

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

**APPLICATIONS FOR CONSENT TO TRANSFER OF
CONTROL FILED BY AT&T INC. and BELLSOUTH
CORPORATION**

**WC Docket No. 06-74
DA 06-904**

COMMENTS OF PAETEC COMMUNICATIONS, INC.

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COMMENTS OF PAETEC COMMUNICATIONS, INC.

PAETEC Communications, Inc. (“PAETEC”) submits these comments in response to the April 19, 2006 notice issued by the Federal Communications Commission (the “FCC” or “Commission”) seeking comments on the applications for transfer of control filed by AT&T Inc. and BellSouth Corp. (the “Applicants”).

SUMMARY

PAETEC is an innovative supplier of communications solutions to medium and large businesses and institutions. Based in Fairport, New York, PAETEC offers a full line of telecommunications and Internet services, enterprise communications management software, security solutions, and managed services to its customers through its own switches and lines leased from other carriers in 28 of the nation’s major metropolitan areas. Specifically, PAETEC leases special access service from ILECs to connect subscriber premises with the nearest PAETEC point-of-presence (“POP”). PAETEC does not rely on unbundled network elements, and it is dependent on incumbent local exchange carrier (“ILEC”) special access services for 95 percent of its last-mile connections to end-users.

In its recent SBC/AT&T and Verizon/MCI merger orders, the Commission found that each merger was likely to result in anticompetitive effects in the provision of Type I special access services to certain specific buildings where AT&T or MCI was then the only competitive alternative to

the local incumbent, whether SBC or Verizon. The Commission stated that its concerns about these effects were only allayed because the applicants had entered into consent decrees with the Department of Justice and had “voluntarily” proffered certain additional conditions related to the high capacity loop special access market, conditions which the Commission accepted and incorporated in its final order for each merger.

This proposed merger presents the same potential for anticompetitive consequences in the market for high capacity loop special access in the BellSouth territory that those mergers presented in the SBC and Verizon territories. In addition, this merger also poses a potential for anticompetitive consequences in the market for interoffice transport in the BellSouth territory. PAETEC continues to believe, as it demonstrated in the course of the Verizon/MCI merger proceeding, that the anticompetitive effects that result in both special access markets from the merger of a regional Bell operating company (“RBOC”) and its largest competitor in the special access market extend far beyond a few buildings, and in fact require divestiture of overlapping in-region special access facilities under applicable antitrust and communications law. PAETEC recognizes, however, that such divestiture may not be the Commission’s preferred outcome in this proceeding.

Therefore, PAETEC is urging the Commission also to condition its approval of the transfers on the acceptance by the Applicants of conditions related to both special access markets that are similar to those imposed on the high capacity loop market in the SBC/AT&T and Verizon/MCI merger orders.

Specifically, the Applicants should be required to commit that AT&T's and BellSouth's incumbent local operating companies will implement a performance metrics plan for interstate special access services, under which they will provide performance data on a quarterly basis. Second, the Applicants must commit not to raise rates paid by existing customers of AT&T's DS1 and DS3 local private line services and interoffice transport services that AT&T provides in AT&T's or BellSouth's in-region territory pursuant, or referenced, in its existing tariffs (or any successor or equivalent AT&T tariff). Third, the Applicants must commit that neither AT&T's nor BellSouth's incumbent local telephone companies will provide special access offerings to their wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions. Fourth, the Applicants must commit that, before AT&T/BellSouth provides a new contract tariff to its own section 272(a) affiliate(s), it will certify to the Commission that it provides service pursuant to that contract tariff to an unaffiliated customer other than Verizon or its wireline affiliates. Finally, the Applicants should commit that AT&T/BellSouth will not increase the rates in either AT&T's or BellSouth's interstate tariffs, including contract tariffs, for special access services that it provides in its in-region territory and that are set forth in tariffs on file at the Commission on the merger closing date. Each condition should apply for 30 months after the merger closing date.

I. Introduction

PAETEC supplies its innovative package of telecommunications and Internet services, enterprise communications management software, security solutions, and managed services primarily to medium-sized and larger business customers in Tier 1 markets in AT&T's and BellSouth's territories (particularly California, Connecticut, Florida and Illinois) and throughout the Northeast (Verizon's footprint). PAETEC also provides long distance service throughout the 48 contiguous states. PAETEC's high-quality communications and managed services offerings to business customers require T-1 capacity levels or greater. PAETEC's targeted business customers are mainly medium-size and larger business customers, and they include subscribers in vertical markets such as hotels, hospitals, and universities, as well as government and private firms. Founded in 1998, PAETEC has grown into a successful and profitable company with over \$500 million in annual revenue.

Unlike most other CLECs, PAETEC has obtained its interoffice transport in the form of ILEC tariffed special access offerings or competitive access provider ("CAP") wholesale transport rather than unbundled network elements ("UNEs"). In addition, PAETEC generally uses T-1 special access loops to connect its customers' premises to various points of presence

(“POPs”) distributed throughout its serving area.¹ As a competitive IXC as well as a CLEC, PAETEC also relies heavily on special access to provide dedicated connections to customers who take long distance, but not necessarily local, service from PAETEC. Thus, PAETEC is intimately familiar with the special access market in the AT&T, and to a lesser extent, the BellSouth footprints and with the impact of the proposed merger on competition in those markets.

PAETEC has a relatively conservative network planning strategy. The company generally neither establishes a POP nor orders circuits to that POP until there is a critical mass of ready-customers to be served by such circuits. That way, operational dollars are not needlessly expended by constructing facilities to an ILEC end office or tandem while waiting for customers to sign up for service. PAETEC’s ownership of its switches, in combination with leased transport and special access facilities, results in a core network deployment strategy that requires no UNE loops, collocation, UNE transport, enhanced extended loops (or EELs), or dark fiber. PAETEC’s measured-growth strategy has worked extremely well. Unlike many other competitive telecom startups, PAETEC has never gone through a bankruptcy or financial reorganization, but has managed to grow successfully while honoring its commitments to all of its creditors and investors.

¹ Recently, PAETEC has used commercially negotiated resale of ILEC DS0 services on a very limited basis, primarily to serve smaller branch locations of some of its customers. However, DS0 level services are a very minor component of PAETEC’s overall service offerings.

II. This Merger, Like the SBC/AT&T and Verizon/MCI Mergers Last Year, Will Inevitably Result in Anticompetitive Effects in the Special Access Markets

As successful as PAETEC has been in the competitive telecommunications marketplace, the fact is that its network and the continued growth of its business is dependent on the availability of reasonably priced special access facilities, which PAETEC leases almost exclusively from ILECs because there are very few alternatives to ILEC-provided services. PAETEC is deeply concerned about the impact of this merger on the availability and pricing of the two types of special access – interoffice transport and high-capacity loops.

The analysis of a proposed merger’s anticompetitive effects begins, of course, with a definition of the relevant market. PAETEC agrees with the Commission that these are distinct markets, and believes that the definitions the Commission has adopted in the past are appropriate.² In any event, it is irrelevant whether this is one market or two because no matter how the markets are defined, the combined AT&T/BellSouth will have dominant market power in the AT&T and BellSouth territories. PAETEC further agrees with the Commission that in undertaking a competitive analysis of these markets, a route-specific inquiry is necessary.³

III. The High Capacity Loop Market

² See, e.g., *SBC Communications, Inc. and AT&T Corp. Applications for Transfer of Control*, Memorandum Opinion and Order, FCC 05-183 (rel. Nov. 17, 2005) (“*SBC/AT&T Merger Order*”) at ¶¶ 25-27.

³ *Id.* at ¶ 28.

PAETEC has participated in the Commission's ongoing special access proceedings⁴ and last year's Verizon/MCI merger proceeding.⁵ In each proceeding, it has pointed out that the market for special access end user terminations – high capacity loops - continues to be monopolized by price cap LECs, including the RBOCs. The grant of pricing flexibility to ILECs makes it difficult, if not impossible, for competitive special access providers to compete effectively against ILECs in light of their ability to exploit their unconstrained monopoly power. These observations are not anecdotal. They are the observations of a growing competitor in the business telecommunications and information services marketplace that has set the bar for using this type of wireline access to reach its endusers.

The competitive analysis for the local access or high capacity loop market should be identical to that performed by the Commission last year in the SBC/AT&T and Verizon/MCI merger proceedings,⁶ and the outcome of the analysis must also be identical. The only possible conclusion the Commission can reach is that “AT&T provides special access services in competition with [BellSouth]'s special access services, and that the merger, absent appropriate remedies, is likely to result in anticompetitive effects for wholesale special access services offered wholly over AT&T's own facilities to

⁴ See, e.g., Comments of PAETEC Communications, Inc., in *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM 10593, filed June 13, 2005.

⁵ See, e.g., Comments of PAETEC Communications, Inc., in *Verizon Communications, Inc. and MCI Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, filed May 9, 2005.

⁶ See *SBC/AT&T Merger Order* at ¶¶ 24, 32, 36-40; *Verizon Communications, Inc. and MCI Corp. Applications for Transfer of Control*, Memorandum Opinion and Order, FCC 05-184 (rel. Nov. 17, 2005) (“*Verizon/MCI Merger Order*”) at ¶ 24, 32, 36-40.

certain buildings.”⁷ The Applicants do not even attempt to demonstrate otherwise; their Application fails to address the high capacity loop market.⁸ Even assuming that the Applicants enter into a consent decree with the DOJ, pursuant to which the Applicants agree to certain divestitures in the form of IRUs for loops and transport necessary to reach to certain buildings where AT&T is the only competitive LEC that has a direct wireline connection, the Commission must still conclude, as it did in the *SBC/AT&T* and *Verizon/MCI Merger Orders*, that in order to remedy any likely anticompetitive effects, the Applicants must also agree to a series of conditions that limit their ability to exercise monopoly power in the high capacity loop special access market. Those necessary conditions, which are modeled after those imposed in the *SBC/AT&T* and *Verizon/MCI Merger Orders*, are discussed in more detail in Section III below.

IV. The Interoffice Transport Market

PAETEC also believes that the Commission should impose similar conditions related to the interoffice transport market. In the *SBC/AT&T* and *Verizon/MCI Merger Orders*, the Commission looked at this market and concluded that it was sufficiently competitive that anticompetitive effects from the merger, whether unilateral or coordinated, were unlikely and did

⁷ *SBC/AT&T Merger Order* at ¶ 24; see also *Verizon/MCI Merger Order* at ¶ 24.

⁸ AT&T, Inc. and BellSouth Corporation Applications for Transfer of Control, WC Docket

not require mitigation.⁹ In large part, this conclusion was premised on the assumption that any competitive problems could be better dealt with in the ongoing proceedings concerning special access performance metrics and pricing.¹⁰

The Commission should re-examine its assumptions and the facts, and reach a different conclusion in this case. As a buyer of special access throughout the U.S., PAETEC found the market for DS-3 interoffice transport to be quite competitive prior to the Verizon/MCI and SBC/AT&T mergers, and it benefited from the availability of multiple providers. In the northeast, for example, PAETEC's largest single interoffice transport supplier prior to the Verizon/MCI and SBC/AT&T mergers was MCI (through its MFS subsidiary), with Verizon a distant second in its territories. MFS's pricing was substantially lower than that of Verizon, and its network is second in scope only to that of the RBOC.

In PAETEC's experience, what competition existed in the special access markets prior to the Verizon/MCI and SBC/AT&T mergers came from MCI and, to a lesser extent, AT&T. PAETEC is deeply concerned about the effects of RBOC/IXC consolidation on competition in the special access market in the Verizon and AT&T footprints. Verizon and AT&T overwhelmingly dominate the high-capacity special access and transport markets in their territories. Since the mergers of SBC/AT&T and

No. 06-74 (filed March 31, 2006), Description of Transaction, Public Interest Showing and Related Demonstration at 102-105.

Verizon/MCI, the competitive situation in the special access market in their territories has deteriorated substantially. PAETEC has found that MFS is no longer pricing as aggressively in either SBC or Verizon territory, and AT&T is also not behaving as competitively as before the mergers.

The situation in the BellSouth region is similar to that which existed in the SBC and Verizon territories prior to their mergers. AT&T and Verizon (through the legacy MCI and AT&T networks) are the largest competitors to BellSouth in providing interoffice transport in the BellSouth region. AT&T would exponentially increase its market power and dominance over additional markets by acquiring BellSouth's facilities. The anticompetitive effects that PAETEC is beginning to see in the AT&T and Verizon territories will spread, and grow, in the BellSouth territories if this merger is approved without conditions. The anticompetitive effects will not be ameliorated by the ongoing proceedings concerning special access performance metrics and pricing. It has been almost ten months since the Commission announced its approval of the SBC/AT&T and Verizon/MCI mergers, and there is no indication that the special access proceedings are any closer to resolution. The fact is that the anticompetitive effects of this merger may well make whatever decisions the Commission makes in those proceedings largely irrelevant in the BellSouth territory, unless the Commission imposes now specific merger conditions designed to offset those anticompetitive effects.

⁹ *SBC/AT&T Merger Order* at ¶45-55; see also *Verizon/MCI Merger Order* at ¶ 45-55.

¹⁰ *SBC/AT&T Merger Order* at ¶ 55; see also *Verizon/MCI Merger Order* at ¶ 55.

It is incontestable that the actual rates charged for special access services have generally remained steady or increased, contrary to the trend for rates charged for other telecommunications services over the past several years, which have generally declined. Furthermore, no real competition has emerged in markets where ILECs such as BellSouth and AT&T have been granted special access pricing flexibility. Competitive providers such as PAETEC continue to be subject to monopoly rents for special access services, and the elimination of AT&T as a competitor in BellSouth's territory can only exacerbate that trend.

In order to prevent further competitive harm and preserve the competitive status quo while it addresses the industry-wide issues in the ongoing proceedings concerning special access performance metrics and pricing, the Commission should impose conditions related to the interoffice transport market. Specifically, it should require that the Applicants agree to certain divestitures in the form of IRUs for transport necessary to reach to certain central offices or wire centers where AT&T is the only competitive LEC that has a direct wireline connection. In addition, the Commission should conclude that in order to remedy any other likely anticompetitive effects, the Applicants must agree to a series of conditions that mirror those imposed in the high capacity loop market, which would limit the Applicants' ability to exercise monopoly power in the interoffice transport special access market. Those proposed conditions are detailed in the next section.

V. The Commission Must Impose Conditions in the Special Access Market to Mitigate the Anticompetitive Effects of the Proposed Merger

The Applicants have not shown, and indeed cannot show, that the proposed merger does not present a potential for anticompetitive effects in the high capacity loop and interoffice transport markets. Therefore, if the Commission is to approve the merger, it should condition that approval on the Applicants' agreement to specific conditions relating to special access services in both markets. Each of those conditions should remain in effect for a period of thirty months or more.

First, the Applicants should be required to commit that AT&T's incumbent local operating companies will implement a performance metrics plan for both types of interstate special access services, under which they will provide performance data on a quarterly basis. Second, the Applicants must commit not to raise rates paid by existing customers of AT&T's DS1 and DS3 local private line services and interoffice transport services that AT&T provides in AT&T's or BellSouth's in-region territory pursuant to, or referencing, its existing tariffs (or any successor or equivalent AT&T tariff). Third, the Applicants must commit that neither AT&T's nor BellSouth's incumbent local telephone companies will provide special access offerings to their wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions. Fourth, the Applicants must commit that, before AT&T/BellSouth provides a new contract tariff to its own section 272(a) affiliate(s), it will certify to the

Commission that it provides service pursuant to that contract tariff to an unaffiliated customer other than Verizon or its wireline affiliates. Fifth, the Applicants should commit that AT&T/BellSouth will not increase the rates in either AT&T's or BellSouth's interstate tariffs, including contract tariffs, for special access services that it provides in its in-region territory and that are set forth in tariffs on file at the Commission on the Merger Closing Date. Finally, the Applicants should be required to agree to certain divestitures in the form of IRUs for transport necessary to reach to those central offices or wire centers where AT&T is the only competitive LEC that has a direct wireline connection.

These necessary commitments and their duration are described in greater detail in Exhibit 1, which is modeled on the conditions accepted by the Commission in Appendix F to the *SBC/AT&T Merger Order*. The Commission found that those commitments would serve the public interest, so it “adopt[ed] them as conditions of our approval of the merger.” It should do the same here, and in addition it should extend those conditions not only to the market for high capacity loops, but also to the interoffice transport market.

CONCLUSION

For the foregoing reasons, PAETEC respectfully urges the Commission to condition its approval of the application for transfer of control upon the

agreement by the applicants to fulfill the conditions set forth in Exhibit 1
hereto.

Respectfully submitted,

A handwritten signature in black ink that reads "Mark C. Del Bianco". The signature is written in a cursive style with a horizontal line at the end.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of June, 2006, a true and correct copy of the foregoing Comments of PAETEC Communications, Inc. was served via electronic mail on the following:

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/S/ Mark C. Del Bianco

APPENDIX 1

Proposed Conditions in WC Docket No. 06-74

[All capitalized terms used in this proposal and not defined herein shall have the meanings attributed to them in the Commission's SBC/AT&T Merger Order, except that Merger Closing Date refers to the date the AT&T/BellSouth merger closes.]

Special Access

1. AT&T/BellSouth affiliates that meet the definition of a Bell operating company in section 3(4)(A) of the Communications Act of 1934, as amended ("AT&T BOCs"),¹¹ will implement, in the AT&T Service Area,¹² the Service Quality Measurement Plan for Interstate Special Access Services ("the Plan"), as described herein and in Attachment A. The AT&T BOCs shall provide the Commission with performance measurement results on a quarterly basis, which shall consist of data collected according to the performance measurements listed in Attachment A [to be developed]. Such reports shall be provided in an Excel spreadsheet format and shall be designed to demonstrate the AT&T BOCs' monthly performance in delivering interstate special access services within each of the states in the AT&T Service Area. These data shall be reported on an aggregated basis for interstate special access services delivered to (i) AT&T/BELLSOUTH's section 272 affiliates, (ii) its BOC and other affiliates, and (iii) non-affiliates.¹³ The AT&T BOCs shall provide performance measurement results (broken down on a monthly basis) for each quarter to the Commission by the 45th day after the end of the quarter. The AT&T BOCs shall

¹¹ For purposes of these conditions, AT&T Advanced Services, Inc. ("ASI") shall not be considered an AT&T BOC.

¹² For purposes of this condition, "AT&T Service Area" means the areas within AT&T's service territory in which AT&T's Bell Operating Company subsidiaries, as defined in 47 U.S.C. § 153(4)(A), are incumbent local exchange carriers.

¹³ BOC data shall not include retail data.

implement the Plan for the first full quarter following the Merger Closing Date. This condition shall terminate on the earlier of (i) thirty months and 45 days after the beginning of the first full quarter following the Merger Closing Date (that is, when AT&T/BellSouth file their 10th quarterly report); or (ii) the effective date of a Commission order adopting performance measurement requirements for interstate special access services.

2. For a period of thirty months after the Merger Closing Date, AT&T/BELLSOUTH shall not increase the rates paid by existing customers (as of the Merger Closing Date) of (a) the DS1 and DS3 local private line services that AT&T/BELLSOUTH provides in AT&T/BELLSOUTH's in-region territory¹⁴ pursuant, or referenced, to its TCG FCC Tariff No. 2 (or any successor or equivalent AT&T tariff), or (b) interoffice transport special access services that AT&T/BELLSOUTH provides in AT&T/BELLSOUTH's in-region territory pursuant to or referenced in [appropriate tariffs to be identified] above their level as of the Merger Closing Date.

3. For a period of thirty months after the Merger Closing Date, AT&T/BELLSOUTH will not provide special access offerings to its wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions.

4. To ensure that AT&T/BELLSOUTH may not provide special access offerings to its affiliates that are not available to other special access customers, for a period of thirty months after the Merger Closing Date, before AT&T/BELLSOUTH provides a new or modified contract tariffed service under section 69.727(a) of the Commission's rules to its own section 272(a) affiliate(s), it will certify to the Commission that it

¹⁴ For purposes of these conditions, AT&T's "in-region territory" means the areas within AT&T's service territory in which an AT&T operating company is the incumbent local

provides service pursuant to that contract tariff to an unaffiliated customer other than Verizon Communications Inc., or its wireline affiliates. AT&T/BELLSOUTH also will not unreasonably discriminate in favor of its affiliates in establishing the terms and conditions for grooming special access facilities.

5. AT&T/BELLSOUTH shall not increase the rates in AT&T/BELLSOUTH's interstate tariffs, including contract tariffs, for special access services that AT&T/BELLSOUTH provides in its in-region territory and that are set forth in tariffs on file at the Commission on the Merger Closing Date. This condition shall terminate thirty months from the Merger Closing Date.

6. AT&T/BELLSOUTH shall divest (in the form of IRUs or other arrangement acceptable to the Commission) those transport facilities identified on Attachment B [to be developed], which are necessary to reach to those central offices or wire centers where AT&T is the only competitive LEC that has a direct wireline connection.

exchange carrier, as defined in 47 U.S.C. § 251(h)(1)(A) and (B)(i).