August 24, 2005

BY ECFS

Marlene H. Dortch
Secretary
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 Ms. Dortch:

We are writing on behalf of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") in response to an *ex parte* presentation made on August 9, 2005 by Patrick J. Donovan and Richard M. Rindler of Swidler Berlin LLP on behalf of sixteen carriers (the "Commenters").[1] There, the Commenters repeat their discredited allegations that competitive harms will flow from the SBC/AT&T merger, and on this basis, ask the Commission to impose a litany of radical conditions on its approval of the merger applications. We have demonstrated repeatedly that no competitive harms will flow from the merger. As a result, the conditions that the Commenters propose are unrelated to any merger-specific effect and have no place in this proceeding. In addition, many of the conditions that the Commenters propose address issues being considered in industry-wide proceedings, and as this Commission has repeatedly and consistently held, the public interest is best served if industry-wide matters are addressed in broad proceedings of

[1] ACN Communications Services, Inc., ATX Communications, Inc., Biddeford Internet Corporation d/b/a/ Great Works Internet, Bridgecom International, Inc., Broadview Networks, Inc., BullsEye Telecom, Inc., Cavalier Telephone Mid-Atlantic LLC, CTC Communications Corp., Gilette Global Network, Inc. d/b/a Eureka Networks, Granite Telecommunications, LLC, Lightship Telecom LLC, Lightyear Network Solutions, LLC, Pac-West Telecomm, Inc., US LEC Corp., and US TelePacific Corp. d/b/a TelePacific Communications.

general applicability.[2] In all events, none of the conditions proposed by Commenters is appropriate.

Special Access

In their continuing quest to use the merger as a vehicle for obtaining a regulatory windfall, the Commenters continue to rely on empty rhetoric and "facts" that have been shown to be inaccurate. The Commenters continue to claim, for example, that AT&T is a significant special access wholesale provider to CLECs and has more extensive local facilities holdings than other CLECs, although we have repeatedly placed facts in the record that conclusively disprove this claim. Specifically, we have shown that AT&T's annual sales of local private line service to carriers (*i.e.*, the equivalent of SBC wholesale special access sales) in the SBC region, when compared with SBC's total wholesale special access sales, are far too low to have any competitive significance.[3] The Commenters also cite the BOC UNE Fact Report in claiming that AT&T and MCI possess 50% of all nationwide local fiber routes, yet we have shown that this report only provided local fiber estimates for eight of twenty-five CLECs listed, and that other studies indicate that CLECs such as XO, McLeod, Telecove, and ITC possess amounts of local fiber comparable to or larger than AT&T.[4]

Nor have the Commenters bolstered their assertion that AT&T's presence as a wholesale access provider has a constraining effect on price. The Commenters' claim that AT&T and MCI offer rates from 15 to 35% below SBC's tariffed rates is at best misleading, given that their source document includes a long list of competing access providers that offer such rates and does not highlight either AT&T or MCI for offering lower alternatives than other CLECs.[5] In addition, the comparison in that citation was to SBC's "rack" rates, not to the actual rates paid by special access customers under the

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[2] *In re Applications of AT&T Wireless Servs., Inc. & Cingular Wireless Corp.*, Mem. Op. and Order, 19 FCC Rcd. 21522, 21592 ¶ 183 (2004); *In re Applications of Comcast Corp., AT&T Corp., & AT&T Comcast Corp.*, Mem. Op. and Order, 17 FCC Rcd. 23246, 23257, 23301 ¶¶ 31, 138-39 (2002); *In re Applications of S. New Eng. Telecomms. Corp. & SBC Communications Inc.*, Mem. Op. and Order, 13 FCC Rcd. 21292, 21306 ¶ 29 (1998); *In re Applications of Time Warner & Am. Online, Inc.*, Mem. Op. and Order, 16 FCC Rcd. 6547, 6550 ¶ 6 (2001); *In re Applications of Craig O. McCaw & Am. Tel. & Tel. Co.*, Mem. Op. and Order, 9 FCC Rcd. 5836, 5904 ¶ 123 (1994); *In re Applications of Gen. Motors Corp., Hughes Elecs. Corp. & News Corp. Ltd.*, Mem. Op. and Order, 19 FCC Rcd. 473, 605-09 ¶¶ 304-09, 313-14 (2004); *In re Applications of Ameritech Corp. & SBC Communications Inc.*, 14 FCC Rcd. 14712, 14925, 14928-29, 14942-43, 14948-50 ¶¶ 518, 526, 557-59, 569-71 (1999); *In re Applications of Tele-Communications, Inc. & AT&T Corp.*, Mem. Op. and Order, 14 FCC Rcd. 3160, 3183 ¶ 43 (1999).

[3] Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, FCC at App. A1, WC Docket No. 05-65 (Aug. 1, 2005) ("Aug. 1 Ex Parte").

[4] *Id.* at App. B3.

[5] *See* Reply Comments of SBC Communications Inc. at 45-46, WC Docket No. 04-313, CC Docket No. 01-338 (Oct. 19, 2004) (citing NPRG study).

variety of discount arrangements that account for the majority of SBC's special access revenues.[6] In all events, we already have provided detailed evidence showing that AT&T's wholesale local private line rates are generally *higher* than those offered by other CLECs.[7]

The Commenters also attempt to breathe new life into a theory that the Commission has rejected, namely, that the merger of a facilities-based long distance carrier and a BOC creates additional incentives and opportunities for the BOC to discriminate. As the Commission stated in the Qwest/US West merger proceeding, an incumbent LEC would have no greater "incentive to degrade the quality of . . . access it provides to competing interexchange carriers whether the incumbent LEC is providing . . . [interexchange] service[s] over facilities it constructed or that it purchased from another carrier."[8]

Because the merger does *not* materially increase concentration for special access services or the risk of undetected discrimination, none of the self-serving "remedies" the Commenters propose to address these ostensible harms is remotely necessary or appropriate. The divestitures they seek might benefit certain carriers by enabling them to acquire new facilities "on the cheap," but they are not justified by any increase in market power resulting from the merger. Moreover, they would frustrate the rights and legitimate interests of customers by increasing the risk of service outages and forcing them to deal with suppliers they have not chosen and that may lack the ability to deliver the same levels of service and proprietary features for which these customers have contracted. Indeed, many customers have specifically contracted for sophisticated end-to-end solutions and service quality levels, and these customers would lose the benefit of their bargains in the wake of forced divestitures.

Equally indefensible is their fresh look proposal, which is nothing more than an attempt to give the Commenters an immediate crack at customers that are contractually committed to AT&T and on whose behalf AT&T may have incurred unrecovered sunk costs. Because "fresh look" upsets private contract relationships, the Commission has repeatedly rejected fresh look even for contracts that ostensibly reflected unequal bargaining power that was remedied by a subsequent rule change.[9] The case for fresh

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[6] *See id.* at 46 & Attach. A ¶ 8 (Reply Decl. of Parley C. Casto).

[7] Aug. 1 Ex Parte at App. A4.

[8] *In re Qwest Communications Int'l Inc. and US West, Inc.*, Mem. Op. and Order, 15 FCC Rcd. 5376, 5398 ¶ 42 (2000); *see also In re Applications of PacTel & SBC Communications Inc.*, 12 FCC Rcd. 2624, 2469 ¶ 54 (1997)("[W]e observe that both SBC and PacTel are capable of price squeezes at present, and the pertinent issue in this [merger] proceeding is the incremental increase in the scope of the price squeeze that the proposed transfer will make possible for the first time."). *See generally* Joint Opp'n 46-53, WC Docket No. 05-65.

[9] *See In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers; Implementation of the Local Competition Provisions of the Telecomms. Act of 1996; Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, Report

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look is even weaker here, where there is no past "injustice" to be remedied, and the customer contracts at issue will expire in due course in any event.[10]

Likewise, the nondiscrimination conditions the Commenters propose are wholly unnecessary as safeguards against any increased risk of discrimination. Indeed, they do not even purport to offer anything other than high-level rhetoric in support of their proposal that the Commission reinstate Section 272 requirements that have already sunset by operation of law. This proposal is thus as groundless as it is unwarranted. Similarly, their proposal that SBC and Verizon be required to make available to others the lowest rate at which they provide service to their own affiliates or to other BOCs, regardless of volume or term, is nothing more than a thinly disguised attempt to codify *reverse discrimination.* The Commenters do not even purport to explain why this obviously self-serving proposal is necessary given that: (1) the Communications Act already prohibits unjust and unreasonable discrimination in the provision of any Title II service, contractual or otherwise, and requires that such services be available to similarly situated customers; and (2) the Commission's pricing flexibility rules already require price cap LECs to certify, before making a pricing flexibility contract available to their own affiliate, that they already provide service pursuant to that contract to an unaffiliated customer.[11]

By the same token, the Commenters' call for LRIC pricing, extended promotional discounts and comprehensive UNE and special access performance metrics has no place in this merger proceeding. Not only does this merger not create any competitive harms

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and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17400-03 ¶¶ 692-99 (2003), *corrected by* Errata, 18 FCC Rcd. 19020 (2003), *vacated and remanded in part, affirmed in part, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S. Ct. 313 (2004) (rejecting request for "fresh look" remedy); *see also In re Direct Access to the INTELSAT System*, Report and Order, 14 FCC Rcd. 15703, 15751 ¶ 118 (1999) (same) ("*INTELSAT Order*"); *In re Pet. for Modification of Fresh Look Policy*, Mem. Op. and Order, 8 FCC Rcd. 5046, 5050 ¶¶ 22-23 (1993) (same). The theory of a fresh look remedy is that, following a fundamental regulatory change that creates a new environment in which customers have more choices among suppliers, all customers (and suppliers) should have the opportunity to take advantage of the more competitive environment and that existing long-term contracts might otherwise "lock up" the market and prevent customers from obtaining the benefits of the new, more competitive environment. *See INTELSAT Order* 14 FCC Rcd. at 15752 ¶ 119. As noted in the text, those conditions are not present here. Even if they were, though, a fresh look is considered an extreme remedy that is rarely used, because of the potentially severe market disruption and the fact that it denies sophisticated parties the benefits of their bargains. *Id*. at 15754 ¶ 125.

[10] The contracts at issue generally are not "long term," precisely because customers want flexibility to take full advantage of the dynamic competitive environment. Indeed, most contracts are only two or three years and, in response to continually declining prices, many contracts include annual rate "refresh" provisions.

[11] 47 C.F.R. § 69.727(a)(iii).

that might be remedied through such performance metrics, but SBC provides performance assurances for special access through tariffs, service level agreements, and negotiated pricing flexibility contracts.[12] In addition, there are open proceedings to consider whether the Commission should adopt standards for evaluating ILEC performance in the provisioning of UNEs[13] and special access services, and special access tariffing requirements.[14]

Internet

The Commenters continue to assert that the merger will increase concentration in the provision of Internet Backbone services so significantly as to lead to de-peering and discrimination in the price and quality of interconnection. We have provided ample evidence, however, that the merger will not meaningfully increase concentration in the provision of Internet Backbone services.[15] We have further shown that the combined company could not successfully engage in global, near-global or targeted de-peering of the numerous Internet Backbone Providers ("IBPs") currently peered with AT&T,[16] and that even considering the effects of the Verizon/MCI merger concurrently with the SBC/AT&T merger, the analysis remains unchanged.[17] The combined company's post-merger shares will simply be too low to make any strategic de-peering profitable, and thus any threats to do so would not be credible.[18]

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[12] Letter from Brett A. Kissel, SBC, to Marlene H. Dortch, FCC, CC Docket No. 01-321 (May 27, 2004).

[13] *In re Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, 16 FCC Rcd. 20641 (2001).

[14] *In re Performance Measurements and Standards for Interstate Special Access Servs.*, Notice of Proposed Rulemaking, 16 FCC Rcd. 20896 (2001); *In re Special Access Rates for Price Cap Local Exch. Carriers, AT&T Corp., Pet. for Rulemaking to Reform Regulation of Incumbent Local Exch. Carrier Rates for Interstate Special Access Servs.*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994 (2005).

[15] Decl. of Marius Schwartz at Table 2, WC Docket No. 05-65 (SBC and AT&T combined would account for less than 20% of Internet traffic).

[16] Reply Decl. of Marius Schwartz ¶ 26, WC Docket No. 05-65 (conclusions on global de-peering); *id.* ¶¶ 29-32 (targeted de-peering).

[17] Even if the effects of the SBC/AT&T and Verizon/MCI transactions are combined as if they were a single transaction (and we have shown why it would not be appropriate to do so, *see* Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, FCC at 3 n.6, WC Docket No. 05-65 (Aug. 15, 2005)), the conclusion would not change. *See* Reply Decl. of Marius Schwartz ¶¶ 35-38, WC Docket No. 05-65; Decl. of Michael Kende ¶ 8, WC Docket No. 05-75 (Verizon and MCI combined would account for less than 10% of Internet traffic, and would continue to rank fourth post merger).

[18] *See also* Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Gary Remondino, FCC, WC Docket No. 05-65 (July 6, 2005); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-65 (July 26, 2005).

In the absence of any anticompetitive effects arising in the Internet Backbone segment, the conditions that the Commenters propose are unwarranted. Requiring provision of interconnection and transit services to non-peering Internet Service Providers ("ISPs") is wholly unnecessary since there will remain at least four Tier I Internet IBPs not party to either of the pending transactions – Level 3, Qwest, Global Crossing and Sprint – as well as a half-dozen other IBPs that are, today, fully peered with AT&T, any of which could provide non-peered ISPs competitively priced transit services. Furthermore, the Commenters' LRIC pricing proposal would have the Commission enter into the regulation of Internet connectivity, which runs counter to such deregulatory moves as the Commission's recognition that investment in Internet access is best achieved by not compelling facilities owners to share their facilities.[19] As for the net neutrality proposal, this is not a merger-specific issue. The Commission already has set forth its policy statement for all broadband providers,[20] and the Commission has opened a comprehensive proceeding addressing the issue of IP-enabled services.[21]

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In sum, the Commenters have offered no new evidence of any competitive harm flowing from the merger and, as we have demonstrated with data provided in the proceeding, there is no basis for imposing any conditions on the grant of the merger applications.

Sincerely,

SBC Communications Inc.	AT&T Corp.
/s/ Gary L. Phillips	**/s/ Lawrence J. Lafaro**
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cc (via email): Commissioner Abernathy

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[19] News Release, FCC, FCC Eliminates Mandated Sharing Requirement on Incumbents' Wireline Broadband Internet Access Services (Aug. 5, 2005); *Nat'l Cable & Tel. Ass'n v. Brand X Internet Servs.*, No. 04-277, 2005 U.S. LEXIS 5018 (June 27, 2005).

[20] News Release, FCC, FCC Adopts Policy Statement: New Principles Preserve and Promote the Interconnected Nature of Public Internet (Aug. 5, 2005).

[21] *In re IP-Enabled Servs.*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004); *In re IP-Enabled Servs., E911 Requirements for IP-Enabled Serv. Providers*, First Report and Order and Notice of Proposed Rulemaking, WC Docket Nos. 04-36, 05-196, FCC No. 05-116, 2005 WL 1323217 (rel. June 3, 2005).

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