

May 27, 2005

**BY ECFS**

Hon. Kevin Martin  
Chairman  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

Re: *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from AT&T Corp., Transferor, to SBC Communications Inc., Transferee, WC Docket No. 05-65*

Dear Chairman Martin:

On May 25, 2005, six competitors<sup>1</sup> of SBC and AT&T asked the Commission to delay its consideration of our merger. This is yet another in a string of similar requests, the earliest of which was made before the public notice was even issued.<sup>2</sup> Our competitors justify their most recent request for delay by claiming that they have been unable to review adequately the confidential materials that we have submitted in support of our applications. The reality could not be more different. We have made extraordinary efforts to make these confidential materials available for review, and our complaining competitors have failed to avail themselves of the opportunity to do so, preferring instead to invest their energies in trying to delay these proceedings rather than address their merits.

- The data rooms that contain the confidential information usually sit empty. Overall, during business hours, the data rooms are unused nearly two thirds of

---

<sup>1</sup> One letter was sent to you on behalf of Cbeyond Communications, Eschelon Telecom, SAVVIS Communications, Inc., TDS MetroCom and XO Communications by Brad E. Mutschelknaus and Edward A. Yorkgitis, Jr. of Kelley Drye & Warren LLP and Christopher J. Wright of Harris Wiltshire & Grannis LLP (the "CBeyond Letter"). Gary Lytle of Qwest sent you a separate letter (the "Qwest Letter").

<sup>2</sup> See, e.g., Letter to Marlene H. Dortch from Brad E. Mutschelknaus of Kelley Drye & Warren LLP on behalf of Covad Communications, Eschelon Telecom, NuVox Communications and XO Communications, dated February 25, 2005.

the time. Indeed, one of the three data rooms has had no visitors at all since May 20.

- Notwithstanding the opportunities that have been available to visit the data rooms, most of our complaining competitors have made only perfunctory visits. Indeed, several have not bothered to send any attorneys to some data rooms, relying instead on paralegals or consultants.
- The materials in the data room are organized in the same way they were provided to the FCC in accordance with the instructions in the Commission's Information and Document Request and the Protective Orders entered in this Docket.

Our competitors' complaints about access to confidential materials fall into four categories.

First, our competitors imply that we have limited their access to "three to five-hour windows"<sup>3</sup> and provided "[o]nly one paper copy of the material."<sup>4</sup> This seriously distorts and understates their access to the confidential material. When we set up the procedures for access, we anticipated numerous requests to review the confidential material. To give everyone a fair chance to do so, we set up multiple shifts each day so that each party could have its turn. The parties were free to sign up for multiple shifts, and they were free to stay past the end of their shifts if subsequent shifts were not taken. This system has worked well, with most parties receiving their first choice of shifts, and no one having to wait more than a day to get access to the confidential materials. Almost two thirds of shifts have gone unused,<sup>5</sup> one of the three data rooms have had no visitors at all since May 20, 2005,<sup>6</sup> and only a handful of future visits are scheduled at this point. The length of the shifts has been adequate – most parties left long before their shifts

---

<sup>3</sup> CBeyond Letter at 2; *see also* Qwest Letter at 2.

<sup>4</sup> CBeyond Letter at 2.

<sup>5</sup> At Arnold & Porter, only 7 of the first 24 shifts, or 29%, were filled. At Crowell & Moring, only 8 of the first 22 shifts, or 36%, were filled. At Sidley & Austin, only 6 of the first 16 shifts, or 37.5%, were filled.

<sup>6</sup> Since May 20, 2005, no one has visited the data rooms at Sidley, and there has been only one visit to Crowell and three visits to Arnold & Porter.

ended, no party has been forced to leave because its shift was over, and only a few parties have scheduled a second shift.

The experiences of Kelley Drye & Warren LLP, which represents four of the competitors, is typical – it was promptly provided access to the confidential materials, and it has availed itself to that access in only a very limited way. The firm had 16 of its attorneys, paralegals and consultants execute acknowledgments of the Second Protective Order, which were served on us between May 13 and May 18. One attorney and two consultants reviewed confidential materials at Arnold & Porter LLP on May 17 for approximately two hours, and one consultant reviewed materials there on May 24 for approximately 30 minutes. Two consultants reviewed materials at Crowell & Moring LLP on May 18 for approximately three hours. Two consultants reviewed materials at Sidley Austin Brown & Wood LLP on May 19 for approximately four hours. We have received no requests from Kelley Drye & Warren to return to conduct any additional review. Nevertheless, its clients complain that they have not had “a fair and meaningful opportunity to obtain and analyze the data.”<sup>7</sup>

Second, our competitors complain that their review of confidential materials has been hindered because those materials “are inconveniently dispersed among locations at three law firms.”<sup>8</sup> In fact, this logical arrangement of confidential materials facilitates access and responds to requirements of the Protective Orders. Four types of confidential materials are at issue:

- AT&T’s response to the FCC’s Information Request, which consists of a one volume narrative response, two volumes of exhibits to the narrative response, and 27 boxes of documents that respond to six specifications in the Information Request (the “AT&T Response”).
- SBC’s response to the FCC’s Information Request, which consists of a one volume narrative response, four volumes of exhibits to the narrative response, and 169 boxes of documents that respond to four specifications in the Information Request (the “SBC Response”).

---

<sup>7</sup> CBeyond Letter at 3.

<sup>8</sup> *Id.* at 2.

Chairman Martin  
May 27, 2005  
Page 4

- AT&T's and SBC's one volume Joint Opposition to Petitions to Deny and Reply to Comments (the "Joint Opposition").
- A seven page ex parte that SBC submitted to the FCC on May 17 (the "May 17 Ex Parte").

The AT&T Response is available at Sidley, the SBC Response is available at Crowell & Moring, and the Joint Opposition and May 17 Ex Parte are available at Arnold & Porter.

This system fully complies with the terms of the Protective Orders. Indeed, those Orders require that the confidential materials be made "available for review at the offices of the Submitting Party's outside counsel."<sup>9</sup> Hence, at least two locations are required: one for AT&T, and one for SBC. Accordingly, the AT&T Response is available at the offices of its counsel, Sidley, and the SBC Response is available at the offices of its counsel, Crowell & Moring. The Joint Opposition, which contains confidential information of both AT&T and SBC, was placed in a third location – the offices of SBC's counsel, Arnold & Porter, which submitted the Joint Opposition. The May 17 Ex Parte was also placed at Arnold & Porter in light of the small volume of materials there.

Not only does this approach comply with the terms of the Protective Orders, it also allows more parties to review confidential materials simultaneously, as well as facilitates administration in light of the substantial volume of materials at Sidley and Crowell & Moring. The burdens associated with visiting three locations are minimal – all are located within *less than one mile* of each other and, of equal importance, within *less than one mile* of the offices of our competitors' counsel.<sup>10</sup>

Third, our competitors claim that the material "has not been organized in any manner that relates logically to the points the information allegedly supports," and, in this regard, they ask the Commission "to send staff to the three sites to see for themselves how the responsive materials have been 'organized.'"<sup>11</sup> We would be more than happy for the Commission staff to visit our sites. If they were to come, they would see that the

---

<sup>9</sup> Order Adopting First Protective Order ¶ 5; Order Adopting Second Protective Order ¶ 7.

<sup>10</sup> The competitors' counsels' offices and the confidential materials are in the Northwest Quadrant of Washington, D.C.: the competitors' counsels' offices are at 19<sup>th</sup> & M, 18<sup>th</sup> & M, and 13<sup>th</sup> & F, and the documents are at 15<sup>th</sup> & M, 15<sup>th</sup> & K and 12<sup>th</sup> & F.

<sup>11</sup> CBeyond Letter at 2; *see also* Qwest Letter at 2.

information has been organized in the same way it was organized for delivery to the Commission in accordance with the Commission's instructions. The Joint Opposition and the May 17 Ex Parte are presented as separate and entire documents. The SBC Response and the AT&T Response include a narrative that proceeds specification-by-specification in question-and-answer format. The exhibits to those narrative responses immediately follow in sequence and are clearly labeled, exhibit-by-exhibit. The documents that respond to one of the specifications are segregated.<sup>12</sup> The documents that respond to the remaining specifications that require the production of documents<sup>13</sup> are "grouped based on the individual from whom the documents were obtained" – as required by Instruction 20(g) of the FCC's information request. Moreover, as required by Instruction 21(d), the master index accompanying each party's response identifies "the name of the individual(s) from whom responsive documents are most likely to be submitted in response to the particular specification."

Fourth, our competitors suggest that too much of our material has been designated as "confidential" or "highly confidential" and copying prohibited.<sup>14</sup> Our competitors also complain that we do not make electronic copies of the information available.<sup>15</sup> Their real objection here, however, is to the terms of the Protective Orders, which are similar to protective orders in other proceedings.<sup>16</sup> The Commission has requested, and we have supplied, our most closely guarded competitive information – present and future business plans, highly segmented current revenue information, and similar information, release of which to our competitors would cause us incalculable harm. We understand that our competitors' lawyers and consultants need access to this information to participate

---

<sup>12</sup> Because the documents called for in Specification 25 were compiled through a separate process, they were given a different set of Bates numbers and were produced (and are presented) in four boxes by themselves.

<sup>13</sup> For SBC, specifications 3.e, 22.d, and 26.b; for AT&T, specifications 3.d, 3.e, 8.d, 10 and 26.

<sup>14</sup> CBeyond Letter at 2-3; Qwest Letter at 2.

<sup>15</sup> CBeyond Letter at 2-3; Qwest Letter at 2.

<sup>16</sup> Compare Order Adopting First Protective Order with, e.g., *In re Applications of SBC Communications Inc. and BellSouth Corporation*, Order Adopting Protective Order, 15 FCC Rcd. 15095 (2000); compare Order Adopting Second Protective Order with *In re News Corporation, General Motors Corporation, and Hughes Electronics Corporation*, Order Concerning Second Protective Order, 18 FCC Rcd. 15198 (2003).

meaningfully in this proceeding. However, as the Commission has recognized,<sup>17</sup> their need to access that information must be balanced against our rights to protect this information from improper distribution. Thus, certain restrictions on their ability to duplicate that data and to copy it electronically, with the risks of dissemination that electronic duplication entails, is necessary and appropriate.<sup>18</sup> Of course – as we have told other parties, including Qwest – if any party believes a particular document has not been appropriately classified, we would be happy to review the document in question and discuss the matter. To date, we have not received a single specific objection from any party that we have improperly classified any particular document.

In sum, the most recent letters are but another attempt by our competitors to delay these proceedings. After months of arguing that the proceedings should be stopped because there was too little information in the record, they are now complaining that there is too much information in the record – “over 500,000 pages”<sup>19</sup> – and the proceedings should be stopped on that basis. Instead of setting about to analyze that information, however, our competitors have made only brief visits to the data rooms, which sit empty most of the time.<sup>20</sup> They then complain that there are not enough copies of the materials in these rarely visited data rooms<sup>21</sup> and object to traveling a short

---

<sup>17</sup> *In re Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd. 24816, 24831 ¶ 21 (1998) (“In recent years, the Commission has tried to balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials by making more use of special remedies such as protective orders.”).

<sup>18</sup> *In re WorldCom, Inc. and Its Subsidiaries and MCI, Inc.*, Order, 18 FCC Rcd. 24385, 24387 ¶ 6 (2003) (modifying protective order to prohibit copying and recognizing that Commission should take action, such as prohibiting copying of confidential information “to avoid ‘unnecessary disclosure of information that might put its regulatees at a competitive disadvantage.’”); *id.* at 24387 ¶ 7 (“We therefore find that the potential for administrative inconvenience cited by Mr. Belendiuk does not outweigh SBC’s interest in protecting the confidentiality of these documents and modify the Protective Order below to prohibit copying of these documents.”)

<sup>19</sup> CBeyond Letter at 3; *see also* Qwest Letter at 2.

<sup>20</sup> The press release that accompanied the filing of the CBeyond Letter indicates that the Consumer Federation of America (“CFA”) and Consumers Union (“CU”) have joined our competitors in urging a delay in this proceeding. This is rather ironic since neither CFA nor CU has asked to see any of the confidential materials, nor has either of them even signed any acknowledgments that would allow them to do so.

<sup>21</sup> CBeyond Letter at 2.

distance to get from one data room to the next.<sup>22</sup> The Commission should pay no heed to these transparent efforts to manipulate these proceedings to advance the competitors' private interests at the expense of the public interest. Rather, the Commission should continue its effort to complete its review of the merger within 180 days of the public notice.

Our competitors also rehash another theory they had advanced earlier in their petitions to deny: that consideration of the SBC/AT&T merger be delayed so that it can be consolidated with the Verizon/MCI merger. Such action, however, would be contrary to Commission precedent. The Commission has expressly held that license transfer applications are ordinarily treated as "mutually exclusive" and are subject to "simultaneous consideration" only where "the grant of one application would require the denial of the other."<sup>23</sup> Thus, for example, the Commission rejected Consumers Union's claim that the AT&T-MediaOne merger proceeding had to be consolidated with the AOL-Time Warner merger proceeding because the "AT&T-MediaOne merger would fundamentally change the nature of the relevant markets of the applicants in the AOL-Time Warner merger."<sup>24</sup> Instead, the Commission recognized these mergers were independent and took into account, as appropriate, the impact of the AT&T-MediaOne merger in its analysis of the subsequent AOL-Time Warner merger.<sup>25</sup>

The Commission has not acceded to our competitors' previous requests to delay consideration of the SBC/AT&T merger, nor should it do so now. These requests are not only unwarranted, but any such delay would harm the public interest by postponing the realization of the numerous public interest benefits that our Public Interest Statement demonstrated will flow from the SBC/AT&T merger. The Commission should continue

---

<sup>22</sup> *Id.*

<sup>23</sup> *In re Applications of MediaOne Group, Inc, and AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd. 9816, 9893 ¶ 181 (2000).

<sup>24</sup> *Id.* at 9892-93 ¶ 179.

<sup>25</sup> *Id.* at 9893 ¶ 181.

Chairman Martin  
May 27, 2005  
Page 8

the hard work that it has begun to complete the merger review within 180 days of its public notice.

Sincerely,

SBC Communications Inc.

AT&T Corp.

**/s/ Gary L. Phillips**

**/s/ Lawrence J. Lafaro**

Gary L. Phillips  
SBC Communications Inc.  
1401 I Street, N.W.  
Suite 400  
Washington, D.C. 20005  
Tel: (202) 326-8910

Lawrence J. Lafaro  
AT&T Corp.  
Room 3A 214  
One AT&T Way  
Bedminster, NJ 07921  
Tel: (908) 532-1850

cc: Commissioner Kathleen Q. Abernathy  
Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
Daniel Gonzalez  
Michelle Carey  
Sam Feder  
Lauren "Pete" Belvin  
Jessica Rosenworcel  
Scott Bergmann  
Jonathan Levy  
Thomas Navin  
Julie Veach  
Bill Dever  
Marcus Maher  
Brad E. Mutschelknaus  
Edward A. Yorkgitis, Jr.  
Christopher J. Wright  
Gary Lytle