

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**In the Matter of** )  
 )  
**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**

**JOINT COMMENTS**

**IMAGE ACCESS, INC. D/B/A NEWPHONE  
DPI TELECONNECT  
EXPRESS PHONE SERVICE, INC.  
ABC TELECOM D/B/A HOME PHONE  
BUDGET PHONE  
QUALITY TELEPHONE  
AMERIMEX COMMUNICATIONS CORP.  
GANOCO, INC. D/B/A AMERICAN DIALTONE  
THE NATIONAL ALTERNATIVE LOCAL  
EXCHANGE CARRIER ASSOCIATION/  
PREPAID COMMUNICATIONS  
ASSOCIATION**

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## SUMMARY

The proposed merger of AT&T, the nation's largest incumbent local exchange carrier, and BellSouth, the nation's third largest incumbent local exchange carrier, is an affront to consumers of local exchange telecommunications services. The proposed merger will inhibit local exchange competition, which will undoubtedly result in higher prices to American consumers.

Specifically, the merger will only exacerbate BellSouth's unjust, unreasonable and discriminatory resale practices in violation of the Telecommunications Act of 1996, and the Federal Communications Commission's rules and policies governing the resale of telecommunications services.

Congress has declared that resale is instrumental to the promotion of local exchange competition by weaving the incumbent local exchange carriers' resale obligations into the very fabric of the Act. In order to preserve resale as a viable method of competition, the Commission must either deny the proposed merger or subject the combined company to significant conditions to ensure that it does not discriminate against resellers in an attempt to stifle any remaining vestige of resale local exchange competition.

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Image Access, Inc. d/b/a NewPhone, dPi Teleconnect, Express Phone Service, Inc., ABC Telecom d/b/a Home Phone, Budget Phone, Quality Telephone, AmeriMex Communications Corp., Ganoco, Inc. d/b/a American Dialtone, and the National Alternative Local Exchange Carrier Association/Prepaid Communications Association (“NALA/PCA”), on behalf of all of its member companies<sup>1</sup> (collectively, the “Resale Joint Commenters”), through undersigned counsel, hereby respond to the Federal Communication Commission’s (“FCC” or “Commission”) April 19, 2006 *Public Notice* requesting comment on the application for consent to transfer of control filed by AT&T, Inc. (“AT&T”) and BellSouth Corporation (“BellSouth”) in the above-captioned docket.<sup>2</sup> For the reasons stated herein, the Resale Joint Commenters strongly oppose the proposed merger of AT&T and BellSouth.

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<sup>1</sup> NALA/PCA is a non-profit association dedicated to ensuring that the concerns of the prepaid dialtone industry are heard in federal and state regulatory and legislative arenas.

<sup>2</sup> *Commission Seeks Comment on Application for Consent to Transfer of Control Filed by AT&T, Inc. and BellSouth Corporation*, Public Notice, WC Docket No. 06-74, DA 06-904 (rel. April 19, 2006).

## I. INTRODUCTION

The proposed merger of AT&T, the nation's largest incumbent local exchange carrier ("ILEC"), and BellSouth, the nation's third largest ILEC, is an affront to consumers of local exchange telecommunications services. The proposed merger will inhibit local exchange competition, which will undoubtedly result in higher prices to American consumers. The basic goal of the Telecommunications Act of 1996 ("the Act") is "to reorganize markets by rendering . . . monopolies vulnerable to interlopers," giving "aspiring competitors every possible incentive to enter local retail telephone markets."<sup>3</sup> In the decade since the Act was passed, however, it is clear that the Regional Bell Operating Companies ("RBOCs") have chosen to merge rather than compete, and the Commission has acted as a facilitator by approving all of the proposed RBOC mergers. The result is that the RBOCs now dwarf even their largest competitive local exchange carrier ("CLEC") competitors, the average bill for local exchange service has increased since 1996 from \$19.95 to \$24.31,<sup>4</sup> and households are spending nearly \$200 more annually for their telephone service.<sup>5</sup> Surely Congress could not have imagined such a scenario when it passed the Act.

Ever since the FCC approved the Bell Atlantic-NYNEX merger in 1997, the RBOCs have been claiming that they need economies of scope and scale in order to better fend off competitive challenges.<sup>6</sup> In 1998, for instance, SBC claimed that it faced "unprecedented new challenges in the profitable core of their operations, in-region service to business

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<sup>3</sup> *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 152 L. Ed.2d 701, 122 S. Ct. 1646 (2002).

<sup>4</sup> *Trends in Telephone Service*, Table 3.2, Federal Communications Commission, rel. June 21, 2005

<sup>5</sup> *Id.* at Table 3.1.

<sup>6</sup> *Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19,985 (1997) ("*Bell Atlantic-NYNEX Merger Order*").

customers[,]" from [CLECs] and foreign carriers.<sup>7</sup> Rather than “try to hang on in the face of the inroads of new competitors,”<sup>8</sup> SBC and Ameritech concluded that a merger would provide them with the necessary “financial resources, customer base, managerial and employee talent, economies of scale and scope and business commitment to most effectively offer integrated telecommunications services . . . to consumers nationwide and beyond, for the benefit of both their customers and shareholders.”<sup>9</sup> But, nearly a decade later, we have little more than a trail of broken promises from SBC to use its newfound size and scale to provide meaningful out-of-region service. Now, the company that swallowed Pacific Bell, SNET, Ameritech, and AT&T wants to use the very same false justification for adding BellSouth to its stable. The Commission should not be duped again.

Despite the Commission’s previous reluctance to deny RBOC mergers, it nevertheless has recognized the competitive harms that such mergers can inflict upon the mass market. In the *SBC-Ameritech Merger Order*, the Commission found that the merger of SBC and Ameritech, and well as subsequent RBOC mergers, would result in the loss of potential competition, the loss of the ability to perform regulatory “benchmarking,” and the would increase the opportunity for RBOC discrimination against competitors.<sup>10</sup> Indeed, the Commission determined that:

Because after the merger the larger combined entity would realize

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<sup>7</sup> *Application of Ameritech Corporation and SBC Communications Inc. for Authority, Pursuant to Part 24 of the Commission’s Rules, to Transfer Control of Licenses Controlled by Ameritech Corporation*, WT Docket No. 98-141, filed July 24, 1998, at Att. 2, p. 49.

<sup>8</sup> *Id.* at 50.

<sup>9</sup> *Id.* at 52.

<sup>10</sup> *Applications of Ameritech Corp. and SBC Communications, Inc., For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14,712 (1999) (“*SBC-Ameritech Merger Order*”).

more of the gains from such external effects, the marginal benefit and corresponding incentive to discriminate in each area would increase. As a result, the level of discrimination engaged in by the combined entity in each region within the combined territory would be greater than the sum of the level of discrimination engaged in by the two individual companies in their own, separate regions, absent the merger.<sup>11</sup>

The Resale Joint Commenters have experienced BellSouth's discrimination<sup>12</sup> first-hand and fully expect, consistent with the Commission's findings in the *SBC-Ameritech Merger Order*, that the combination of AT&T and BellSouth will only exacerbate such discrimination, to the detriment of competitors and consumers. As Resale Joint Commenters explain in detail below, BellSouth has engaged in an extensive campaign throughout its nine-state operating region to win back customers and to retain existing customers through the use of various promotional incentives and discounts designed, in part, to eliminate resale competition. Specifically, BellSouth's extensive use of cash-back promotions and bundling as a means to disguise promotional price discounts is discriminatory and, as such, violates the Act as well as the Commission's rules and policies governing the resale of telecommunications services. These anticompetitive actions would be far less likely if there were additional competing networks in BellSouth territory, particularly networks owned and operated by formidable entities such as the neighboring RBOC, AT&T. This proposed merger, however, greatly diminishes this potential.

In order to preserve any hope of meaningful competition through the use of the Act's resale provisions, the Commission must either deny the merger or mitigate its harmful effects by approving the merger subject to significant conditions. To the extent that the Commission chooses the latter course of action, the Resale Joint Commenters urge the Commission to preserve the status of resale as an important method of competitive entry by

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<sup>11</sup> *Id.* at ¶193.

<sup>12</sup> Upon information and belief, AT&T engages in some similar discriminatory conduct.

adopting the conditions recommended herein.

## II. ARGUMENT

### A. RESALE IS AN IMPORTANT METHOD OF LOCAL EXCHANGE COMPETITION AND MUST BE PRESERVED

Congress expressly recognized that resale is an important method of competitive entry into the local exchange market. The resale obligations are woven into the very fabric of the market opening provisions of the Act by imposing distinct obligations upon different categories of carriers. First, Section 251(b)(1) of the Act, which applies to all local exchange carriers, provides that no local exchange carrier shall “impose unreasonable or discriminatory conditions or limitations on [] the resale of its telecommunications services.”<sup>13</sup> By contrast, the resale obligations under Sections 251(c)(4) and 271(c)(2)(B)(xiv), apply only to ILECs and RBOCs, respectively. Section 251(c)(4) requires ILECs

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) *not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service*, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.<sup>14</sup>

Section 271(c)(2)(B)(xiv) provides that, before an RBOC may offer in-region interLATA services, it must offer telecommunications services for resale in accordance with section 251(c)(4) and the avoided cost pricing standard enunciated in section 252(d)(3).<sup>15</sup>

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<sup>13</sup> 47 U.S.C. §251(b)(1).

<sup>14</sup> 47 U.S.C. §251(c)(4) (emphasis added).

<sup>15</sup> 47 U.S.C. §271(c)(2)(B)(xiv). 47 U.S.C. §252(d)(3) provides, in pertinent part, “a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.”

In the *Local Competition Order*, the Commission explained “the strategic importance of resale to the development of competition,” by stating that “[r]esale will be an important entry strategy for many new entrants, especially in the short term when they are building their own facilities. Further, in some areas and for some new entrants, we expect that the resale option will remain an important entry strategy over the longer term.”<sup>16</sup> Indeed, resale allows competitive providers the flexibility to increase their market presence through resale beyond the reach of their existing networks. It also allows competitive providers to increase their market share more quickly than would be possible solely through expansion of their own networks.

The Commission recently reaffirmed the importance of resale in its *Qwest Omaha Forbearance Order*.<sup>17</sup> In that order, the Commission granted, in part, and denied, in part, Qwest’s petition for forbearance from numerous statutory and regulatory obligations related to Qwest’s provision of service in the Omaha Metropolitan Statistical Area (“MSA”). In denying Qwest’s petition for forbearance from the resale obligations of Section 251(c)(4), the Commission stated that “Qwest has not persuaded us that section 251(c)(4) resale is no longer necessary in the Omaha MSA to ensure reasonable and nondiscriminatory pricing, and ensure that customers’ interests are protected . . . [W]e conclude that section 251(c)(4) resale continues to be necessary to existing competition and makes future competitive entry possible.”<sup>18</sup>

Given the Commission’s recent series of orders limiting ILEC unbundling obligations, resale is now an even more important method of local exchange competition.

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<sup>16</sup> *Local Competition Order*, ¶907.

<sup>17</sup> *In the Matter of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, FCC 05-170, rel. Dec. 2, 2005 at ¶63 (“*Qwest Omaha Forbearance Order*”).

<sup>18</sup> *Id.* ¶88.

Central to this reality, however, is that the barriers to resale entry remain low and that competitive providers are able to obtain service upon reasonable rates, terms and conditions, in accordance with the Act and the Commission's rules and policies. The best way to ensure that resale is a viable alternative for competitors (and consumers) is by having competing local networks. The Commission sought to ensure this by imposing conditions in the *SBC-Ameritech Merger Order* that require SBC to construct and provide service in markets outside its region, including in BellSouth's operating territory.<sup>19</sup> Given the limited amount of mass market competition in the BellSouth region, there is every reason for the Commission to continue to enforce that condition, and, not to accede to AT&T's request to permit it to merge with BellSouth and snuff that actual and potential competition. If the Commission decides otherwise, however, it must be vigilant in policing BellSouth's unjust, unreasonable and discriminatory resale practices such as those described below, by taking measures to ensure that the combined AT&T-BellSouth will adhere to the law.

**B. BELL SOUTH'S RESALE PRACTICES ARE UNJUST, UNREASONABLE, AND DISCRIMINATORY IN VIOLATION OF THE ACT AND THE COMMISSION'S RULES AND POLICIES**

BellSouth has engaged in an extensive campaign throughout its nine-state operating region to win back customers and to retain existing customers through the use of various promotional incentives, discounts, and other schemes specifically designed to discriminate against and eliminate its resale competition. BellSouth discriminates against and attempts to eliminate its resale competition through two principal forms of what it refers to as "marketing incentives."<sup>20</sup>

The first type of marketing incentive is a promotion of more than 90 days in

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<sup>19</sup> *SBC-Ameritech Merger Order*, 14 FCC Rcd 14,712 at Appendix C.

<sup>20</sup> See examples of BellSouth marketing incentives attached hereto as *Exhibit A*.

duration offered to end-user subscribers in the form of cash-back incentives, which effectively reduce the price of the telecommunications service purchased by subscribers by the value of the cash-back incentive, *i.e.*, the “effective retail rate.” Although BellSouth makes such promotions available for resale at the applicable state commission avoided cost discount rate, BellSouth does not provide resellers with the promotional incentives that it provides to its own end-users, *i.e.*, cash-back, nor does BellSouth apply the state commission wholesale avoided cost discount to the “effective retail rate” of the telecommunications services offered for resale. BellSouth’s extensive use of these cash-back promotions enables it to disguise promotional price discounts to its subscribers and undercut the price at which resellers are able to offer customers the same service.<sup>21</sup>

The second type of marketing incentive used by BellSouth to discriminate against and attempt to eliminate BellSouth’s resale competition are promotions greater than 90 days in duration in which BellSouth offers a mixed service bundle, *i.e.*, a bundle consisting of both telecommunications and information service(s). By bundling a telecommunications service together with an information service, an ILEC is able to disguise the true retail price of the telecommunications service and thereby discriminate against its resale competitors by applying the wholesale avoided cost discount to the tariffed retail rate rather than to the rate at which BellSouth offers the bundled telecommunications service to its own subscribers (the “effective retail rate”). BellSouth, however, does not even concede that the telecommunications service incorporated within a mixed service bundle is available for resale in the first instance.

Section 51.605(e) of the Commission’s rules provides that, “[e]xcept as provided

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<sup>21</sup> In some cases, BellSouth’s cash-back offers may result in a situation where the effective retail price of the service is below BellSouth’s cost. *See Local Competition Order*, ¶956 (requiring ILECs to apply the wholesale discount on services at below-cost levels).

in Sec[ti]on] 51.613, an [I]LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the [I]LEC.”<sup>22</sup> Section 51.613(a) states, in relevant part, that the only restriction on resale that may be imposed by ILECs are those concerning cross-class selling and short term promotions of 90 days or less in duration.<sup>23</sup> Importantly, Section 51.613(b) also states that “[w]ith respect to any restrictions on resale not permitted under paragraph (a), an [I]LEC may impose a restriction *only if it proves to the state commission that the restriction is reasonable and nondiscriminatory.*”<sup>24</sup> The Joint Resale Commenters are not aware of any state in which BellSouth has proven that its refusal to give resellers the benefit of the effective retail rate offered to consumers via its cash-back and mixed bundle promotional offerings is either reasonable or nondiscriminatory.<sup>25</sup> Accordingly, BellSouth is obligated to provide resellers with the benefit of cash-back incentives in association with making the telecommunications service available for resale at the wholesale avoided cost discount, pursuant

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<sup>22</sup> 47 C.F.R. §51.605(e).

<sup>23</sup> See 47 C.F.R. §51.613(a). Cross-class selling, e.g., offering business customers a residential customer promotion, is only prohibited to the extent that a state commission relieves an ILEC of its resale obligations with respect to cross-class promotions.

<sup>24</sup> 47 C.F.R. §51.613(b).

<sup>25</sup> To the contrary, the North Carolina Utilities Commission had found that BellSouth’s marketing incentives such as its cash-back offers have the effect of lowering the “real” retail rate and that BellSouth must determine that wholesale rate charged to resellers on the basis of the “real” retail rate charged to BellSouth subscribers. The NCUC also found that BellSouth is required to offer the telecommunications service component of a mixed service bundle at the “real” retail rate charged to BellSouth subscribers. See *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled “An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,”* Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay, North Carolina Utilities Commission Docket No. P-100, Sub 72b, released June 3, 2005 (“*NCUC Clarifying Order*”). The U.S. District Court for the Western District of North Carolina recently reversed the NCUC decision only as it relates to marketing incentives such as Walmart gift cards and like incentives which do not *directly* reduce the price paid for a particular service. The court order did not address the bundling aspect of the NCUC’s order, as BellSouth has not appealed that aspect of the NCUC’s decision. See *BellSouth Telecommunications, Inc. v. Sanford et al.*, W.D.N.C. Case 3:05-cv-00345, Order, issued May 15, 2006 at 6. The Court’s order, which leaves unaddressed the indirect promotional price discounts offered through cash-back promotions and the like, will be appealed by the NCUC. The NCUC and W.D.N.C orders are each attached hereto as *Exhibit B*.

to the Act and the Commission's rules. Similarly, BellSouth is required to offer for resale the telecommunication services incorporated in mixed service bundles as a stand-alone service at the "effective retail rate." Thus, BellSouth's practice of using of cash-back promotions and bundling in order to disguise promotional price discounts and restrict the resale of telecommunications services discriminates against resellers and their customers and is an unreasonable restriction on resale in violation of the Commission's rules and Section 251(c)(4)(B) of the Act.

**C. IF THE COMMISSION DOES NOT DENY THE MERGER, IT MUST ADOPT SIGNIFICANT CONDITIONS GOVERNING AT&T'S AND BELL SOUTH'S RESALE PRACTICES**

To the extent that the Commission chooses to approve the merger, the Commission must act to preserve resale as a viable competitive alternative by subjecting the combined company to following conditions:

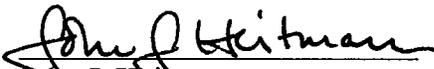
- (1) for all promotions greater than 90 days in duration, at the option of the requesting telecommunications carrier, AT&T and BellSouth shall *either* (i) in addition to offering the telecommunications service that is the subject of the promotion at the wholesale avoided cost service discount, offer to telecommunications carriers throughout the entire local exchange footprint of the combined company the value of all cash-back, gift card, coupon, or other similar giveaways or incentives that AT&T and BellSouth provide to retail end-users; *or* (ii) apply the wholesale avoided cost service discount to the "effective retail rate" of the telecommunications service that is the subject of the AT&T or BellSouth promotion;
  - (a) the "effective retail rate" shall be determined by subtracting the face value of the promotional incentive from the tariffed rate; the value of such discount shall be distributed evenly across any minimum monthly commitment up to a maximum of three months.
- (2) for all promotions greater than 90 days in duration, AT&T and BellSouth shall make available for resale the telecommunications services contained within mixed bundle promotions, *i.e.*, bundles consisting of both telecommunications service and information service, and apply the wholesale avoided cost discount to the "effective retail rate" of the telecommunications services contained within the mixed bundle.
  - (a) the "effective retail rate" of the telecommunications component of a mixed service bundle shall be determined by prorating the telecommunications service component based on the percentage that each unbundled component is to the total of the mixed service bundle if added together at their retail unbundled component

prices (for example, if the individual components comprising a mixed service bundle have a combined retail price of \$150 if purchased on a stand-alone basis, and the telecommunication service component has an stand-alone retail price of \$30, the telecommunications service component would have an "effective retail rate" of 20% of the total mixed service bundled price).<sup>26</sup>

### III. CONCLUSION

Consistent with the foregoing, the Resale Joint Commenters strongly urge the Commission to deny the AT&T-BellSouth merger or, in the alternative, adopt significant conditions governing the combined company's resale practices, as outlined herein.

Respectfully submitted,

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<sup>26</sup> This calculation is generally consistent with the way taxing authorities apply a variety of taxes and policies to various components of bundled offerings.