

June 9, 2005

By Hand and ECFS

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 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 Mr. Chairman:

Once again, Qwest has asked the Commission to delay its consideration of our merger.¹ In its May 25 *ex parte*, Qwest asserted that AT&T and SBC were hindering review by interested parties of the documents submitted in response to the Commission's data request.² Now that this charge has been discredited, Qwest tries a new tack.³ It argues now – in effective repudiation of its own earlier claim – that it could hardly be blamed for not seeking access to the documents since, Qwest alleges, “its ability actually to review and use the documents was unnecessarily burdened.”⁴ This claim, however, has no more merit than Qwest's earlier charge.

Qwest seeks to justify its current request with unfounded allegations that we have failed to comply with “the terms and spirit of the Protective Orders.”⁵ Qwest also seeks

¹ Letter of June 7, 2005 from Gary R. Lytle, Senior Vice President – Federal Relations, Qwest, to the Honorable Kevin J. Martin, Chairman, Federal Communications Commission (“June 7 Letter”). This letter also transmitted to you a letter from Qwest's outside counsel to our outside counsel. That letter supposedly gave us two days to cure our alleged “noncompliance” before Qwest would burden the Commission and its staff with these issues. *See* Letter of June 7, 2005 from David L. Sieradzki, Hogan & Hartson L.L.P., to Peter J. Schildkraut, Arnold & Porter LLP, & David L. Lawson, Sidley Austin Brown & Wood LLP (“Sieradzki Letter”). As you have no doubt noticed, those two days were ephemeral as the letters were sent nearly simultaneously.

² Letter of May 25, 2005 from Gary Lytle, Senior Vice President – Federal Relations, Qwest, to the Honorable Kevin J. Martin, Chairman, Federal Communications Commission, at 1-2.

³ Qwest claims, weakly, that SBC and AT&T relaxed restrictions on document review only after receiving complaints from Qwest and others, but any restrictions that previously applied were set up to facilitate review by all interested parties and in no material way hindered review by Qwest or anyone else. In making this charge (and so many others), Qwest is merely grandstanding for reasons that are obvious to all.

⁴ Sieradzki Letter at 2.

⁵ June 7 Letter at 1.

to delay this proceeding because of the volume of materials we have produced⁶ and because of the “unprecedented” “size and scale” of our merger along with the Verizon/MCI merger.⁷ Qwest’s agenda as the frustrated suitor for MCI clearly is to use any tactic necessary to defeat the pending mergers or, as it candidly has admitted elsewhere,⁸ to acquire assets by inducing the Commission or the Department of Justice to compel divestitures. As we have demonstrated previously and detail again below, Qwest’s objections are baseless. The Commission should continue its diligent efforts to complete the review of our merger within its 180-day guideline.

I. Compliance with the Protective Orders

As shown in the attached letter to Qwest’s outside counsel, SBC and AT&T have made our protected information⁹ available to Qwest and other parties in full compliance with the terms and spirit of the Protective Orders.¹⁰ And, when parties have approached us with suggestions for improvements in our processes, we have been reasonable and flexible in our responses. Indeed, as Qwest’s counsel notes in his letter,¹¹ when he asked (as early as three weeks ago) about the way in which we had classified our documents under the Protective Orders, we told him we would be happy to review and discuss any particular document he believed might have been misclassified. (We have made the same offer to other parties as well.)

⁶ *Id.* at 3-4.

⁷ *Id.* at 3.

⁸ *See* Richard Notebaert, Chairman & CEO, Qwest Communications, Remarks at the Sanford C. Bernstein & Co. Strategic Decisions Conference (June 1, 2005) (“We’re very, very, very available to help our peers in solving any problems they have with the government.”), available at <http://www.qwest.com/about/investor/events/index.html>; Yuki Noguchi, *After MCI Miss, Qwest Aims at Other Targets*, Wash. Post, May 25, 2005, at E5 (quoting Qwest Chairman & CEO Richard Notebaert as stating that SBC/AT&T and Verizon/MCI mergers “creat[e] other opportunities for Qwest to pick up assets”); Matt Richtel, *Rebuffed, Qwest Ponders the Next Move*, N.Y. Times, May 4, 2005, at C5 (“Qwest, [Notebaert] said, may be able to acquire some of the network assets and customer lists that federal regulators may require Verizon-MCI and SBC . . . to divest.”); Letter of May 18, 2005 from Melissa E. Newman, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, Attach. at 18 (attaching presentation that proposed divestiture of local networks and customers).

⁹ We will use “protected” information here to refer both to “confidential” information under the First Protective Order and “highly confidential” information under the Second Protective Order.

¹⁰ We previously delivered to Qwest’s counsel, upon request, copies of all copy allowed protected documents and information within the scope of its current request.

¹¹ Sieradzki Letter at 4 (“Mr. Schildkraut indicated that your clients would be willing to consider providing copies of certain documents in response to our specific requests.”).

His reply, two weeks later – to ask that essentially all of the Narrative Responses to the FCC Information and Document Request and the bulk of the exhibits and attachments thereto be reclassified as copying allowed, and that they further should be shared with Qwest company personnel – is untenable, as is his request that Qwest be given manipulable versions of the data we provided. These documents contain some of our most closely guarded competitive information – present and future business plans, highly segmented current revenue information, and similar data, release of which to our competitors would cause us incalculable harm. These are the very types of materials that are accorded the highest level of protection under the specific terms of the Commission's Protective Orders. Indeed, the Second Protective Order delimits the specifications for which the responses may be designated as highly confidential under that Order, and we precisely followed those instructions in designating portions of the Narrative Responses, exhibits thereto, and the accompanying document productions as highly confidential. Thus, despite Qwest's generalized claims of Protective Order violations, its real quarrel is with the very idea of having protective orders in this and other proceedings. That complaint rings particularly hollow, given that the Protective Orders are substantially similar to other protective orders issued in other merger proceedings including Qwest/US West.¹² Qwest, in any event, did not seek reconsideration of either of the Protective Orders in this proceeding.

By the same token, our refusal to provide Qwest's counsel or others with copies they may remove from our counsels' offices recognizes that the only sure way to prevent our competitors' businesspeople from obtaining this information – and accidents do happen¹³ – is not to let these documents out of our control in the first place.¹⁴

¹² Compare Order Adopting First Protective Order with, e.g., *In re Applications of SBC Communications Inc. and BellSouth Corp.*, Order Adopting Protective Order, 15 FCC Rcd. 15095 (2000) and *In re Applications of US West, Inc. & Qwest Communications Int'l Inc.*, Order Adopting Protective Order, 14 FCC Rcd. 19362 (CCB 1999); compare Order Adopting Second Protective Order with *In re News Corp., General Motors Corp., & Hughes Elecs. Corp.*, Order Concerning Second Protective Order, 18 FCC Rcd. 15198 (2003); see also *In re Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, Order, 19 FCC Rcd. 16292 (WCB), modified, Order, 19 FCC Rcd. 20531 (WCB 2004); *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers; et al.*, Order, 17 FCC Rcd. 5852 (WCB 2002).

¹³ See, e.g., *In re Applications of Am. Online, Inc. & Time Warner Inc.*, Memorandum Opinion and Order, 16 FCC Rcd. 2400 (CSB 2001) (Outside counsel for a merger opponent (Disney) described and quoted from confidential information in an email to in-house people at his client whom he thought had signed onto the protective order but had not. One of those in-house people forwarded the information to, among others, Disney's President and CEO, its Vice Chairman of the Board of Directors, its Executive Vice President and General Counsel, its Senior Vice President, and the Executive Vice President of ABC.).

¹⁴ We note that the Commission's analysis of the competitive impact of this merger is becoming like the Department of Justice's with respect to the breadth and depth of its

That said, if Qwest's counsel – or anyone else – points us to a *particular* document or portions thereof that they believe were classified improperly, we again renew our willingness to re-review it promptly and reclassify it if appropriate.

II. Qwest's Other Arguments

Qwest also argues that the volume of materials produced by Verizon, MCI, and us requires stopping the clock to allow additional time for review of our transaction.¹⁵ By pointing to the million pages produced in the two distinct merger dockets, Qwest obfuscates the issue on two levels. First, as we noted before,¹⁶ these are two separate proceedings and should be treated separately. Therefore, roughly half of the volume is irrelevant to the analysis of this merger. Second, the Narrative Responses and exhibits thereto that contain the data requested by the staff, which Qwest complains its economists have not been able to access and analyze readily, only amount to about 2000 pages each for SBC and AT&T – a far cry from the million pages to which Qwest points.¹⁷

We also take issue with Qwest's assertion that the "size and scale of these proposed mergers" somehow justifies departing from the Commission's standard review schedule. To begin with, as discussed above, the Verizon/MCI merger is analytically separate from this merger, and Commission precedent requires that it be considered separately.¹⁸ Moreover, this transaction is no more complex than others such as

Footnote continued from previous page
data requests. However, the Hart-Scott-Rodino Act provides explicit protection of the information submitted by the merging parties from release to third parties. 15 U.S.C. § 18a(h). That statute reflects Congress's considered decision that competitively sensitive information of merging parties should be protected from disclosure. Of course, the Communications Act requires the Commission to undertake a different mode of decisionmaking in its merger reviews, and that distinction requires third parties to have some access to our protected materials. However, Congress hardly could have intended for third parties to use the Commission's processes to subvert the confidentiality protections it established in the antitrust laws. Therefore, the policy behind the Hart-Scott-Rodino Act's confidentiality protections should inform the Commission's decision about whether restrictions on access are appropriate.

¹⁵ June 7 Letter at 3.

¹⁶ Letter of May 27, 2005 from Gary L. Phillips, SBC Communications Inc., & Lawrence J. Lafaro, AT&T Corp., to Hon. Kevin Martin, Chairman, Federal Communications Commission at 7 (citing precedent for not consolidating simultaneously pending merger reviews into a single proceeding); Joint Opposition of SBC Communications Inc. & AT&T Corp. & Reply to Comments at 6, 62 n.171 (filed May 10, 2005).

¹⁷ June 7 Letter at 1, 3.

¹⁸ *In re Applications of MediaOne Group, Inc. & AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd. 9816, 9892-93 ¶¶ 179-81 (2000) (rejecting the 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 Honorable Kevin J. Martin

June 9, 2005

Page 5

AOL/Time Warner, Comcast/AT&T Broadband, Cingular/AT&T Wireless, and others that the Commission has handled in the normal course. On a numerical level, many of these other mergers involved significantly higher purchase prices than this one.¹⁹ More importantly, however, SBC and AT&T's businesses largely are complementary in character rather than overlapping. In that sense, this merger is not any more difficult analytically than these other mergers.

* * * * *

For all these reasons and those we have presented in our other filings, we respectfully urge the Commission to continue its diligent efforts to complete its review within 180 days of the public notice and, of course, to approve the merger as in the public interest.

Sincerely,

SBC Communications Inc.

AT&T Corp.

/s/ Gary L. Phillips

/s/ Leonard J. Cali

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

Leonard J. Cali
AT&T Corp.
1120 Twentieth Street, N.W.
Suite 1000
Washington, D.C. 20036
Tel: (202) 457-2120

Attachment

Footnote continued from previous page
the nature of the relevant markets of the applicants in the AOL-Time Warner merger" and concluding that the mergers should be reviewed separately).

¹⁹ The purchase price for Time Warner at the time the AOL/Time Warner merger was announced was approximately \$182 billion in stock and debt. Tom Johnson, *That's AOL Folks*, CNNMoney (Jan. 10, 2000), at http://money.cnn.com/2000/01/10/deals/aol_warner/. Cingular acquired AT&T Wireless for approximately \$41 billion in stock. Press Release, Cingular Wireless, Cingular to Acquire AT&T Wireless (Feb. 17, 2004), available at <http://www.prnewswire.com/micro/cingul04>. (Because the Comcast/AT&T Broadband transaction was not an acquisition, a comparable figure is not readily available.) The purchase price in each of these acquisitions far exceeds the approximately \$16 billion that SBC plans to pay for AT&T. See SBC & AT&T Press Release, SBC to Acquire AT&T (Jan. 31, 2005), available at <http://sbc.merger-news.com/materials/am.html>.

The Honorable Kevin J. Martin

June 9, 2005

Page 6

cc (via email):

The Honorable Kathleen Q. Abernathy

The Honorable Michael J. Copps

The Honorable Jonathan S. Adelstein

Daniel Gonzalez

Michelle Carey

Lauren Belvin

Jessica Rosenworcel

Scott Bergmann

Thomas Navin

James Bird

Gail Cohen

Kathleen Collins

William Dever

Charles Iseman

David Krech

Jonathan Levy

JoAnn Lucanik

Marcus Maher

Erin McGrath

Gary Remondino

Mary Shultz

Jeff Tobias

Gary R. Lytle (Qwest)

David L. Sieradzki (Hogan & Hartson
L.L.P.)

June 9, 2005

BY EMAIL

David L. Sieradzki
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

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 Mr. Sieradzki:

We have received the letter that you sent on June 7, 2005, on behalf of Qwest in regard to the confidential materials in the SBC/AT&T merger proceeding at the FCC.²⁰ You style this letter as an attempt to “resolve . . . directly with SBC and AT&T” concerns you have about alleged “deficiencies” in the production of confidential information “without burdening the FCC and its staff.”²¹ Nevertheless, at the time your letter was sent to us, and before we could review it much less respond to it, it was also sent to the Chairman, the Commissioners, and 19 FCC staff members, thereby vitiating its stated purpose.²² This type of conduct can only raise further questions about Qwest’s good faith and true intentions.

You begin your letter with a grave accusation against SBC and AT&T, claiming that they “have violated both the letter and the spirit”²³ of the Protective Orders. As shown below, there is no basis for that accusation. Both SBC and AT&T have made extraordinary efforts to comply with every aspect of the Protective Orders and make all materials – including highly confidential, competitively sensitive information – available to all of the parties, most of which are competitors. Qwest’s representatives have been provided with access to the data rooms, which are located less than one mile from its counsel’s offices, whenever they have sought it. No representative of Qwest has been denied access to the confidential materials, and in every instance SBC and AT&T have waived the five business day waiting period specified in the Protective Orders between

²⁰ Letter from David L. Sieradzki, Hogan & Hartson LLP, dated June 7, 2005, to Peter J. Schildkraut, Arnold & Porter LLP, and David L. Lawson, Sidley Austin Brown & Wood LLP (“Sieradzki Letter”).

²¹ *Id.*, pp. 6, 1.

²² Letter from Gary R. Lytle, Qwest, dated June 7, 2005, to Kevin J. Martin, Chairman, Federal Communications Commission (attaching the Sieradzki Letter).

²³ Sieradzki Letter, p. 1.

execution of an “Acknowledgment of Confidentiality” and provision of access.²⁴ Qwest has been given copies of all materials that may be copied, and Qwest’s representatives have been allowed to use laptop computers to take notes on the remaining materials without any restrictions. Qwest has received the same index to the materials that the Commission received, and the materials have been organized for Qwest in the same way that they were organized for the Commission, all as provided for by the FCC Information and Document Request. In short, SBC and AT&T have accorded Qwest all of the rights that it has under the Protective Orders, and then some. The generalized and unsupported claims to the contrary in your letter are meritless.

You next reiterate your claim that Qwest still lacks “access to basic data.”²⁵ The fact is that Qwest and others have made only limited efforts to review these data. As the table below shows, neither Qwest nor any other party has availed itself fully of the opportunities that have been made available to visit the data rooms that contain all of the materials that have been provided to the FCC.²⁶

Data Room	Used by Qwest	Used by Other Parties	Vacant
Arnold & Porter LLP	4%	13%	83%
Crowell & Moring LLP	17%	18%	65%
Sidley Austin Brown & Wood LLP	6.25%	18.75%	75%

SBC and AT&T recognize that they have provided the Commission with a significant number of documents,²⁷ as part of their commitment to be fully responsive to the FCC in the course of its review of their merger. They seriously doubt, however, that your firm, which is the largest in Washington, D.C. and has significant experience in major litigation, is unable to conduct a meaningful review of these documents.

More specifically, SBC and AT&T reject any claim that the index, which was prepared to the specifications set forth in the FCC Information Request, is deficient. It

²⁴ For example, we received your Acknowledgment of Confidentiality on May 16, 2005, and we allowed you to visit a data room on the following day, May 17, 2005, although the Protective Order did not require your admission until May 23, 2005. Similarly, we received Acknowledgments of Confidentiality from personnel in your firm on both June 1, 2005 and June 7, 2005, and admitted them to the data rooms on the same day rather than requiring them to wait for five business days.

²⁵ Sieradzki Letter, p. 1.

²⁶ The table shows the percentage of time during the business day that the data rooms were occupied between May 16, 2005, and June 7, 2005.

²⁷ We categorically reject your attempt to treat the Verizon/MCI documents as part of this merger proceeding

was the FCC's prerogative, and not Qwest's, to determine the format of the index. You do not even purport to show that SBC and AT&T have not complied in full with the FCC's instructions. It is also untrue, as you allege without any basis, that "the parties have created indexes for themselves"²⁸ and, in any event, even if they had, nothing in the Protective Order gives Qwest the right to data that are not part of the record in this proceeding.

Your other charges and demands are equally unreasonable. You ask that representatives of Qwest (and the dozens of other parties to this proceeding) should be allowed to take out of the data rooms electronic copies of extraordinarily sensitive competitive data, such as business plans, segmented revenues, and network design information.²⁹ You also suggest that such material should be available for review not only by outside counsel, consultants, and experts, but by in-house Qwest personnel who "are often in a better position to understand the implications of a certain data point or piece of information."³⁰ SBC and AT&T cannot accommodate this request.

As an initial matter, notwithstanding your generalized claims to the contrary, your real complaint here is not about compliance with the Protective Orders, but rather about the substance of the Protective Orders themselves. You seem to believe that, at least for purposes of this proceeding, the Commission has failed to balance properly the needs of parties to protect sensitive proprietary information that they are compelled to submit to the Commission and the legitimate interest of competitors and other members of the public to participate in the license transfer process. Hence, you are asking SBC and AT&T to give up the rights they have under the Protective Orders and longstanding Commission precedents and acquiesce to a new process that dramatically tilts the balance away from the protection of proprietary information. You have advanced no basis for such different treatment in this case.

The Protective Orders recognize that there is "information so sensitive that it should not be copied by anyone"³¹ and information which, "if released to competitors, will allow those competitors to gain a significant advantage in the marketplace"³² and provides appropriate protections for such information, including restrictions on copying and restrictions on dissemination to in-house personnel. Such restrictions are critical because, as is universally recognized, confidential information, especially in electronic

²⁸ Sieradzki Letter, p. 5.

²⁹ *Id.*, p. 4.

³⁰ *Id.*, p. 2.

³¹ First Protective Order, WC Docket No. 05-65, ¶ 6.

³² Order Adopting Second Protective Order, WC Docket No. 05-65, ¶ 2.

form, is vulnerable to loss, theft, and misuse.³³ Indeed, the communications law bar itself recently has experienced the mishandling of confidential data. In one incident, competitively sensitive information about the revenue, margins and cost structures of a licensee were inadvertently posted on ECFS, and then reported in the trade press.³⁴ In another incident, an outside law firm inadvertently filed confidential information on ECFS, and that information was widely disseminated.³⁵ In yet another incident, summaries of a dozen confidential documents were emailed to 13 executives of a competitor.³⁶ Limits on access and copying are necessary because, without these restrictions, the chances of disclosure increase significantly. Parties to FCC proceedings have long operated within the confines of these limits, and SBC and AT&T are not prepared to waive the rights they have to protect competitively sensitive information.

SBC and AT&T also believe that they have appropriately designated information under the Protective Orders. Indeed, with respect to the Second Protective Order treatment accorded to the Narrative Response and its exhibits, SBC and AT&T have followed precisely the list of specifications set forth in the Second Protective Order.³⁷ As SBC and AT&T have stated before,³⁸ if Qwest or any other party believes a particular document has not been appropriately classified, SBC and AT&T would be happy to review again the document in question. Although SBC and AT&T have made this policy clear from the outset, Qwest has not availed itself of this option. Instead, your letter demands that SBC and AT&T change the classification of a lengthy list of documents that seems to have been prepared with little discernment. For example, your list includes documents that do not exist³⁹ and documents that outside counsel for Qwest has previously declined to review.⁴⁰ Most importantly, your list includes documents that are

³³ See, e.g., Joseph Schuman, *Another Massive Breach of Private-Record Protection*, Wall Street Journal, June 7, 2005.

³⁴ *Pegasus Satellite Communications' Financial Data Became Public*, Communications Daily, Dec. 14, 2004.

³⁵ *Private ALTS Document Mistakenly Lands on FCC Website*, Communications Daily, Oct. 4, 2004.

³⁶ *In re Applications of America Online Inc. & Time Warner Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 2400 (CSB 2001).

³⁷ Order Adopting Second Protective Order, WC Docket No. 05-65, ¶ 4.

³⁸ See, e.g., Letter from Gary L. Phillips, SBC Communications Inc., and Lawrence J. Lafaro, AT&T Corp., to Kevin Martin, FCC, dated May 27, 2005.

³⁹ For example, you seek a copy of the exhibits and attachments to the Narrative Responses relating to Specification 2. There are no such exhibits or attachments.

⁴⁰ For example, shortly after Acknowledgments of Confidentiality were filed for Qwest and some of its outside counsel on March 25, 2005, we asked whether the organizational charts that you now seek would be reviewed. We were told that there was no interest in reviewing those organizational charts.

David L. Sieradzki

June 9, 2005

Page 5

among the most sensitive in this proceeding. Indeed, you appear to have made no attempt whatsoever to consider the proprietary nature of the documents on your list, as reflected by the fact that you seek a large majority of the pages of exhibits to the Narrative Response. By way of example, among the documents in those exhibits are business plans, segmented revenues, and network design information. Nowhere in your letter do you acknowledge the confidentiality concerns associated with widespread availability or copying of these and other documents you have requested. We reiterate our clients' willingness to consider promptly any good faith claim that they have misclassified a document. We do not believe your letter to be such a claim.

The FCC has created a process for review of confidential information in this proceeding which closely parallels those of prior proceedings and offers abundant opportunities to the parties to do so. SBC and AT&T believe that they have complied

fully with the requirements of this process, and they encourage Qwest to avail itself of the opportunities available to it under this process for review of confidential information.

Sincerely,

/s/ Peter J. Schildkraut

Peter J. Schildkraut
Counsel for SBC Communications Inc.

Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
Tel: (202) 942-5634

/s/ David L. Lawson

David L. Lawson
Counsel for AT&T Corp.

Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8088