have with 'potential competition'").

B. InterLATA Services

The merger will likewise have no adverse impact on competition in the market for interLATA services. The starting point is market definition. The Commission has repeatedly found, as recently as October 1995, that interLATA services form a national market. See, e.g., AT&T Nondominance Order ¶ 22; In the Matter of Policy & Rules for Competitive Common Carrier Servs., Fourth Report and Order, 95 F.C.C.2d 554, ¶ 30 (1983), vacated on other grounds sub nom. AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 3020 (1993); In the Matter of Application of GTE Corp., 94 F.C.C.2d 235, ¶ 42 (1983); In the Matter of United Telecommunications, Inc., 98 F.C.C.2d 1306, ¶ 22 (1984). The Commission has specifically rejected any segmenting of interLATA services "into distinct city pairs or even domestic regions." In the Matter of Policy & Rules for Competitive Common Carrier Servs., Fourth Report and Order, 95 F.C.C.2d at 573-74; Competitive Common Carrier Servs., Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, ¶ 157 (1981). See also Response of the United States to Comments on its Report and Recommendations Concerning the Line-of-Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment, in United States v. Western Elec. Co., No. 82-0192 (D.D.C. Apr. 27, 1987) ("[T]he market for most interexchange services is national; it cannot easily or logically be subdivided along regional lines corresponding to the territories in which various BOCs provide (or do not provide) local exchange service.") (footnote omitted).

AT&T recently summarized the compelling rationale for this market definition (in explaining why the Commission should not alter its position, in CC Docket No. 96-61):

> [T]here is today a single, nationwide geographic market. As the Commission itself has repeatedly recognized, buyers ordinarily buy, and virtually all sellers sell, 'ubiquitous calling' which enables callers to place calls anywhere in the country. Moreover, the principal facilities-based interexchange carriers all have nationwide networks with alternative geographic routing capabilities, and new carriers can and do enter additional areas either by constructing new facilities or by interconnecting and reselling the services of other carriers. Both demand and supply substitutability, therefore, strongly support a nationwide geographic market for interexchange telecommunications services.

AT&T Reply Comments, CC Docket No. 96-61, at 6 (May 3, 1996) (footnotes omitted). AT&T further explained: given the presence of a substantial number of long-distance networks nationwide, the existence of significant excess capacity on those networks, and the ability to route long-distance calls economically (at the speed of light) over almost any network in the country, "the interexchange market [is] a single national market because even though all interexchange services may not be perfect demand substitutes, there will be perfect supply substitution so long as each LEC will allow any carrier to offer interexchange services to the LEC's customers on nondiscriminatory terms." AT&T Comments, CC Docket No. 96-61, at ii (Apr. 19, 1996). Such nondiscrimination, of course, is required by law. <u>See</u> 47 U.S.C. §§ 202, 251(g); Modification of Final Judgment § II(A), <u>United States v. AT&T</u>, 552 F. Supp. 131, 227 (D.D.C. 1982), <u>aff'd sub nom. Maryland v. United States</u>, 460 U.S. 1001 (1983).

In this market, the merger of Bell Atlantic and NYNEX cannot raise a problem, for it does not either increase concentration in the market or result in a concentrated market. <u>See</u> <u>1992 U.S. Dep't of Justice/Federal Trade Commission Merger Guidelines</u> § 1.0. The fundamental fact is that, with two small exceptions (noted below), Bell Atlantic and NYNEX are effectively starting at zero market share in offering long-distance services. Having first been allowed to sell interLATA wireline services this February, they are still generally barred from doing so in their own regions. See 47 U.S.C. § 271 (requiring FCC approval based on "competitive checklist"). Bell Atlantic and NYNEX have just recently taken steps to offer interLATA service (as resellers) outside their regions, applying for approval in several States. The two companies' negligible market shares mean that their merger does not noticeably increase concentration or raise a serious antitrust concern. See 1984 Merger Guidelines § 4.134 ("The Department is unlikely to challenge a potential competition merger when the acquired firm has a market share of five percent or less."); AT&T-McCaw ¶ 30 (refusing to treat "McCaw's relatively de minimis presence in the current interexchange services market as a significant factor").

The two "corridors" form the only exceptions to the absence of the RBOCs from any participation in interLATA wireline services until February 1996 -- but even there Bell Atlantic and NYNEX have not offered such services in competition to the same customers. To avoid destruction of certain unusual efficiencies from use of two sets of facilities crossing LATA boundaries, two exceptions were made in the 1984 divestiture to the otherwise-strict rule of the MFJ that each RBOC must hand off interLATA calls to an interexchange carrier. Pursuant to those exceptions, Bell Atlantic has provided interLATA service in both directions across the Philadelphia-Camden LATA boundary (both LATAs being in Bell Atlantic territory); and Bell Atlantic and NYNEX each have originated interLATA calls in the New York City-Northern New Jersey area, but only from its side of the border. See United States v. Western Elec. Co., 569 F. Supp. 990, 1018-19, 1107 (D.D.C. 1983). The total interLATA traffic Bell Atlantic and

NYNEX carry in these corridors amounts to 0.08% of nationwide interLATA traffic (0.3% of in-region interLATA traffic). See Exhibit 4.[27]

If the merger thus does not impair any significant actual competition, neither is it vulnerable to any potential competition theory applicable to the long-distance market. Such a theory would require that Bell Atlantic or NYNEX have some long-distance market power, for only then could the merger, by eliminating any possible hypothesized rivalry between them, eliminate a present or imminent market discipline. But neither firm is even in the long-distance market, much less has any power in it. Of course, the leading incumbents in the long-distance industry might perceive Bell Atlantic and NYNEX each as a significant potential entrant. But the merger cannot plausibly be thought to weaken any competitive restraint that results from any such perception. The effect of the merger, if any, is to strengthen the restraint.

In any event, the Commission has found that the interLATA market already is characterized by sufficient competition (from national and regional facilities-based carriers and from hundreds of resellers), sufficient churning of customer affiliations, and sufficient excess capacity that the Commission recently declared AT&T no longer dominant. AT&T Non-Dominance Order, 11 F.C.C.R. 3271 (1995); see Exhibit 5. Nothing but implausible speculation could lead to the conclusion that Bell Atlantic and NYNEX, with virtually no long-distance customers today, would somehow together knock off the established competitors, as well as other new entrants (such as other RBOCs and GTE, independent local telephone companies, and cable companies), and gain power over price in this market already characterized by vast excess

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[27] Bell Atlantic NYNEX Mobile provides interLATA wireless services in 13 States. See Bell Atlantic News Release, Bell Atlantic Mobile to Expand Cellular Long Distance Calling to Its Entire Service Area (Feb. 8, 1996).

capacity. A scenario in which that result is achieved because of the combination is, if anything, still more fanciful.[28]

Even if the fact of a national interLATA market were somehow ignored, and even if attention were focused solely on future interLATA services sold to in-region customers (which is still barred to Bell Atlantic and NYNEX today), it would remain in the realm of pure speculation to suggest that the merger of Bell Atlantic and NYNEX would somehow harm competition. The two companies provide originating and terminating access as separate local inputs into the consumer end product of interLATA calls (made from or to telephones in their respective regions). Those inputs are not sold in competition with each other. The merger does not raise concentration levels as to either originating access or terminating access, and it does nothing to increase whatever market power each company has over local access in its area. Nor, indeed, is this a vertical merger of buyer and seller that creates new incentives or power to use an upstream input monopoly to harm downstream competition (or vice versa). Whatever Bell Atlantic's or NYNEX's power in access markets, the merger has no adverse effect on long-distance competition.

The two firms' provision of originating and terminating access presents no problems for the merger for other reasons as well. Any local exchange carrier's theoretical ability to

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[28] See, e.g., Salomon Brothers, AT&T--Q1 Outlook: Services OK, but Aggregate Results Could Be Soft (Apr. 15, 1996) ("we clearly don't believe the RBOCs will eat AT&T's or anybody else's lunch in long distance"); Lehman Brothers, Telecom Services: RBOC Entry into LD--Debunking the Myths, Part II (May 2, 1996) ("with National Account [business] customers, we believe that the RBOCs are unlikely to even attempt to crack this market" because of long-term contracts with and services of AT&T, MCI, and Sprint; "it is difficult to imagine hordes of customers leaving AT&T to sign up for an RBOC long distance service, if they are happy with the services they are getting, and don't want to disrupt the multiproduct discount structures and single contact point relationship with AT&T").

discriminate against competing long-distance carriers, through price or quality, is controlled by law. Access prices are regulated pursuant to 47 C.F.R. pt. 69. And Bell Atlantic and NYNEX are prohibited from discrimination in access by the continuing requirement of equal access, covering price and quality alike. See 47 U.S.C. §§ 202, 251(g). Any theory of vertical misconduct through discriminatory control over access is therefore a theory of predictable, intentional, significant, and otherwise-undetectable or uncontrollable illegal conduct on the part of merger partners. There is no basis for such a theory. See AT&T-McCaw ¶ 7 (relying on ability to impose regulatory checks on misconduct, if it arises, as a reason not to block a merger on the speculation of such misconduct).[29]

Each form of access, moreover, has been carefully addressed by Congress in the 1996 Act. As for originating access, the Act forbids each RBOC to enter the interLATA services market for calls originating in an in-region State until it gains Commission authorization pursuant to congressionally specified standards. 47 U.S.C. § 271© and (d). See also 47 U.S.C. § 272 (separate subsidiary requirement; safeguards). Thus, vertical integration using originating access cannot occur until the conditions laid down by Congress have been met.

The Act deals just as clearly with terminating access, making clear that any further concern with terminating access is simply unwarranted. Section 271 grants express authority to the BOCs to terminate long-distance calls in-region immediately, with the sole exception of calls on which the recipient selects the long-distance carrier. 47 U.S.C. § 271(b)(4). And there is a

[29] In the two corridors, Bell Atlantic and NYNEX have competed against interexchange carriers for originating long-distance traffic. In the Philadelphia-Camden corridor, Bell Atlantic provides both originating and terminating access even while it competes with interexchange carriers for long-distance traffic. There is no record of discrimination problems -- let alone of any capture of market power -- in these corridors.

compelling rationale behind that judgment. Given easily monitored price regulation, any theory of the BOCs' use of terminating access to skew competition for long-distance services, and thereby eventually gain power over price, depends at an absolute minimum on the ability of BOCs to degrade quality selectively on incoming long-distance calls to a sufficient degree that consumers will be influenced to choose the BOC-affiliated carrier. This scenario is pure imagination, and not only because the posited exclusion of established incumbents with insignificant marginal costs is itself fanciful. Local telephone networks do not today permit call-by-call degradation of quality. And even if they did, the simple fact is that any discriminatory degradation of quality on those calls coming from customers with non-BOC carriers, in order to have the supposed effect of influencing callers to switch long-distance carriers to the BOC, would almost by definition have to be noticeable to incumbents like AT&T and to the Commission -- and hence would be stopped as illegal.[30]

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[30] Discrimination among trunks coming into the region would be patently obvious, easily avoided, and self-defeating, because the BOCs themselves will be using these trunks to carry their own long-distance calls originating out-of-region. Discrimination among private lines for businesses would produce shifts to CAP alternatives and would be self-defeating as to the large volume of "virtual" private lines--ones that use regular BOC lines, carrying a variety of traffic (most of it the BOCs'), whose quality the BOCs cannot afford to degrade. And discrimination among particular calls would require the receiving BOC to conduct a database check to determine if the BOC is the caller's presubscribed interexchange carrier (PIC), followed by some selective degradation of quality. Such a use of the incoming caller's number to check such a PIC database, with the result used to advantage the BOCs' own long-distance service, would not only be an illegal form of access discrimination but might be subjected to bars on use of carrier or customer proprietary information. See 47 U.S.C. § 222(b), (c).

For discussions of some of the difficulties with discrimination scenarios, see, e.g., Aff. of Robert Crandall ¶¶ 4-6, attached to Reply Comments of Bell Atlantic Corp. in CC Docket No. 96-21 (Mar. 25, 1996), and Aff. of Robert Crandall ¶¶ 11-15, attached to Comments of Bell Atlantic Corp. in CC Docket No. 96-21 (Mar. 13, 1996).

Finally, if neither originating access nor terminating access is a basis for concern about the merger, no additional concern is raised by the fact that the merger, by combining two regions, will result in more overall long-distance traffic that stays entirely "within region." For one thing, the resulting number -- roughly 42% of calls that originate in-region will also terminate in-region -- leaves the merged company with a figure comparable to Ameritech's today (42%) and substantially less than BellSouth's "internal" interLATA number (55%). See Exhibit 6. In any event, the number is irrelevant. With neither originating nor terminating access a basis for concern about the merger, there is no sound theory according to which the combining of the two inputs somehow creates a separate problem of market power.

C. IntraLATA Toll Services

IntraLATA toll service, which is undergoing a transformation toward more competition, encompasses a varying mix of switching and transport services, covering different size areas, depending on how particular state regulations define "toll" boundaries. Those differences make categorical classification of the relevant economic markets difficult. But no such difficulties are relevant to the present issue. Bell Atlantic and NYNEX do not compete for any such services today; there is growing competition from the long-distance carriers offering presubscribed interLATA and intraLATA toll service; and Bell Atlantic and NYNEX are no more specially advantaged potential competitors in each other's regions for intraLATA toll traffic than they are for the clearly local or long-distance services. The merger raises no problem with respect to intraLATA toll service.

D. International Services

The merger raises no concern about impairing competition for international calls (which are assumed for present purposes to require separate analysis). Until the 1996 Act, Bell Atlantic and NYNEX were forbidden to carry outbound international calls; and they do not do so today.[31] The two companies have no overlapping international investments. Only in New Zealand (Bell Atlantic) and Gibraltar (NYNEX) -- the former open to competition, the latter tiny -- do the companies have substantial interests in incumbent local exchange carriers. The volumes of traffic to countries where Bell Atlantic and NYNEX have alliances is negligible. See Exhibit 7. The merger here thus bears no resemblance to the MCI/British Telecom alliance (which, of course, was approved), where the merger was seen to create a significant new incentive for a dominant foreign local exchange carrier to divert a substantial volume of traffic to the facilities of its newly allied international carrier, to the material detriment of other international carriers. See Dep't of Justice, Antitrust Division, Proposed Final Judgment and Competitive Impact Statement, United States v. MCI Communications Corp., 59 Fed. Reg. 33009, 33017 (June 27, 1994). No anticompetitive incentives are created by the current merger.

CONCLUSION

Rapid technological and competitive change is under way in the telecommunications industry. The merger of Bell Atlantic and NYNEX, with the efficiencies and cost savings it will produce, will create a more effective participant in the world that is taking shape. Far from

[31] Since February 1993, the BOCs have been permitted, under certain restrictions, to provide the foreign "half" of international traffic between the United States and any foreign country and to own up to 10% of international satellite and submarine cable facilities. See Order, United States v. Western Elec. Co., No. 82-0192 (D.D.C. Feb. 4, 1993).

threatening to impair the proper functioning of any market, the merger will in fact benefit the public by hastening innovation and strengthening competition. The Commission should approve the requested transfer of licenses and lines.