

June 7, 2005

By ECFS

Kevin Martin, Chairman
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20544

Re: *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65; *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75.

Dear Chairman Martin:

On May 25, 2005, five companies filed an *ex parte* letter urging the Commission to take steps to protect the fairness and integrity of the review process as it examines the above-captioned mergers.¹ The letter explained that almost halfway through the Commission's informal 180-day review period for the proposed SBC-AT&T merger, those Applicants "have not presented data and documentation in support of their Public Interest Statement in a fashion that permits thoughtful review by interested parties."² Rather, the Applicants' oversized and under-organized responses to the Commission's data requests appear "designed to thwart effective examination."³ The five companies asked the Commission to: 1) stop the clock to allow the public adequate time for a fair and substantive review of the Applicants' data submissions; and 2) consolidate review of the proposed mergers to increase administrative efficiency and reflect the interrelated nature of the proceedings.

In addition to the five companies on that initial filing, a large number of other communications companies (together the "Companies") have reviewed the Applicants'

¹ Letter from Brad Mutchelknaus, Edward Yorkgitis, and Christopher Wright to Chairman Martin, WC Docket Nos. 05-65 & 05-75 (May 25, 2005) ("Prior Letter"). The five companies are Cbeyond Communications, Eschelon Telecom, SAVVIS Communications, Inc., TDS Metrocom, and XO Communications.

² *Id.* at 2.

³ *Id.*

submissions and now join in this letter.⁴ As further set forth below, the Companies ask that the Commission grant the relief originally requested, and also order the Applicants to make searchable soft copies of their data responses available. It is particularly important that the Applicants provide “native format” excel spreadsheets containing the data they have submitted, so that the data may be subjected to rigorous analysis.

The present filing addresses SBC Communications Inc.’s (“SBC’s”) and AT&T Corp.’s (“AT&T’s”) May 27, 2005 response to our initial request for relief.⁵ That response primarily argues that: 1) additional time to analyze the data submissions is not warranted because parties opposing the mergers purportedly have not spent enough time in the Applicants’ document rooms; and 2) the submissions are adequately organized. But this “response” is peculiarly unresponsive. Indeed, it misses our core point. Simply put, the Companies believe that the volume and format of Applicants’ data submissions render it *impossible* to analyze that data in anything close to the time available.

As set forth in the prior letter, the SBC data response policed by Crowell & Moring contains approximately 175 banker boxes (500,000 pages) of hardcopy material, most of which counsel may not photocopy but must examine solely on site. The boxes are not, for the most part, organized according to the FCC’s information request – rather, they are organized by the name of the individual within SBC from whom the documents were taken. That information is singularly unhelpful to non-SBC counsel. Moreover, even SBC’s Exhibits comprise many hundreds of pages, most of them containing tabular material dense with figures.

The AT&T production chaperoned by Sidley, Austin, Brown & Wood is almost equally inscrutable. It originally tallied a comparatively modest ten banker boxes, with some organized to correspond to the Commission’s data request. Apparently, however, AT&T’s copy vendor initially misplaced most of the boxes, and their reappearance brought the AT&T total to a more daunting 27. In addition, AT&T’s Exhibits – like

⁴ These parties include Nuvox Communications, Xpedius Communications, WilTel Communications, LLC, ACN Communications Services, Inc., ATX Communications, Inc., Bullseye Telecom, Inc., Cavalier Telephone Mid-Atlantic, LLC, CTC Communications Corp., Gillette Global Network, Inc. D/B/A Eureka Networks, Granite Telecommunications, LLC, Lightship Communications, LLC, Lightyear Network Solutions, LLC, Pac-West Telecomm, Inc., RCN Telecom Services Inc., US LEC Corp., and U.S. TelePacific Corp. D/B/A TelePacific Communications.

⁵ Letter from Gary Phillips and Lawrence Lafaro to Chairman Martin, WC Docket No. 05-65 (May 27, 2005). In addition, on June 2, 2005, Richard S. Whitt of MCI and Michael E. Glover of Verizon sent a letter to Chairman Martin opposing requests to “stop the clock” in the SBC/AT&T merger proceeding, as well as the consolidation of that matter with the Verizon/MCI application. See Attachment to the Letter of Ann D. Berkowitz of Verizon to Marlene Dortch of the FCC, WC Docket No. 05-75 (June 2, 2005) (the “Verizon/MCI Letter”). The arguments advanced by Verizon and MCI relate primarily to their recent data submissions, which the Companies have had little opportunity to review. Those submissions, however, appear to share many of the defects of the SBC and AT&T data responses, and the Companies naturally reserve the right to comment more fully on them as our review continues. To the extent that Verizon and MCI specifically oppose stopping the clock in the SBC/AT&T merger and consolidating the two merger proceedings, their arguments are largely duplicative of those made by SBC and AT&T, and this reply is intended to apply equally to the Verizon/MCI Letter.

SBC's – include hundreds of pages filled with figures, largely unencumbered by textual explanation. And again, counsel may not photocopy most of these documents.

Under these circumstances, even if the Companies' task were only to review the Applicants' submissions, the required time commitment would be prohibitive. Consider the basic math of such review. If an individual were to spend just 30 seconds per page on SBC's submission – not long enough to actually read most pages, of course, but perhaps better than nothing – that would take approximately 250,000 minutes, or 4,166 hours. In other words, working 12 hours a day, an individual could theoretically make it through the SBC materials in about a year (347 days) – leaving aside, of course, the fact that review is permitted only on certain days and in three to five-hour shifts. At that pace, five particularly industrious individuals could perform a cursory review of the SBC submission in a mere 70 days – putting aside the AT&T submission altogether, of course, and assuming that no analyses whatsoever were performed on the SBC data.

But analysis is the whole point of requiring the Applicants to divulge their data. And under the current conditions, serious analysis is out of the question. The sheer enormity of the Applicant's submissions, exacerbated by the lack of effective indexing, makes it difficult even to locate the data requiring analysis. More importantly, to the extent that such data can be identified, it is not available in a format susceptible to analysis. As noted above, the vast majority of the documents at issue cannot be photographed or photocopied. But many of the documents that the Companies *have* managed to identify as requiring rigorous data analysis contain literally hundreds of pages filled with tiny rows and columns of numbers. It would be virtually impossible to transcribe that data by hand, and even if it could be copied, the error rate involved in such transcription would likely render it worthless. To avoid these serious problems, the Commission should compel the Applicants to provide all of this information in electronic format.

In short, the Applicants' suggestion that the Companies have willfully failed to apply themselves to the task of analysis is absurd. The truth is that while the Companies' attorneys, economists, and consultants have spent many hours in the Applicants' document rooms, sending them there with pen and paper is like sending Hercules to King Augeas's stables with shovel and basket. Hercules, it will be recalled, realized that even he could not succeed in that approach, and instead diverted two rivers through the stables to perform his labor. Unfortunately, that is not an option here – while diverting the Potomac through the Applicants' document rooms would certainly be gratifying in some respects, it would ultimately accomplish little. The Companies remain determined to analyze the Applicants' data submissions, not to sweep them away.

But the Companies need this Commission's help. Only the Commission can ensure access to the Applicants' data in a format in which it can be analyzed effectively. The most straightforward way for the Commission to enable careful review of the Applicants' submissions would be to require SBC and AT&T to make electronic soft

copies⁶ of their entire submissions available to the Companies' outside counsel. Notably, allowing outside counsel to examine soft copies of the data submissions is particularly appropriate because much of the data is not contained in internal company documents to begin with, but rather in reports prepared by outside analysts. If the information in those reports was not too sensitive to share with analysts, it is hard to see how it could be too sensitive to share with attorneys legally and ethically bound not to divulge it.

If the Commission determines not to require the Applicants' to make soft copies of their entire submissions available, it should at least mandate electronic access to critical documents. Unfortunately, for the reasons discussed in the prior letter and further set forth above, it is currently extremely difficult even to identify such documents, particularly for the SBC submission. Nonetheless, the Companies have been obliged to attempt the task. For purposes of illustration, we have prepared the following non-exhaustive list of documents produced by AT&T that appear to contain highly relevant data files, but that cannot practicably be used for analysis in the hardcopy format provided to us. Mandating soft-copy access to these materials would be a helpful start in enabling meaningful analysis of the Applicants' data, subject to further requests as the process of initial review of the Applicants' documents continues:

Exhibit 3(a)-I "FCC 3(a) – Full Detail for SBC States"

A spreadsheet approximately 300 pages in length that contains quarterly AT&T revenue and customer counts within the SBC territory for the period 1Q2004 through 1Q2005.

Exhibit 3(a)-II "FCC 3(a) – Full Detail for Non SBC States"

A spreadsheet approximately 75 pages in length that contains quarterly AT&T revenue and customer counts outside of the SBC region for the period 1Q2004 through 1Q2005.

Exhibit 3(b)-I "Local Voice Services Estimated DS0s, SBC Territory"

A 43-page spreadsheet that provides monthly counts of DS0-equivalent circuits for externally billed AT&T customers in the SBC territory, by MSA and by customer segment (e.g., enterprise, small business, wholesale).

Exhibit 3(c)-I "Physical Connection Count at End of Quarter" and "eDS0 for Physical Connections End of Quarter"

A thick (approximately 1-inch) spreadsheet that contains quarterly counts of AT&T physical connections and DS0-equivalent connections for the period 1Q2004 through 1Q2005.

⁶ By "electronic soft copies" we mean documents that are searchable and not documents provided, for example, in PDF form. With respect to data, analysis requires production of Excel spreadsheets.

Exhibits 4-I to 4-III “FCC Specification 4 – AT&T Business Opportunities Since Oct. 1, 2004 in Which SBC Was a Primary Competitor”

A thick spreadsheet (containing approximately 8,000 observations) that identifies situations since October of 2004 in which AT&T and SBC competed for a business customer opportunity. The data file identifies date, product and product line, primary competitor, secondary competitor, term in months, opportunity number, and other such information.

Exhibit 6(a)-III Spreadsheet regarding AT&T “on-net” buildings

A 129-page spreadsheet (containing approximately 5,500 observations) regarding all AT&T “on-net” buildings within the SBC territory. This spreadsheet apparently identifies all buildings within the SBC territory in which AT&T had a retail or wholesale customer as of April 17, 2005.

Exhibit 6(a)-IV Spreadsheet regarding AT&T lines to on-net buildings

A spreadsheet approximately 118 pages in length that contains information regarding the number of DS0-equivalent switched voice lines and other voice and data lines provided by AT&T to customers identified as being in an AT&T on-net building within SBC territory.

Exhibit 6(a)-V Spreadsheet regarding capacity to AT&T on-net buildings

A spreadsheet approximately 74 pages in length that contains information regarding the capacity of data services provided by AT&T to its on-net buildings within SBC territory. The number of DS0-equivalent voice, data, and undefined lines are given. Also given are counts of type 1 and type 2 BBW, DS0, DS1, DS3, OC3, OC12, OC48, and OC192 lines.

Exhibit 6(b) “FCC Interrogatory 6(b) – Full Detail”

A thick (approximately 3-inch) spreadsheet containing AT&T’s 2004 annual revenues within SBC territory. Revenues are broken down by MSA, customer segment (e.g., enterprise, wholesale), service category, and sub-category (e.g., data, domestic long distance voice, etc.).

Exhibit 6(d) Spreadsheet regarding CLEC fiber buildings in SBC region

A spreadsheet approximately 175 pages in length that contains a list of the building locations within SBC's region that are served by the fiber of CLECs from which AT&T purchases special access substitutes.

Each of these documents obviously contains data relevant to understanding AT&T's current role in the special access market, and in each case it is equally obvious that the quantity of data defies transcription, thereby preventing analysis. Again, however, it bears emphasis that this is by no means an exhaustive list of documents that the Companies would need in soft copy to perform meaningful review – it is simply intended to illustrate that such review is obviously impossible under the current conditions.

In addition to the need for appropriate access to the Applicants' data, the prior letter also underscored that analysis will require sufficient time to study the data and report findings to the Commission. Accordingly, the Companies again urge the Commission to act now to stop the informal review clock and thereby ensure the parties and the Commission itself adequate time for review.

As noted above, the prior letter also asked the Commission to consolidate its review of the two parallel mergers in recognition of the fact that the issues presented substantially overlap. Such consolidation will eliminate redundancy, and reflect the reality that the two mergers are interrelated and should be processed together as a substantive matter. As a practical matter, it seems likely that either both mergers will be denied, or both will be approved with similar major conditions.

This overlap in the issues presented by the mergers underscores the need for the Commission to stop the clock. In short, the present circumstances are unprecedented: the typical 180-day merger review cycle simply is not applicable to two interrelated transactions of this magnitude. In these unusual circumstances, adhering to the standard review period will only complicate the ability of the Commission and third parties to do their job by putting artificial constraints on the process. It will also send misleading signals to other federal and state regulatory agencies presently engaged in parallel review of the mergers, but without such artificial procedural schedules.

In sum, the Applicants' data responses do not, in their present form, allow serious analysis. Instead, even assuming that all relevant data has been submitted, the Applicants plainly seek to hide that data in plain sight – as the Applicants surely intended, their submissions are the data response equivalent of a jigsaw puzzle with 500,000 pieces. The Companies believe that the Commission should curtail this gamesmanship now by requiring disclosure of soft copies and by stopping the clock to allow sufficient time for analysis.

Please contact the undersigned should you have any further questions or to discuss.

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