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1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

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BEIJING
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TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8224

WRITER'S E-MAIL ADDRESS
cbeckner@sidley.com

November 10, 2004

Ex Parte

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Ex Parte Presentation, *Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

Enclosed for filing in connection with the above referenced matter is a white paper entitled "The Quality of Bell Special Access Service Is Markedly Inferior To The Quality Of UNEs." This white paper demonstrates that the Bells have the ability to foreclose competition by providing rivals inferior special access service quality than what they provide to themselves.

Please contact me if you have any questions.

Very truly yours,

/s/ C. Frederick Beckner III
Counsel for AT&T Corp.

Encl.

The Quality Of Bell Special Access Services Is Markedly Inferior To The Quality Of UNEs

As AT&T demonstrated in its comments and in its November 8, 2004 *ex parte* filing, the Bells have both the incentive and ability to price squeeze rivals relegated to above-cost special access service. The evidence also shows that the Bells can foreclose competition by providing competitive carriers with inferior quality access. This fact independently justifies the Commission eliminating consideration of special access services when it makes impairment determinations under § 251(d) of the Communications Act.

In order to offer competitively viable services, competitive carriers need to obtain the same access service quality the Bells provide their own affiliates. Just as customers prefer low prices, they also prefer high quality service.[1] Thus, "as a practical matter," "[u]nlawful discriminatory preferences in the quality of the service . . . can have the same effect as charging unlawfully discriminatory prices."[2]

Such non-price discrimination is a particularly potent anticompetitive weapon in enterprise markets. First, many enterprise customers use telecommunications services to support mission-critical operations and require vendors to supply them with "five-nines" reliability. If these customers believe that a competitive carrier cannot provide them with the same reliability as the Bells – even if it is the Bells' fault – the competitor is at an enormous competitive disadvantage in the marketplace. Second, as with most providers of enterprise services, AT&T's contracts with enterprise customers routinely provide the customer substantial credits if AT&T's service fails to meet certain specified service quality criteria. AT&T is liable under these contracts even if the retail service quality problem was the result of poor special access performance provided by the Bells. Thus, when the Bells provide AT&T with poor quality special access service, they not only weaken AT&T's ability to offer competitive services, but they also effectively increase AT&T's costs to provide retail services.

Although the Bells' replies contend that their special access service and UNEs offer equivalent quality,[3] the record shows that the opposite is true. The comments unambiguously establish that the Bells' special access service quality is inferior to the quality of their UNEs.[4]

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[1] AT&T, Benway-Holleron-King-Lesher-Mullan-Swift ("Benway *et al.*") Dec. ¶ 47.

[2] *Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905, ¶ 12 (1996); *see id.* ("If a BOC charged the same rate to its affiliate for a higher quality access service than the BOC charged to unaffiliated entities for a lower quality service . . . the BOC could effectively create [a] 'price squeeze.'"); *LEC Classification Order*, 12 FCC Rcd. 15756, ¶ 111 (1997) ("[T]here are various ways in which a BOC could attempt to discriminate against unaffiliated interLATA carriers, such as through poorer quality interconnection arrangements or unnecessary delays in satisfying its competitors' requests to connect to the BOC's network. . . . [This gives a BOC] the ability to raise prices by restricting its own output upon entry or shortly thereafter").

[3] *See, e.g.*, BellSouth Reply at 50-53; Verizon Reply at 98-100.

[4] *E.g.*, AT&T at 109-13 & Benway *et al.* Dec. ¶¶ 47-61.

Whereas state commissions have required the Bells to adopt performance measures designed to detect and prevent discriminatory UNE provisioning,[5] and in all its § 271 orders the Commission ensured that the BOC applicant was subject to a performance measurement and enforcement plan, there is no regulation governing special access provisioning quality.[6] Indeed, the Commission even eliminated the § 272 accounting and non-accounting safeguards that Congress designed to detect and prevent BOC discrimination. Thus, even if a Bell were currently providing rivals with service quality at parity with what it provides to its affiliates, there is no regulatory constraint on its ability to degrade the service quality it provides to rivals at any time in the future.

The Bells do not deny these regulatory facts.[7] Instead they try to divert the Commission's attention by claiming that they have voluntarily adopted performance measures. But because the Bells face little special access competition, it is unsurprising that the "quality assurance plans" in the Bells' tariffs provide little benefit.

For example, BellSouth claims that it offers a "Service Installation Guarantee" ("SIG") that covers service order installation dates.[8] But BellSouth fails to disclose that it *unilaterally* sets the applicable installation date (which may or may not meet the date requested by the customer) and routinely provides itself with ample cushion for error. Further, the "penalty" for failing to meet the lengthy installation BellSouth assigns itself – the mere loss of the non-recurring charge for the installation – is a pittance compared with the potential anticompetitive harm inflicted on carriers that cannot provision their retail service when their customers want it or when they have promised it will be installed.

BellSouth also claims that its "Service Assurance Warranty" ("SAW") provides a guarantee of meaningful service quality[9] but those provisions offer access purchasers similarly weak protections. Indeed, this "warranty" is so riddled with "fine print" that it is almost meaningless. For example, for many services, BellSouth limits the outages that qualify for a credit.[10] Further, the "credits" are tiny relative to the enormous competitive harm that can be caused by service interruptions.[11] BellSouth also refuses to provide credits in instances where BellSouth causes an outage when performing maintenance or when BellSouth is filling a change

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[5] *See, e.g.*, *Nevada 271 Order*, 18 FCC Rcd 7196, ¶¶ 50-51 (2003).

[6] AT&T, Benway *et al.* Dec. ¶¶ ¶¶ 42-51, 52.

[7] *See, e.g.*, BellSouth Reply, Varner Reply Dec. ¶ 18 (acknowledging that the FCC has failed to adopt performance standards).

[8] BellSouth Reply, Starcher Reply Dec. ¶ 18.

[9] *Id.* ¶ 17.

[10] *See* BellSouth FCC Tariff No. 2, § 2.4.4 (B)(1) ("no credit shall be allowed for an interruption of less than 30 minutes").

[11] *Id.* ("The customer shall be credited for an interruption of 30 minutes or more at a rate of 1/4440 of the monthly charges for the facility or service for each period of 30 minutes or major fraction thereof that the interrupt continues.").

order.[12] And BellSouth's SAW excludes altogether any special access service that is "commingled" with UNEs.[13]

Most telling, however, is that BellSouth's SAW specifically excludes providing *any* actual level of service quality. And BellSouth's (meager) credits "apply no more than once per month."[14] Thus, even if there are multiple service interruptions in a single month, the access customer is not entitled to any credit allowance at all for any interruptions after the first, regardless of how often they occur or how severe they may be.

It is critical to understand that these deficiencies are mere symptoms of a more fundamental problem. In BellSouth's own words, the Bells are obligated to provide competitive carriers with special access performance that is at "parity" with what they provide to their own affiliates.[15] But even when viewed in the most favorable light, the Bells' tariffs do not even *purport* to provide special access performance parity.

For this same reason, the performance metrics BellSouth and Verizon offer are meaningless. For example, Verizon claims that it returns "firm order commitments" ("FOCs") on a timely basis.[16] But Verizon fails to disclose that it alone gets to pick the date that counts for determining whether the FOC is timely. And Verizon refuses to provide a FOC to a rival carrier-customer for 5 days after an order is placed, an interval that far exceeds that provided by the other Bells. The fact that Verizon can meet such a lengthy period is meaningless without any comparison to the FOC interval Verizon typically provides its own affiliates.[17]

Verizon and BellSouth also contend that they provision orders "on time."[18] Again, this claim is meaningless because the Bells control the due date. The date that "counts" under the Bells' metrics is the date that they unilaterally set in the FOC. Given the control this gives them,

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[12] *Id.* § 2.4.4(C)(4).

[13] *Id.* § 2.4.4(C)(12).

[14] *Id.* § 2.4.4(B)(1).

[15] BellSouth Reply, Varner Reply Dec. ¶ 20 ("A parity standard is the *only* appropriate standard because it is the standard mandated by Sections 251 and 272.") (emphasis in original).

[16] Verizon Reply, Lataille-Jordan-Slattery Dec. ¶ 45.

[17] In a remarkable *non-sequitur*, BellSouth says that the fact that it returned most of its FOCs promptly means that AT&T cannot be correct in claiming that it took "weeks or months" to get a response from BellSouth. *See* BellSouth Reply, Varner Reply Dec. ¶ 8. First, AT&T was reporting on its experiences with all of the Bells, not just BellSouth. Second, the fact that BellSouth may have returned "most" of its FOCs promptly does not in any way invalidate the fact that in some cases the Bells did not return FOCs for weeks or months.

[18] BellSouth Reply, Varner Reply Dec. ¶ 8; Verizon Reply, Lataille-Jordan-Slattery Dec. ¶ 46.

what is most remarkable is not that they can usually meet the leisurely installation schedules they set for competitive carriers, but how often they *miss* them.[19]

Verizon and BellSouth also say that they have decreased the mean time to repair.[20] Again, what is most telling is what the Bells do not say. They provide no benchmark for comparing that information with their mean time to repair their affiliates' troubles. They likewise provide no information about the most relevant measure of service quality – overall *frequency* of troubles for competitive carriers' circuits compared to the frequency of troubles on circuits provisioned to affiliates. These omissions strongly suggest the Bells' own internal data flunks the very parity standard that they embrace.

Although the Bells offer no "parity" evidence, such evidence is available from the recent § 272 audit of SBC. That audit showed that SBC provides competitive carriers with "poorer installation service for DS0 facilities, poorer FOC performance for DSO, DS1 and DS3 service, and poorer repair performance for DS0 and DS1 service" that it provides to its own affiliates. Comments of AT&T, at 3 (filed in EB Docket No. 03-199, March 26, 2004). Such disparities can only be expected to grow as the § 272 safeguards sunset.

In sum, there is no regulation of special access quality, and what little special access competition that exists is far too weak to force the Bells to provide rivals with service quality that is equal to what they provide themselves and their affiliates. This gives the Bells a textbook opportunity to raise rivals' costs and foreclose competition. The Commission should thus readopt its historic rule deeming special access service irrelevant to the § 251(d) impairment inquiry.

[19] *See, e.g.*, Verizon Reply, Lataille-Jordan-Slattery Dec. ¶ 46 (showing that Verizon has historically missed between five and ten percent of installation dates). Indeed, Verizon's own self-selected data show that Verizon's provisioning has gotten *worse* since 2002. Verizon Reply, Lataille-Jordan-Slattery Dec. ¶ 46.

[20] BellSouth Reply, Varner Reply Dec. ¶ 10; Verizon Reply, Lataille-Jordan-Slattery Dec. ¶ 47.