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EX PARTE

File via ECFS

October 5, 2005

Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW B-204
445 12th Street SW
Washington, DC 20554

RE: WC Docket No. 05-65, DA 05-656, *In the Matter of SBC/AT&T Applications for Approval for Transfer of Control*

Dear Ms. Dortch:

Attached to this correspondence is a letter from Robert L. Connelly, Jr., of Qwest to FCC Secretary Marlene H. Dortch, dated October 5, 2005. Today's submission responds to the September 27, 2005 letter of Gary L. Phillips, SBC Services, Inc. to Marlene H. Dortch, FCC, in which SBC addressed issues that had been raised by Qwest in its September 22, 2005 *ex parte* concerning the new barriers to competition resulting from the increased market power arising from SBC's acquisition of AT&T. Please include this correspondence and the attached letter in the record of the above-captioned proceeding.

Pursuant to the March 11, 2005 *Public* Notice (DA 05-656), a copy of this correspondence (and attachment) is also being provided to the following FCC personnel: Marcus Maher and Gary Remondino of the Wireline Competition Bureau, Jeff Tobias and Mary Shultz of the Wireless Telecommunications Bureau, David Krech and JoAnn Lucanik of the International Bureau, Charles Iseman of the Office of Engineering and Technology, James Bird of the Office of General Counsel, and Jonathan Levy of the Office of Strategic Planning and Policy Analysis. In addition, a copy of this correspondence is being provided to the FCC's duplicating contractor, Best Copy and Printing, Inc.

This ex parte submission is being filed pursuant to 47 C.F.R. § 1.1206(b).

Sincerely,

/s/Melissa Newman

Attachment

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Qwest
Spirit of Service

October 5, 2005

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., SW
Washington, D.C. 20554

RE: SBC/AT&T Applications for Approval of Transfer of Control – WC Docket No. 05-65

Dear Ms. Dortch:

In its September 22, 2005, ex parte filing, Qwest brought to the Commission's attention actions by SBC designed to build bulwarks around the increased market power it will obtain through its acquisition of AT&T. These actions, particularly taken together, would make it significantly less likely that any other company will be able to reach the economies of scale and scope needed to replace AT&T's competitive force in the SBC region.[1]

This letter will respond to SBC's recent attempt, in its September 27, 2005, ex parte filing, to sweep these matters under the rug.[2] Qwest's response will be brief, given the transparency of the SBC defenses. Rather than address head-on the substantive contentions of Qwest, SBC has chosen first to malign Qwest's motives and then to present selected, and often distorted, facts to facilitate its sidestepping of the key public policy issue raised by Qwest: the actions SBC is taking, now that it believes AT&T is out of the competitive mix, are designed to materially restrict the growth of competition and competitors in SBC's local service territory. In effect, SBC is unabashedly telling Qwest and other competitors that having spent $16 billion to acquire its largest competitor, it has no intention of ever permitting a competitor of similar size and scale to develop.

Under the Communications Act, the Commission can only approve the SBC/AT&T transaction if it finds that, notwithstanding the elimination of AT&T, the acquisition "enhances

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1 *See* Letter of Robert L. Connelly, Jr., WC Docket No. 05-65 (September 21, 2005 ("Qwest Letter").

2 *See* Letter of Gary Phillips, WC Docket No. 05-65 (September 27, 2005) ("SBC Response").

competition."[3] Even absent other anti-competitive conduct by SBC, it would require an incredible level of out-of-region pro-competitive impacts and in-region conditions for SBC's acquisition of its largest competitor to be justified. There is no way, however, for the Commission to find this acquisition to be in the public interest when, based on the record before it, it is clear SBC is attempting to erect barriers that would make it difficult, if not impossible, for any new or expanded competitive force to emerge and replace the scale, scope and influence of AT&T.

By capturing AT&T's entire customer base -- immediately by acquisition rather than through market competition -- SBC is left facing only balkanized networks supported by minor customer sets. That is why the recent SBC conduct is so revealing. Even in advance of its merger, SBC is creating new restrictions that, individually and collectively, will prevent even the competitors that remain from working to reduce their dependency on SBC special access. SBC is trying to ensure that no other firm is able to replace AT&T as a competitive force in its region.

SBC's primary response is to ridicule Qwest's motives for bringing these facts to the Commission's attention. SBC's overheated rhetoric is telling in itself. According to SBC, Qwest is on a "desperate mission to sabotage other BOC mergers."[4] SBC endeavors to bury the issue by claiming that Qwest is participating here only out of disappointment that it did not acquire MCI. The Commission will quickly see through this rhetorical ruse. From the beginning, Qwest has made clear its goal to become a more significant competitive force in the SBC region and elsewhere outside its local service territory. That is why the anti-competitive SBC conduct is so offensive. Indeed, AT&T and MCI were the strongest critics of similar SBC actions in the past, and they would be speaking loudly here but for their acquisitions by the two largest telecom companies in the country.

SBC's secondary strategy is to distort the facts that Qwest has brought to the Commission's attention. Qwest encourages the Commission to closely examine these matters, which go directly to the question under the Act of whether, as required, the SBC-AT&T transaction would "enhance competition." In doing so, the Commission will find that SBC's actions, particularly when viewed together, take advantage of the increased market power SBC will obtain from its acquisition to make the development of replacement competition of AT&T's scale and scope even less likely.

Before turning to the specific deficiencies in SBC's ex parte, it is important to point out that, contrary to SBC's assertions, Qwest has not finally agreed to any special access pricing plan offered by SBC. Qwest and SBC began negotiations in April of this year for a new overlay special access discount plan. There were a number of areas of agreement; however, the matters discussed below and in Qwest's September 22, 2005, ex parte were presented by SBC as take-it-or-leave-it propositions. SBC made several commitments to file the contract tariff that included the offensive provisions. To date it has not done so. Qwest can only assume SBC has failed to act because Qwest had the temerity to raise with the Commission SBC's anti-competitive behavior.

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[3] *Memorandum Opinion and Order*, 12 FCC RCD 19985, para. 30 (rel. August 14, 1997 In making this determination, the Commission's analysis "necessarily subsumes and extends beyond the traditional parameters of review under the antitrust laws." Id.

[4] SBC Response at 1.

When Qwest recently inquired why SBC has not filed the contract tariff, a necessary precondition to Qwest being able to agree to anything, SBC responded that Qwest would be receiving SBC's formal response shortly. Qwest received the promised response in the form of a registered letter, dated September 22, 2005, but received by Qwest on October 3, 2005. In this letter, SBC expressed a willingness to reopen negotiations on the special access overlay plan, including the special access/UNE ratio issue and grooming restrictions.. While Qwest appreciates that SBC is apparently willing to engage in further discussions, it is clear that absent Qwest raising SBC's anti-competitive conduct in connection with the proceedings to approve its acquisition of AT&T, SBC would have hewed to its take-it-or-leave-it approach.

New Grooming Restrictions:

Qwest has discussed the new and extraordinarily stringent limits SBC seeks to impose on grooming of special access facilities, either to move from SBC to CLEC networks or to move to more efficient SBC facilities. SBC tries to defend its new grooming restrictions, for which it has provided no empirical or historical basis, with four empty assertions. None of these goes to the fundamental issue of SBC's attempts to prevent the development of special access competition reflecting meaningful scale economies.

First, SBC attempts to defend its conduct by suggesting that it is applying to all of its special access purchasers, on a non-discriminatory basis, the same arbitrary and unreasonable grooming limitations.[5] Apparently, SBC believes that imposing limits on all of its customers that bear no rational relationship to what it has been able to do in the past, at least for Qwest, somehow makes legal this anti-competitive conduct. The disingenuousness of this assertion is patent.

Second, SBC suggests that the grooming restrictions are just part of a larger deal with other concessions to Qwest and that Qwest could have renewed an alternative SBC discount plan (MVP) if it was unhappy.[6] However, SBC is well aware that the MVP was an unattractive alternative for Qwest because that plan requires revenue commitments that would have prevented Qwest from executing on its plan to increase its use of competitive access vendors in lieu of SBC where they are available. When Qwest made that clear to SBC, SBC moved to impose new grooming restrictions that achieved the same result. At first, SBC presented those grooming restrictions as a point of negotiation; later, SBC imposed them unilaterally in its methods and procedures document.

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[5] SBC Response at 3, note 6. There is, of course, no way for Qwest to validate this bald assertion by SBC. Qwest suggests that the Commission should independently verify SBC's contention. It would be telling if SBC is not applying this arbitrary limitation to all carriers, but rather is exacerbating the anti-competitive effects of its practices by treating grooming requests from carriers in an *ad hoc* and discriminatory fashion.

[6] SBC self-servingly characterizes itself as offering "substantial concessions" to Qwest. SBC Response at 2. Needless to say, the materiality of concessions is in the eye of the beholder. As SBC knows, Qwest's overall goal is to reduce its special access cost by leveraging competitive access where it can. To the extent that SBC limits that opportunity through grooming restrictions, it prevents Qwest from avoiding SBC special access prices whatever the alleged "discount" level.

Third, SBC asserts that its grooming restrictions are reasonable polices to control expenses.[7] Nothing in the SBC letter presents any justification for the sharp restrictions here, however, or demonstrates why SBC is required to impose them at the arbitrarily low level it has dictated (further subdivided by region and by quarter of the year). As Qwest stated in its September 22, 2005, ex parte, this limitation is significantly lower than the number of circuits Qwest groomed from SBC's network in 2004 or even in the first six months of 2005.[8] The simple fact is that SBC is aware of Qwest plans to groom circuits away from the SBC network; aware that Qwest already has done so with many more in prospect; and is taking actions to leverage its increasing market power to prevent this result.[9]

Fourth, SBC facilely argues that the fact it removed the grooming restrictions from its tariff is somehow evidence that it is responding to market forces by making a "concession" to Qwest.[10] This is absurd. Qwest objected to the unilateral imposition of these anticompetitive restrictions and continues to do so today. It is no "concession" to Qwest for SBC to impose the same restrictions by another procedure -- internal methods and procedures separate from the tariff

SBC, in each case, is ignoring the fundamental issue: SBC is leveraging its dominant position in the special access market -- dominance increased by its elimination of AT&T -- to prevent Qwest from using other CLECs as sources of special access. The result is to limit the ability of Qwest to reduce its special access costs in the SBC region. It also reduces the market opportunities of CLECs, and prevents them from growing scale and scope to replace AT&T as competitive forces in the SBC region.

Finally and suspiciously, SBC does not address another issue raised by Qwest. Qwest questioned whether these new grooming restrictions reflect a redeployment of internal resources to expedite the combination of the AT&T and SBC networks post-merger to optimize and expedite the achievement of synergies. If this is the case, such preferential treatment would violate Sections 201, 202 and 272 of the Act.[11] This issue deserves more Commission scrutiny. It is one thing for SBC to take away resources that its carrier customers need to achieve more efficient networks. It would be even worse if SBC were doing so because it plans to devote those resources, on a discriminatory basis, to favor its AT&T affiliate post-merger. Indeed, one would assume that with AT&T out of the picture following the merger, SBC would have even more resources available to devote to grooms for companies like Qwest. Based on Qwest's experience grooming AT&T circuits off Qwest's network in its own region, which is much smaller than SBC's, significant SBC resources should be freed up once AT&T is absorbed into SBC.

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7 SBC Response at 2.

8 Qwest Letter at 3.

9 SBC now claims that it will treat grooms to its network in the same manner as grooms away from its network. SBC Response at 2. This is not how SBC articulated the limits to Qwest during negotiations. Indeed, SBC previously advised that it was prepared to groom circuits onto its network at levels over four times the unilaterally imposed annual limitation for grooms off its network. Qwest Letter at 3-4. In any event, of course, the real issue is that Qwest is seeking freedom to move away from SBC special access where it can, not move from CLECs to SBC.

10 SBC Response at 4.

11 Qwest Letter at 6.

95/5 Special Access/UNE Ratio:

Qwest also discussed in its ex parte filing the fact that SBC imposed a requirement limiting Qwest's use of UNEs to five percent of its total local access spend with SBC.[12] This restriction has the practical effect of creating a poison pill that substantially increases the cost for Qwest -- or any other SBC/AT&T competitor subject to a similar policy -- to acquire a CLEC that purchases any significant amount of SBC UNEs. As the price of an acquisition, the majority of those UNEs would need to be converted to more expensive special access on a short timetable.

SBC presents no facially plausible defense of this provision. Its primary claim is that similar 95/5 requirements already are contained in its older MVP tariffs.[13] However, the relevant fact here is that SBC has attempted to impose this limit in the context of the current Qwest negotiations and at a time when SBC is on the cusp of acquiring its single largest competitor, AT&T. In the past, Qwest and others may have been willing, albeit reluctantly, to live with such an anti-competitive provision. Now that two massive megaBOCs confront small competitors like Qwest, these smaller competitors are not estopped from pointing out the competitive repugnancy of the 95/5 proposition.

Furthermore, SBC has expressly made the 95/5 policy automatically applicable to the UNE purchases of any company that Qwest might acquire or with which it might merge and not just to preexisting affiliates. This was a last minute "bait and switch" tactic by SBC as it had initially indicated that it would be at Qwest's option to include the spend of any acquired company in the 95/5 computation.

Finally, SBC has insisted that the policy apply in full throughout its region, whereas under the MVP approach companies at least had the option to designate the circuits to which the plan would not apply. In short, whatever one makes of the restrictions in the MVP plan, it is clear that SBC is now expanding its use of this tool to create a new, stronger barrier to merger by competitors subject to the policy. It is clear, therefore, that SBC seeks only to keep its in-region competition balkanized and fragmented.

Perhaps recognizing the weakness of its position, SBC falls back on a suggestion that the Commission should address the 95/5 restriction in the generic Special Access Rulemaking that was opened in January, 2005. But SBC's ability to impose this limitation, and its incentive to do so, relate directly to the increased market power it will obtain from its purchase of AT&T, and the elimination of AT&T in its region. The Commission must take these actions into consideration when considering whether that merger "enhances competition," and when it determines any conditions that might ensure that the merger achieves that result.

Restrictions on CLEC Mergers:

Qwest also has provided the Commission with evidence that SBC appears to be conditioning certain of its major contracts with other CLECs on retaining an effective veto right

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12 Qwest Letter at 6-7.

13 SBC Response at 4.

over their mergers.[14] This "blacklisting" too would act as a barrier to the creation of new competition in the SBC region of AT&T's scope and scale.

Importantly, SBC does not respond to this point directly. It does not provide the relevant provisions of its contracts so that the Commission and the public can evaluate them and address their potential impact on competition in the SBC region. The fatuity of the SBC defense should be clear from this fact alone. Instead, SBC simply asserts that the change of control provisions are "run-of-the-mill terms" commonly found in commercial contracts.[15] But if this were so, there would be no need for SBC to go to such trouble to hide them from public view.[16]

The Commission should not allow SBC to stonewall on this point. The protective orders in this proceeding more than fully address any truly confidential and proprietary information. The Commission should direct SBC to answer the question of how it is restricting the rights and abilities of CLECs to merge -- and why it is doing so.

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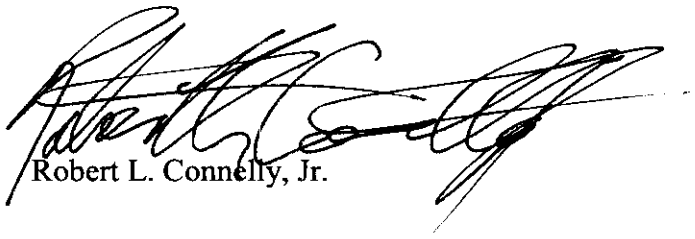
The Commission reportedly is in the final stages of considering the most important acquisition by one telecommunications carrier of another in the history of the country. How the Commission proceeds here will go far to determining the competitiveness of the special access market in the SBC region for years to come. There is compelling evidence that SBC already is leveraging its increased market power from the incipient elimination of AT&T to introduce new barriers that will prevent any other firm from having the opportunity to achieve AT&T's scale and scope. Nothing in the SBC ex parte can or should obscure that basic reality. The anticompetitive SBC conduct simply underscores why robust safeguards -- including divestitures of overlapping AT&T facilities and customers, and safeguards against abuse of special access market power -- are necessary if this merger otherwise is allowed to go forward.

Respectfully submitted,



Robert L. Connelly, Jr.

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14 Qwest Letter at 8-9.

15 SBC Response at 5.

16 SBC tries to make something of Qwest's contract to resell Sprint wireless service. SBC Response at 5. However, this is an "apples to oranges" comparison. First, the Commission has never found that Sprint is a dominant provider of wireless services. By contrast, SBC is the dominant provider of special access in its local service territory, a position it clearly intends to cement by its purchase of its largest special access competitor, AT&T. Second, nothing in that contract gives Sprint a veto right over a Qwest merger with another party. Indeed, Sprint must consent to any Qwest merger or acquisition involving a creditworthy partner.