

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of
SBC Communications, Inc. and
AT&T Corporation
Applications for Approval of Transfer of Control

WC Docket No. 05-65

COMMENTS OF TELSCAPE COMMUNICATIONS, INC.

Pursuant to the Commission's March 11, 2005 Public Notice in the above-captioned proceeding,¹ Telscape Communications, Inc. ("Telscape"), through its undersigned counsel, hereby submits its comments on the applications for consent to transfer of control filed by SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") (collectively, "the Applicants"). These transfer of control applications were filed in connection with a proposed acquisition of AT&T by SBC. As explained below, the proposed acquisition of AT&T by SBC fails the "public interest" standard for approval contained in Sections 214(a) and 310(d) of the Communications Act of 1934, as amended,² unless certain conditions are imposed to preserve the ability of competitors to offer end users true choices in local telephone service. Specifically, these conditions are as follows:

- A requirement that SBC offer a basic two-wire residential loop product on a wholesale basis at a substantial discount to enable facilities-based

¹ *Public Notice*, WC Docket No. 05-65, DA 05-656 (rel. March 11, 2005).

² 47 U.S.C. §§ 214(a), 310(d) (2000).

CLECs to compete on a level playing field with the post-merger SBC.

- A requirement that AT&T and its affiliates divest any loop, collocation, and interoffice facilities that are not actually required for the continued provision of local exchange service to their customers so that those facilities can be made available to competitors.
- A requirement that AT&T and its affiliates provide access to rights-of-way, conduit space, interoffice transport, and fiber loop facilities at the same rates and terms that would apply if those facilities were owned by the pre-merger SBC in order to compensate for the reduction in potential wholesale competition following the acquisition of AT&T.
- A requirement that SBC timely repair any substandard copper loop facilities reported by CLECs in order to ensure that these legacy facilities are available to continue to serve the interests of end users.

I. INTRODUCTION

Telscape is a California-based competitive carrier that specializes in the provision of local and long distance service to residential households, the majority of whom consist of Spanish-language-dominant, low-income families residing in inner city and suburban areas. Telscape provides services within the service territory of Pacific Bell Telephone Company d/b/a SBC California (“SBC-CA”) utilizing its own switching facilities in conjunction with unbundled loops, which it leases from SBC-CA. In addition, Telscape historically has utilized unbundled SBC-CA local switching and loops in Unbundled Network Element Platform (“UNE-P”) combinations to serve end users in locations where Telscape has not yet established the facilities needed to serve customers using its own switching equipment.

In the limited time that Telscape has been operating, it has brought the benefits of competition to a largely ignored sector of the local

telecommunications market. Now, Spanish-speaking consumers in areas served by Telscape have standing equal to that of English-speaking consumers because Telscape's operations, to the greatest extent feasible, are fully Spanish/English bilingual, from the end-user prompts that are programmed into its switching equipment, to its billings, to its customer support systems and personnel.³ Moreover, Telscape has strived to provide its customers with other services that meet their special needs and economic circumstances. For example, Telscape provides free calling among customers who are on Telscape's network, no matter where they are located and one cent per minute calling between San Diego and Tijuana, where many Telscape customers work and have families. In addition, Telscape maintains full service, neighborhood retail outlets, which it calls "telemercados," that cater to and respect the unique cultural attributes of the communities it serves.

Telscape believe that it is both appropriate and necessary for the Commission to impose certain conditions to granting the pending applications in order to ensure that local competition can remain vibrant in the local residential marketplace. Telscape, like virtually all competitors serving the residential market, relies on facilities and services acquired on a wholesale basis in order to be able to provide its services. These include monopoly bottleneck network facilities acquired

³ As noted above, in certain instances, Telscape has been required to rely on unbundled local switching or resale of the incumbent's retail services until it has built a sufficient base of customers within a geographic area to permit it to transition to its own network. In those circumstances, Telscape is not able to offer full bilingual capability.

from SBC and other facilities and services purchased from wholesale competitors. The re-consolidation of SBC and AT&T portends a substantial reduction in wholesale competition, as well as a substantial reduction in potential competition at the retail level. The conditions recommended by Telscape are aimed at responding to these circumstances and preserving and enhancing the ability of competitive carriers to continue to obtain necessary loop, collocation, and interoffice facilities on a fair and reasonable wholesale basis.

II. ARGUMENT

A. **The Commission Should Require SBC to Offer a Discounted Basic Two-Wire Residential Loop Product at a Price That Will Enable Facilities-Based CLECs to Compete on a Level Playing Field With SBC**

The single most important factor in ensuring that residential end users, particularly those in the market sectors served by Telscape, continue to have a broad array of affordable choices in telephone services is to ensure that competitors have the ability to access basic two-wire loops on a nondiscriminatory basis. Copper loops are, and will remain for many years, the only viable communications pathway to many end users, particularly residential and lower-income consumers. While cable broadband networks and wireless loops offer potential competitive “last-mile” alternatives for some consumers in some locations, cable systems are not ubiquitous and wireless loop technology has yet to be widely deployed. Moreover, the cost of using these technologies currently is out of reach for many consumers; thus, for these and other customers, having access to the “triple play” of IP voice, data, and video, over any type of broadband medium, including xDSL, is not a practical alternative.

With the pending acquisition of AT&T and the elimination of a commercially-viable UNE-P product,⁴ the service alternatives for residential end users who simply want, or can only afford, traditional voice service are rapidly diminishing. Although AT&T already indicated that it was no longer interested in providing telephone service to the mass market, its acquisition by SBC will make that decision a certainty. Other competitors theoretically may be able to make up for some of the loss of potential service options, but the costs and technical requirements of providing facilities-based service to mass market customers are likely to prove too daunting to most, and they will simply exit the market. This will leave Telscape and, perhaps, a very small handful of others as the sole competitors in the residential market.

This would seem to be an attractive proposition for Telscape. In a very important way, however, it is not. Being one of a very small number of competitors would leave Telscape particularly vulnerable to highly-targeted price squeezing through special “promotional” or “win-back” marketing by SBC. Telscape, of course, must pay SBC’s unbundled loop rates for every customer that Telscape serves. This is a real cost – Telscape must write a check each month to SBC for the loops that Telscape leases. By contrast, this same cost is not “real” for SBC. SBC’s investment in basic copper loops has been substantially, if not completely, refunded

⁴ Telscape notes that SBC is supposedly offering a commercial alternative to UNE-P; however the prices shown in published agreements, such as those with MCI and Sage, are not commercially viable for a competitor seeking to serve mass market residential customers. Indeed, they would exceed SBC-CA’s full retail rates in most instances.

by ratepayers, including many Telscape customers, through depreciation charges that have been recovered through SBC's basic service rates. As a consequence, SBC can, without incurring any real cost other than loss of revenues (which it would incur anyway), establish temporary promotional or winback prices that are below Telscape's costs of service and, perhaps, below the price that Telscape pays for loops. Indeed, Telscape has experienced just this type of marketing from SBC-CA in the past.

The existence of AT&T and MCI in the marketplace is likely to have tempered SBC's efforts in this regard to some degree, as these carriers were in a position to weather any such pricing storm and preclude SBC from re-imposing super-competitive prices on a long term basis (the supposed prophylactic against price squeezes). Unlike AT&T and MCI, Telscape does not have the financial wherewithal to bear sustained marketing of services by SBC to residential customers at prices that are below the costs that Telscape incurs, and with AT&T and MCI both out of the picture, there is little to prevent SBC from squeezing Telscape, or any other facilities-based residential carrier, entirely out of the local marketplace.

For this reason, it is imperative that Telscape be placed in a position where it, and ultimately consumers, are not vulnerable to such anti-competitive behavior. Telscape should be entitled to operate on a playing field that is substantially less tilted in favor of SBC, one that prices access to basic two-wire loops at a rate that is significantly closer to that actually experienced by SBC.

Telscape therefore proposes that SBC's establishment of a competitively-viable basic two-wire residential loop price be made a condition precedent to granting of the applications herein. At this point, Telscape is not in a position to specify the exact loop price that should be required; however, Telscape expects that a substantial discount from the TELRIC price established for basic two-wire residential loops offered pursuant to 47 U.S.C. § 251 would be appropriate.

The requirement to establish compulsory discounts for competitive carriers is not without precedent. Indeed, the Commission required SBC to provide, as part of the SBC/Ameritech merger conditions, several discounts to competitors in order to level the playing field, including an unbundled loop discount.⁵ Thus, the Commission should require SBC to establish, as a condition of the proposed merger, a substantial discount from the TELRIC price established for basic two-wire residential loops.

B. The Commission Should Require AT&T and Its Affiliates to Divest Any SBC-Owned Loop, Collocation, and Interoffice Facilities That Are Not Required for the Continued Provision of Service to Their Customers.

The re-consolidated AT&T and SBC could impair competition by unfairly restricting access to essential bottleneck facilities. Due to SBC's century-long monopolization of the local exchange market, SBC controls the wire centers where Telscape must collocate its facilities in order to be able to cross-connect to

⁵ *SBC/Ameritech, Memorandum Opinion and Order*, 14 FCC Rcd 14712 (1999), App. C, Conditions (*see, e.g.*, p. 22, discounts for surrogate line sharing charges; p. 28, OSS discounts of 25% from recurring and non-recurring charges applied to unbundled local loops used to provide advanced services; p. 48, unbundled loop discounts; p. 50, resale discounts.).

basic loops, which, of course, are still subject to monopolization by SBC. In addition, SBC controls a substantial portion of the fiber facilities and conduit that are used, or available for use by Telscape and other carriers, for interoffice transport or extending their facilities closer to end users. These are essential facilities and competition among carriers, including AT&T and its affiliates, to gain access to them has been substantial. Moreover, with the elimination of UNE-P, demand for such access is likely to grow significantly in coming years. Following the acquisition of AT&T, there is no legitimate reason why any of these facilities should continue to be assigned for use by AT&T in any case where AT&T's services can be provided over facilities previously reserved for use by SBC. AT&T and its affiliates certainly will have no further need to take up valuable collocation space at any wire center, and it is likely that their continued leasing of separate conduit space and transport facilities will, to a significant degree, be rendered unnecessary following the acquisition. Although, in a truly competitive marketplace, AT&T and its affiliates might be expected to sub-lease any such excess capacity to competitors on just and reasonable terms and prices, the proposed transaction will eliminate any wholesale competition between AT&T and SBC and, in its place, establish strong incentives for AT&T, in concert with SBC, to restrict competitive access to such facilities to the greatest extent possible.

Therefore, as a condition to granting the application, the Commission should order AT&T and its affiliates to divest themselves of any leases, IRUs, or other interests that they have in any facilities owned by SBC, except to the extent

that they can demonstrate that such facilities are not duplicative of facilities that are already used by SBC to serve its customers and are necessary in order to enable continued service to end users or other customers.

C. The Commission Should Require AT&T and Its Affiliates to Provide Access to Rights-of-Way, Conduit Space, Interoffice Transport, and Fiber Loop Facilities at the Same Rates and Terms That Would Have Applied If Those Facilities Had Been Owned by SBC.

As a corollary to requiring AT&T and its affiliates to divest themselves of certain SBC facilities, AT&T also should be required to permit competitors to access any rights-of-way, conduit space, interoffice transport, and fiber loop facilities in which AT&T or its affiliates have ownership or IRU interests at rates and terms that are substantially the same as the rates and terms at which SBC would be required to make such facilities available if they were owned by SBC. This is critical because not only will the re-consolidation of AT&T and SBC significantly reduce incentives for these carriers to offer their facilities to other competitors on a wholesale basis, in a great many instances it is possible that facilities owned by AT&T and its affiliates, along with collocation arrangements leased by them, may have served to trigger, or will serve to trigger, the elimination of SBC's section 251 unbundling obligations for these facilities.

D. The Commission Should Adopt Measures to Ensure That SBC Maintains Its Legacy Facilities in a Manner That Continues to Serve the Interests of End Users in Economically Disadvantaged Areas.

A strong purported reason for SBC's acquisition of AT&T is to strengthen SBC's ability to develop innovative products and services to serve

customers in a rapidly changing communications environment.⁶ Part of this endeavor, of course, requires SBC to intensify its transition to next-generation broadband capability, including fiber-to-the-home or to the neighborhood node. Indeed, such investments are undoubtedly seen by SBC as crucial to its future ability to compete in the converging communications marketplace. Unfortunately, however, this focus creates the potential for disregard of the ongoing need to maintain legacy telephone facilities, which while the multi-year or, perhaps, multi-decade build-out of a ubiquitous fiber network is being undertaken, will continue to be relied upon by many end users, particularly those located in low-revenue-producing, residential areas to meet both their basic and advanced communications needs.

For this reason, it is imperative that the Commission ensure that SBC continues to maintain these legacy facilities to proper standards so that end-users who remain captive to the copper network have the opportunity to obtain high quality telephone and broadband data services. Telscape believes that a simple solution would be to require SBC, as a condition to the acquisition of AT&T, to fully correct any deficiency in a copper loop facility within 5 business days of its receipt of a report that the facility is not in compliance with state commission standards or,

⁶ *See, e.g.*, SBC Communications, Inc., 2004 Annual Report, p. 3 (“the acquisition of AT&T Corp. . . . will dramatically accelerate our expansion and bring new and innovative services to the SBC portfolio faster and on a broader basis than we currently have available.”); *See also* Public Interest Statement, filed with the FCC Feb. 21, 2005, http://sbc.merger-news.com/downloads/public_interest_statement.doc.

when there is a pending order relating to the facility, no later than the order due date. In addition, SBC should be required to set up a point of demarcation (DMARC) hotline for receipt of deficiency reports by CLECs.

By establishing explicit requirements designed to maintain all DMARCs at state commission-established standards, all consumers, not just consumers chosen by SBC, will continue to have the ability to receive the broadest array of services and competitive options feasible over whatever facilities exist to serve them, even if those facilities consist of legacy copper loops.

III. CONCLUSION

SBC cannot be counted on to play fair once the acquisition of AT&T is completed. SBC has shown, repeatedly, that it will engage in no-holds-barred efforts to stifle competition from any competitor, no matter how small. As the California Public Utilities Commission found in Decision No. 04-12-053, SBC-CA has engaged in such tactics as improperly billing competitors for retail-related activities, withholding refunds for amounts that SBC-CA acknowledged were due competitors, circumventing the ability of the Commission and carriers to monitor SBC-CA's performance by forcing competitors to waive performance reporting and penalties in order to receive amounts owed to them, and establishing roadblocks to prevent end users with SBC DSL service from signing up with competitors for voice service.⁷ Moreover, SBC's recent attempt to unilaterally discontinue the provision

⁷ See *Telscape Communications, Inc. v. Pacific Bell Telephone Co.*, C.P.U.C. Case 02-11-011, D.04-12-053 (Dec. 16, 2004). The CPUC observed that "several policies and practices of defendant Pacific Bell Telephone Company . . . *Continued*

of certain unbundled network elements (“UNEs”) without abiding by the terms of its approved interconnection agreements, its blatant defiance of the requirement to seek and obtain amendments to its interconnection agreements before discontinuing those UNEs, and its recent offering of ridiculously high commercial wholesale agreements proves that SBC continues to perceive itself as above the law and having no obligation to further any interests but its own in the competitive marketplace.

Because SBC is now, by far, the most dominant competitor in the mass-market local exchange services market, and will be even more dominant after the acquisition of AT&T, it is vital that the Commission take steps to ensure that the interests of the most vulnerable consumers – residential end users, particularly those in economically-disadvantaged areas – are preserved. Telscape submits that the best way to do so is to adopt conditions to the acquisition that are designed to preserve the ability of other carriers to compete. The conditions proposed by Telscape will do just that. Therefore, Telscape urges the Commission to not grant the application herein without first considering and adopting appropriate conditions, including those addressed herein.

/s/ Danny E. Adams
Danny E. Adams
Kelley Drye & Warren LLP
8000 Towers Crescent Drive

(SBC-CA) with respect to the provision of local exchange telephone service (local voice service) are anticompetitive and discriminatory.” *Id.* at 2.

Suite 1200
Vienna, Virginia 22182
(703) 918-2300

Counsel for Telscape Communications, Inc.

April 25, 2005