

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

**In the Matter of**

**BELLSOUTH  
CORPORATION**

**and**

**AT&T Inc.**

Re: Application Pursuant to  
Section 214 of the  
Communications Act of 1934 and  
Section 63.04 of the  
Commission's Rules for Consent  
to the Transfer of Control of  
BellSouth Corporation to AT&T  
Inc.

**WC Docket No. 06-74**

**COMMENTS OF SWIFTTEL COMMUNICATIONS, INC.**

SwiftTel Communications, Inc. (hereafter "SwiftTel") is a CLEC which provides telephone and internet services throughout the State of Georgia. SwiftTel opposes the merger between AT&T, Inc. (hereafter "AT&T") and BellSouth Corporation (hereafter "BellSouth") and urges the Commission to reject the application for the transfers of control presented to the Commission by AT&T and BellSouth. If the Commission determines,

nonetheless, that the applications should be approved, SwiftTel urges the Commission to condition its approval on AT&T's agreement to correct the problems which have plagued SwiftTel in its relationship with BellSouth.

BellSouth and SwiftTel executed an interconnection agreement on November 19, 2002 which was approved by the Georgia Public Service Commission. That agreement, in fact, was an adoption (with separate pricing schedules) of Bellsouth's previously approved agreement with MCI Metro.

BellSouth's alleged failure to adhere to the terms and conditions of the contract is now the subject of a lawsuit filed by SwiftTel in the Superior Court of Fulton County, Georgia. SwiftTel is well aware that the purposes of this proceeding do not include an opportunity for litigation of private matters. Indeed, SwiftTel wants to litigate its dispute with BellSouth only in the Superior Court. However, SwiftTel believes that its experience with BellSouth is illustrative of broader public policy issues raised by the proposed merger.

SwiftTel is a facilities-based CLEC which uses its interconnection agreement with BellSouth primarily for the purpose of exchanging traffic between its customers and those of BellSouth. SwiftTel purchases from BellSouth some 'last mile' facilities, especially those required to reach customers in geographic areas where SwiftTel does not currently have its own network facilities. SwiftTel has switches and customers in every LATA in the State of Georgia. Prior to the incidents of which SwiftTel complains in its lawsuit, it had 12,500 customers throughout the State of Georgia and revenues in excess of \$ 2.3 million. The success of SwiftTel in the marketplace is not magic – those customers who chose SwiftTel valued intensely responsive customer service, targeted pricing and a regional-based provider over whatever advantages are offered by a nationwide provider.

Left to grow its businesses through competition in the open marketplace, and assuming that BellSouth had continued to provide reliable interconnection services, SwiftTel would have had a long term place in the telecommunications marketplace and increasing market share against the BellSouth monolith. Today, after a half dozen BellSouth- related outages,

SwiftTel still has 5,000 loyal customers who still want excellent customer service, targeted pricing and a regionally-focused provider.

The key perspective which SwiftTel can bring to the FCC's thinking is simple. Notwithstanding some people's notions that a quad play of wireline telephony, cable, internet and wireless is a prerequisite for success, that nationwide coverage is imperative, or that the only battle that matters is between the two big ILECs and the cable monoliths, the simple fact is that SwiftTel and similar companies can compete and have competed successfully against the ILECs. Thus, companies like SwiftTel can be an important part of the overall competitive landscape and should not be forgotten in the Commission's consideration of the merger.

Indeed, SwiftTel's development as a competitor is precisely what many hoped would happen. SwiftTel was founded by Mr. Doug Baird, a business person from Vidalia, Georgia. He and his wife originally formed several ISPs in rural and suburban Georgia. Then, they created SwiftTel and its companion company, CyberSouth Networks, Inc. to provide network-based telephone and internet services to retail customers. Admittedly, at the

start of their business ventures, the Bairds did not have an extensive network of their own. Using the rights of CLECs under the Telecommunications Act of 1996, they used the facilities of the ILEC to grow their customer base and grow their own network. As the Commissions and the Congress hoped, they are now a facilities-based provider in competition with BellSouth having increasingly less dependence on BellSouth's network.

Unfortunately, the Telecommunications Act of 1996 is not sufficient to protect competitors like SwiftTel from adverse actions by companies as large as BellSouth and AT&T because the resulting damages suffered by SwiftTel, while significant to SwiftTel, are not worth the bother of BellSouth. Obviously, the merger of AT&T and BellSouth is only going to make the size of a potential claim by SwiftTel against the combined company less impacting of the success of the ILEC than it is today. And therefore, the fear of a monetary claim by SwiftTel against the merged AT&T is less likely to 'govern' AT&T's behavior.

In this regard, the cause and course of the lawsuit bear brief mention. In its lawsuit, SwiftTel alleges that on at least five occasions, soon to be

amended to add a sixth, BellSouth has failed to satisfy its obligations under the interconnection agreement. Each failure has caused SwiftTel customers in one or more LATAs in Georgia to lose their connectivity to the outside world. In total, over the course of SwiftTel's relationship with BellSouth, customers of SwiftTel have been out of service 170 hours due to BellSouth-related problems. Perhaps the most glaring example of these service issues is that, in one case, a BellSouth employee allegedly looped BellSouth's facilities that had served SwiftTel back to BellSouth causing a loss of connectivity for SwiftTel customers. Notwithstanding complaints from SwiftTel, BellSouth headquarters officials continued to blame the problems on SwiftTel only because they could 'see' remotely that their own facilities were active and carrying traffic.

Some might assume that SwiftTel has many remedies under the Telecommunications Act of 1996 to fix these problems other than urging this Commission to consider additional remedies in the context of a merger. Alas, such is not the case.

Of course, the interconnection agreement between SwiftTel and Bellsouth provides that SwiftTel can seek a return of all or a portion of the payments it makes to BellSouth if 'quality of service' measures are violated. SwiftTel did briefly consider this option before filing its lawsuit but not for long. While being forced to regurgitate service fees might be an incentive to encourage good service if companies like BellSouth and AT&T wanted wholesale customers, nothing in SwiftTel's experience suggests that BellSouth worry about performance penalties because they do not value a wholesale market.

Moreover, notwithstanding that SwiftTel pays to BellSouth a fair amount of money over the year for access to its network, the amount of penalties that BellSouth could conceivably owe to SwiftTel, generously calculated, would be 'lost in the rounding' of BellSouth's financial statements. In fact, the most recent outage that SwiftTel suffered involved a cut-off of interconnection facilities upon which BellSouth owed SwiftTel money not vice versa. In short, SwiftTel previously concluded and continues to believe that contract-based 'quality of service' penalties are not a sufficient deterrent to prevent BellSouth from breaching its obligations

under the interconnection agreement – if they ever were. With a combined AT&T/BellSouth company, the relative risk to the merged company of any performance penalties that might arise due to poor performance under SwiftTel's contract will be infinitesimal.

Of course, SwiftTel also could have filed a complaint against BellSouth in the Georgia Public Service Commission. In fact, SwiftTel did informally involve that commission in one of the early outages. However, again, the loss of revenue from customers of SwiftTel was and is SwiftTel's real problem and the prospect of a fine levied against BellSouth after a long political process was and is somewhat beside the point.

The Commission is well aware of the spate of lawsuits earlier filed against ILECs by companies like MCI Metro and Covad. *E.g.*, *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*, 317 F. 3d 1270 (11<sup>th</sup> Cir. 2003); *Covad Communications Company v. BellSouth Corp.*, 374 F. 3d 1044 (11<sup>th</sup> Cir. 2004). Not wanting to revisit those disastrous attempts to affect the behavior of BellSouth and others, SwiftTel decided to follow a simpler, arguably novel approach and file a

simple breach of contract/negligence case in the Superior Court of Fulton County. The SwiftTel/BellSouth interconnection agreement provides, as did the MCI Metro/BellSouth agreement and others, that SwiftTel can only seek damages in excess of fees paid to BellSouth if SwiftTel can prove that BellSouth's breaches of the contract rise to the level of intentional misconduct or gross negligence. SwiftTel alleged in its lawsuit filed on April 7, 2005 that in four instances (amended to five, soon to be amended to six) BellSouth breached the contract under those standards.

What may also interest the Commission as it considers the application of these two huge companies to merge is that BellSouth moved the Superior Court in Georgia to dismiss or stay the lawsuit so that the Georgia Public Service Commission can handle SwiftTel's issue as a primary matter. BellSouth's position, *inter alia*, is that the Georgia commission, not the Georgia courts, has the primary responsibility for the interconnection agreement under authority of the Telecommunications Act of 1996 and the cases cited above. Whatever the Commission might conclude about the intent of BellSouth in filing that motion, the effect has been that the lawsuit

filed in 2005 is now awaiting a ruling on the motion of BellSouth, with discovery and a trial to follow.

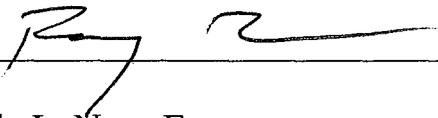
Again, the point is not what this Commission thinks about the litigation that SwiftTel has filed or BellSouth's response. Instead, SwiftTel's point is that it no longer has any effective remedy against BellSouth to 'encourage' it to service properly the wholesale market and that it will have utterly no effective remedy against the combined company. The reason is simple – the merged company's size will be so large that the relative financial risk to it of any legal or regulatory action taken by SwiftTel will be negligible.

SwiftTel believes that this merger application is one of the last opportunities that this Commission will have to affect positively the level of competition in the 'telephone side' of the telecommunications marketplace. SwiftTel does not believe that consumers will actually receive any of the benefits promised by the applicants. But, SwiftTel knows that there are consumers today who do not want to be served by BellSouth or the merged BellSouth-AT&T.

Those customers are not among the customers who will be involved in the mythic battle with the cable giants that AT&T wants the Commission to believe it might lose. The mergers that SBC previously concluded with its RBOC brethren had already given it the scope and scale it needed to take on the cable companies. The strength of SBC with a majority interest in Cingular and access to its network and wireless services and products belies any weakness against the cable companies or anyone else. However, if those statements seem dubious, its merger with AT&T and the accretion of that brand would seem to have removed all doubt. While SwiftTel has no direct experience with SBC or SBC a/k/a AT&T, it has plenty of experience with BellSouth and can assure this Commission that even BellSouth, on its own, has the tools necessary to be a formidable contender with any cable company.

SwiftTel would appreciate the Commission's rejection or conditioning of its approval of the application so that those consumers continue to have some choice.

Respectfully submitted this 5<sup>th</sup> day of June 2006 on behalf of SwiftTel  
Communications, Inc..



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