

**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)	WC Docket No. 06-74
Rules for Consent to the Transfer of)	DA 06-904
Control of BellSouth Corporation to)	
AT&T, Inc.)	

REPLY COMMENTS

**CBEYOND COMMUNICATIONS
GRANDE COMMUNICATIONS
NEW EDGE NETWORKS
NUVOX COMMUNICATIONS
SUPRA TELECOM
TALK AMERICA INC.
XO COMMUNICATIONS, INC., AND
XSPEDIUS COMMUNICATIONS**

June 20, 2006

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SUMMARY

The overwhelming majority of commenting parties agree that the proposed merger of AT&T and BellSouth will harm competition, particularly in the provision of special access services, by eliminating AT&T as an active and unaffiliated service provider in the BellSouth region. The Commission must either deny the merger application outright or impose significant conditions to preclude the anticompetitive rates and terms that will govern the provision of special access services in the BellSouth region if AT&T and BellSouth are permitted to merge.

Currently, Regional Bell Operating Companies ("RBOCs"), including BellSouth, earn monopoly-level rates of return on the special access services they provide and the few sources of downward market pressure on their special access rates have been or will be eliminated in the recent spate of mergers. AT&T is the strongest and most financially viable competitor operating in the BellSouth region and its presence as a competitor constrains BellSouth's ability to offer its services at anti-competitive rates and terms. By eliminating AT&T as a source of special access services at competitive prices and pursuant to competitive terms, the instant proposed merger will enable a merged BellSouth and AT&T to exercise near monopoly control over special access services. A combined AT&T and BellSouth also will have full ownership of Cingular Wireless and thus will have a greater incentive to discriminate in the provision of service to other wireless carriers because the combined entity will benefit from increasing costs to its competitors.

Commenting parties agree that the proposed merger will restrict the ability of competitive special access providers to enter the BellSouth region, thereby making it highly unlikely that a new competitor will be able to duplicate AT&T's ubiquitous network in the BellSouth region. New entrants to the special access marketplace rely on the availability of

customers ready and willing to purchase their services and AT&T and BellSouth have been able to limit the number of available customers by locking them into long term, exclusionary contracts. These contracts prohibit customers from purchasing services from competitors even when the competitor's service is less expensive, and impose high termination fees, thereby effectively negating any benefits to be gained from switching service providers. Until a competitor can enter the BellSouth region, and attain a market presence similar to that of AT&T or BellSouth, there will not be any competitive pressure on BellSouth's rates.

The Commission must subject grant of the merger to significant conditions in order to prevent AT&T and BellSouth from exercising their market power to materially increase prices for wholesale services. AT&T already has begun increasing its special access service rates throughout its region and it is more than likely that these increases would continue, post-merger, as the Applicants would reap the benefits of such increases throughout the larger, combined 22-state region. The merger also would reduce the number of RBOCs from four to three, making it easier for them to collude on the rates and terms by which they provide services.

The commenters agree that the Commission must impose conditions on the merger as the most effective means of preventing AT&T and BellSouth from benefiting from their near-monopoly control over special access services in the BellSouth region. Specifically, the Group Commenters recommend the Commission require AT&T and BellSouth to comply with the following conditions:

- Special Access tariff rates will remain capped for 30 months, including contract tariffs for special access services.
- Customers will be allowed a fresh look on special access contracts.
- AT&T/BellSouth shall not discriminate in the provision of special access circuits.
- AT&T/BellSouth shall file all currently effective contracts for special access or other wholesale services with other carriers pursuant to section 211.

- AT&T/BellSouth shall continue to offer AT&T's wholesale service and will not increase the rates for existing and new customers of the DS1 and DS3 local private line services that AT&T provides in BellSouth's territory for a period of 30 months.
- Implementation of a service quality measurement plan.
- Special Access plans and commercial agreements must be portable from one AT&T/BellSouth state to another state in AT&T/BellSouth territory.
- Cap state-approved UNE rates that are in effect as of the Merger Closing Date.
- AT&T/BellSouth must file state tariffs offering section 271 network elements (including line sharing) at just and reasonable rates and terms.
- Removal of DS1 Loop and Transport Caps.
- Provision of DS1 Loops Required Regardless of Loop Plant.
- AT&T/BellSouth must permit commingling of UNEs and 271 elements.
- Customers must have access to decommissioned copper loops.
- AT&T/BellSouth must provide Line Sharing.
- EELs will not be subject to any requirements or restrictions other than those that apply to individual section 251(c)(3) UNEs.
- Divestiture of AT&T Wireline Facilities in the BellSouth region.
- Divestiture of BellSouth Wireless Spectrum in the 2.5 GHz band.

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REPLY COMMENTS

Cbeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc., XO Communications, and Xspedius Communications (hereinafter referred to as "Group Commenters"), by their attorneys, and pursuant to the Federal Communications Commission's ("FCC" or "Commission") April 19, 2006 Public Notice¹, hereby file these reply comments in opposition to the application for consent to transfer of control (the "Application") filed by AT&T Inc. ("AT&T") and BellSouth Corporation ("BellSouth") (jointly, the "Applicants").

On June 5, 2006, the Group Commenters filed Comments urging the Commission to deny the Application or, in the alternative, to adopt a series of stringent, enforceable conditions in the event it did not deny the Application outright. The Group Commenters' Comments highlighted concerns regarding harms to competition in the retail business and wholesale markets if the merger were allowed to occur. The overwhelming majority of parties submitting pleadings on the Application agree that grant of the proposed merger would seriously weaken competition while reinforcing BellSouth's dominance over the provision of special

¹ *Commission Seeks Comment on Application for Consent to Transfer of Control Filed by AT&T, Inc. and BellSouth Corporation*, Public Notice, DA 06-904 (rel. Apr. 19, 2006). Specific file numbers related to the proposed transaction are hereby incorporated by reference.

access services within its region by drastically reducing the ability of competitive local exchange carriers (“CLECs”) to obtain special access services at fair and reasonable prices. The failure to obtain special access under just and reasonable prices, in turn, would hamper the ability of CLECs to compete in the retail mass market and business market. The chorus of petitioners and commenters, with very few exceptions, concur that, if the Commission were to approve the merger, strong conditions imposed on the post-merger entity, in both the BellSouth and the AT&T regions, are mandatory to support the continued development of competition in the would be combined entity’s 22-state territory. For the reasons discussed in the Group Commenters’ Comments and in greater detail below, the Commission should either deny the Application or grant the Application subject to the significant conditions set forth in the Group Commenters’ initial filing, as supplemented herein.

I. THE COMMENTS DISPLAY A REMARKABLE CONSENSUS THAT THE MERGER WOULD ENTRENCH THE MARKET POWER OF AT&T AND BELLSOUTH AND EXPAND THEIR INCENTIVES TO ACT ANTI-COMPETITIVELY WITH REGARD TO SPECIAL ACCESS SERVICES

The clear majority of petitioners and commenters agree with the Group Commenters that the proposed merger would solidify the Applicants’ dominant market position over the provision of special access services in BellSouth’s region and increase their incentives and ability to act anti-competitively throughout the entire combined AT&T and BellSouth territory. Specifically, the proposed merger would eliminate the principal source of downward pressure – an independent AT&T – on BellSouth special access service rates. The contemplated post-merger entity would also find it easier to discriminate against competitors by controlling upstream inputs. Concomitantly, the initial comments concur that timely and sufficient emergence of alternative providers of special access services in the BellSouth market to offset the loss of AT&T, and to contest the supremacy of the combined entity, is highly unlikely.

The existence and health of competitive retail telecommunications markets depends on the availability of special access transmission inputs. CLECs, commercial mobile radio service providers (“CMRS”) and interexchange service providers (“IXCs”) – as well as the nascent intermodal competitors highly touted by the Applicants – all rely on the special access services of the Applicants to serve their subscribers, including both retail customers and business end users.² For example, Global Crossing estimates that “38% of its national annual special access purchases would be directed to a combined AT&T/BellSouth”³ while COMPTTEL reported that wireless providers depend on ILEC special access services for over 80% of the wireless providers’ circuits.⁴ If carriers are unable to obtain special access facilities at competitive prices they will be unable to compete effectively, and consumers will suffer as these carriers are forced out of the market. There currently is a serious shortage of competitively provided and priced loop and transport services, and the proposed merger will intensify the current shortage by removing AT&T, which is one of the few competitive sources of special access services in the BellSouth region.

² See Comments of Global Crossing North America, Inc. at 3 (“Global Crossing Comments”); Comments of PAETEC Communications, Inc. at 3 (“PAETEC Comments”) (“PAETEC leases [special access facilities] almost exclusively from ILECs because there are very few alternatives to ILEC-provided services.”); Comments of Sprint Nextel Corporation on Application for Transfer of Control at i (“Sprint Nextel Comments”) (“Sprint-Nextel has no alternative to BellSouth or AT&T [special access] for more than 99 percent of Sprint Nextel’s PCS cell sites in the BellSouth and AT&T service areas”).

³ Global Crossing Comments at 3-5.

⁴ Petition to Deny of COMPTTEL at 10 (“COMPTTEL Petition”).

A. BellSouth is earning monopoly-level profits and the few sources of market pressure on its special access service rates are being eliminated as competitors.

Current special access rates enable RBOCs, including BellSouth, to achieve monopoly-level returns. There are few competitors that have sufficient market power to exert competitive pressure on RBOC rates. AT&T remains the strongest competitor in the BellSouth region and it is crucial that the Commission not permit the Applicants to merge as this would result in AT&T being eliminated as an actual and potential competitive provider of special access in the BellSouth region.⁵

The RBOCs' status as, often, the only sources of special access facilities allows them to price their special access services at supra-competitive rates. These anticompetitive rates have translated into ever increasing returns on special access investments.⁶ In 2003, AT&T and BellSouth earned special access returns of 63 and 69 percent, respectively.⁷ In 2004, these

⁵ See, e.g., COMPTTEL Petition at 4 (“the horizontal integration of AT&T and BellSouth will eliminate the single most likely potential competitor in BellSouth territory.”); EarthLink Petition at 18 (“Not only is AT&T a current provider of [broadband] services throughout BellSouth’s region, the merger represents the loss of one of the most likely significant potential entrants providing mass market voice services to business and residential consumers in each of the Applicants’ regions”); PAETEC Comments at 7 (“AT&T and Verizon . . . are the largest competitors to BellSouth in providing interoffice transport in the BellSouth region.”); Sprint Nextel Comments at 5 (“the proposed transaction would eliminate AT&T as an unaffiliated purchaser and provider of special access service in BellSouth’s region”); Time Warner Petition at 16 (“the proposed merger would eliminate AT&T as a significant actual and potential competitor in the BellSouth region.”).

⁶ See, e.g., “A Bit of Irony,” ACTel White Paper, The Anticompetitive Effects of the Telecommunications Acquisitions on Business Customers and the Wholesale Market, and Remedial Actions to Address those Harms, at 13 (noting that AT&T and MCI offered circuits in the local wholesale market “at rates as low as 25% of the Bell rack rate.”)

⁷ Comments of MCI, WC Docket No. 04-313 at 159 (filed Oct. 4, 2004) (detailing RBOC special access rates of return for 1996 through 2003).

returns increased to 76 and 89 percent, respectively⁸ and were eclipsed by record returns of 92 and 98 percent, respectively, for the year 2005.⁹

The pre-merger AT&T and MCI were the only providers with sufficient market presence, both as purchasers and providers of special access services, to influence BellSouth's special access rates¹⁰ but they have been eliminated as independent, unaffiliated competitors by their recent mergers with SBC and Verizon, respectively. Commenters such as COMPTTEL and PAETEC pointed out that CLECs often purchased special access services from the pre-merger AT&T and MCI.¹¹ Similarly, a group of CLECs appealing the Verizon/MCI and SBC/AT&T mergers have noted that "the old AT&T and MCI offered . . . circuits that they owned, as well as circuits that they leased from SBC and Verizon at rates better than the [CLECs] could secure" and "one of the ACTel members regularly received price quotes from MCI at discounts as high as 90% of the Verizon 'special access rate.'"¹² As competitive providers of special access services, AT&T and MCI were able to constrain BellSouth's ability to charge unreasonable rates for its special access services.

⁸ Comments of the Ad Hoc Telecommunications Users Committee, Declaration of Susan M. Gately, ¶9, WC Docket No. 05-25 (filed June 13, 2005).

⁹ See Letter from M. Robinson, Broadview Networks, et al. to Senators Ted Stevens and Daniel Inouye (June 7, 2006). See also, Comments of MCI, WC Docket No. 04-313 at 159 (filed Oct. 4, 2004) (detailing RBOC special access rates of return for 1996 through 2003).

¹⁰ See, e.g., PAETEC Comments at 6-7 ("In PAETEC's experience, that 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.").

¹¹ See COMPTTEL Petition at 7; PAETEC Comments at 6-7 ("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. . . . 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").

¹² *U.S. v. SBC Communications, Inc. and AT&T Corp.*, Civil Action No.: 1:05CV02102 (EGS); ACTel's Reply Memorandum in Opposition to the United States' Motion For Entry of Final Judgment at 13, 15.

Currently, post-merger AT&T remains the only strong competitor in the BellSouth region due to the ubiquitous nature of its network and the fact that it is backed by its ILEC operations in 13 states.¹³ As COMPTTEL noted, prior to its merger with SBC, AT&T wholesale literature showed that AT&T as a competing CLEC had “roughly 61,000 total route miles of fiber, over 16,000 miles of which were used to provide special access service” and that “[a]lthough far from ideal, the presence of AT&T as a special access competitor likely would exert some disciplining effect on the special access rates charged by BellSouth.”¹⁴ Time Warner observed that “[a]fter its merger with SBC, AT&T poses an even greater threat to BellSouth as a potential competitor”¹⁵ and demanded that the Commission obtain from both AT&T and BellSouth their plans, prior to merger talks, to compete in each other’s territories.¹⁶ The Group Commenters support this request. As Access Point, Inc. sums it up, “to the extent there are genuine competitors in the business market, they rely on AT&T and BellSouth for the provision of the essential last mile facilities necessary to provide service.”¹⁷ AT&T’s strong presence in the BellSouth region and its existence as a competitive provider of special access services enables it to exert downward pressure on BellSouth’s special access rates. The Commission

¹³ See, e.g., COMPTTEL Petition at 7-8 (“the presence of AT&T as a special access competitor likely would exert some disciplining effect on the special access rates charged by BellSouth”); Comments of Mobile Satellite Ventures Subsidiary LLC at 5 (“MSV Comments”) (noting that “ILECs are among the few potential competitors with the wherewithal to compete in out-of-region markets.”); Petition to Deny of Time Warner Telecom at 17-19 (“Time Warner Petition”) (“the FCC found the elimination of a large, well-financed contiguous ILEC as an actual and potential competitor in the local market (a market, like the special access market, characterized by high entry barriers and high concentration) resulted in very substantial harms to consumer welfare and the deregulatory goals of the 1996 Act.”).

¹⁴ COMPTTEL Petition at 7.

¹⁵ Time Warner Petition at 16; See also *id.* at 17-18 (discussing the potential for adjacent ILECs to become the most effective competitors of each other).

¹⁶ *Id.* at 19. EarthLink notes that in 2005, SBC and AT&T had plans to compete out-of-region post merger. EarthLink Comments at 7-8. See also, Group Commenters Comments at 54-57.

¹⁷ Petition to Deny of Access Point, Inc. *et al.* at 39 (“Access Point Petition”).

must ensure that BellSouth is not permitted to increase its monopoly status by merging with AT&T, its strongest actual and potential competitor.

Theoretically, the harm from the proposed merger might be mitigated if there were alternative providers of special access services in the BellSouth region. However, as COMPTTEL, Access Point, and numerous others accurately noted, there are few, if any, alternative providers of special access services in the BellSouth region with a similar market presence as AT&T.¹⁸ Absent competitive pressure from an alternative special access service provider with a strong market presence, BellSouth has no incentive to offer its service at competitive prices.

A combined AT&T/BellSouth actually will have a greater incentive and ability to discriminate. This is most dramatically illustrated by the proposed post-merger relationship with Cingular Wireless. Sprint Nextel accurately explained that AT&T and BellSouth currently share ownership of Cingular Wireless and that this shared ownership keeps each company from discriminating in favor of Cingular, for example by offering lower special access prices, because each company would bear the full costs of the discount but would have to share the profits.¹⁹ If the companies are permitted to merge, they will have full ownership of Cingular and thus would have the incentive to discriminate in favor of Cingular since the combined entity would reap the

¹⁸ See, e.g., Access Point Petition at 39 (“Facilities based CLECs still rely on ILEC-provided loop facilities at 75% of their customer locations. Even AT&T Corp., before it merged with SBC . . . informed the Commission that it relied on ILEC-provided loop facilities at 95% of their customer locations.”); COMPTTEL Petition at 8 (“Upon consummation of the merger, the number of major special access providers in the combined AT&T-BellSouth territory will drop from three to two (Verizon and the combined AT&T/BellSouth)”). See also, e.g., Petition to Deny of EarthLink, Inc. at 21 (“EarthLink Petition”); Global Crossing Comments at 3-5; MSV Comments at 11-13; PAETEC Comments at 6-7; Sprint Nextel Comments at 11. In their Comments, the Group Commenters demonstrated, through BellSouth’s own data, that Verizon’s presence in its territory paled compared to that of AT&T’s. Group Commenter’s Comments at 63-66.

¹⁹ Sprint Nextel Comments at 9.

full benefits of any discriminatory behavior. COMPTTEL echoed these sentiments and remarked that a post merger AT&T/BellSouth would have an incentive to raise rivals' costs because "the merged firm could either collect higher profits through a combination of higher access revenue and higher retail wireless revenue (if the rivals raised their retail rates and Cingular followed), or the merged firm could raise its rivals' costs, not follow their price increase, and simply take profits through increased access revenues and higher market share in the retail market."²⁰ The combined companies also would have the incentive to implement rate increases because they would reap the full benefits of the increase while simultaneously benefiting from the resultant disadvantages to its competitors.²¹

B. Commenters agree that the proposed merger would restrict the emergence of competitive sources of special access service in the BellSouth region

Commenters such as Global Crossing, Mobile Satellite Ventures, PAETEC and others accurately observed that the proposed merger would hinder the ability of new competitive providers of special access services to enter the BellSouth region.²² Specifically, competitive service providers must confront issues related to the existence of customers ready and willing to purchase the services. The difficulty for competitors in potentially entering or expanding in the market is exacerbated both by AT&T's and BellSouth's long term, exclusionary service

²⁰ COMPTTEL Petition at 11. *See also, e.g.*, MSV Comments at 6-7 ("with respect to special access services offered to competing carriers such as independent wireless carriers, ILECs such as AT&T and BellSouth still possess dominant market power and have the ability and incentive to harm competition by discriminating against competitors with respect to the provision of these bottleneck facilities.").

²¹ Sprint Nextel Comments at 10.

²² *See, e.g.*, COMPTTEL Petition at 7-16; Petition to Deny of Consumer Federation of America *et al.*, Joint Declaration of Mark N. Cooper and Trevor Roycroft at 40-44; ("CFA Petition – Joint Declaration"); Global Crossing Comments at 3-5; Comments of Jonathan L. Rubin, J.D., Ph.D in Opposition to the Applications of AT&T and BellSouth for Consent to Transfer of Control at 12; ("J. Rubin Comments"); MSV Comments at 9-15; PAETEC Comments at 3-5; Sprint Nextel Comments at 6-12; Time Warner Petition at 6-25.

contracts that limit the potential customer base and by the loss of AT&T as a purchaser of special access services in the BellSouth region. Unless competitors are able to easily enter BellSouth's region and attain a market presence equal to that of AT&T and BellSouth – something that no one can seriously suggest would happen within a short or intermediate time frame – they will not be able to exert competitive pressure on BellSouth's anticompetitive rates.

Time Warner and Access Point provide comments complementing the Group Commenters' demonstrations that competitive service providers seeking to enter the market to provide special access services face particularly unforgiving entry barriers.²³ As Time Warner explains, "perhaps the most significant entry barrier" is "the 'sunk' character of the high capital costs associated with the deployment of competitive fiber."²⁴ Other substantial barriers:

include the ILEC's first mover advantages, the unwillingness of many customers to wait until a competitor has completed its construction before receiving service, the inability to gain access to public and private rights-of-way (including building access) and the ILECs economy of scale and cost advantages.²⁵

Would-be facilities-based competitors must incur significant construction costs to deploy facilities and they depend on the existence of ready customers for those facilities in order to recover the deployment costs. Despite the Applicants' claims of numerous competitors willing to provide special access services,²⁶ the record makes clear that competitors typically will not incur the time and expense of deploying facilities unless they are certain that there will be customers ready and willing to purchase those services.²⁷

²³ See, e.g., Access Point Petition at 39-40; Time Warner Petition at 10-16.

²⁴ Time Warner Petition at 10.

²⁵ *Id.* at 10.

²⁶ AT&T/BellSouth Public Interest Statement at 55-62.

²⁷ See, e.g., COMPTTEL Petition at 12-13.

Further exacerbating the inherent high cost and other barriers to market entry is the fact that the Applicants have taken steps to effectively shrink the potential special access customer base by requiring special access customers to enter into long term and exclusionary contracts for special access services. Similarly, the Applicants impose large fees if a customer terminates the contract prior to expiration.²⁸ For example, COMPTTEL noted that AT&T and BellSouth both offer “optional pricing plans,” but “in order to get ‘discounts’ on circuits for which competitors have no competitive alternative . . . customers must commit to purchasing the majority of their total circuit volumes from the incumbent – including circuits in those locations for which a cheaper competitive alternative may be available.”²⁹ Similarly, MSV and Time Warner reported their experiences with AT&T’s “exclusive agreements for region-wide special access services, thereby forestalling any potential competition from competitive special access service providers who serve specific routes or smaller regions”³⁰ and requires that the customer “eliminate its purchases from a competitive carrier wholesaler.”³¹ AT&T and BellSouth are able to impose these unfavorable conditions on their provision of special access services because there are few, if any, alternative sources of the services. By locking customers into exclusionary contracts and long term commitments, these contracts eliminate the customer base relied on by new service providers and consequently deter service providers from entering the market.

²⁸ See, e.g., COMPTTEL Petition at 11-12, MSV Comments at 12; Time Warner Petition at 15-16 (noting that AT&T’s contracts “represent a Faustian bargain: competitors are usually able to obtain a lower price, but must submit to onerous terms and conditions”).

²⁹ COMPTTEL Petition at 12.

³⁰ MSV Comments at 12.

³¹ Time Warner Petition at 15.

Additionally, the merger will eliminate AT&T as an independent purchaser of special access services from alternative service providers.³² As Sprint Nextel explained, “[c]ompeting third-party providers of special access today benefit from the ability to sell service to AT&T” and the merger would “eliminate[e] AT&T as a substantial, unaffiliated purchaser of special access from alternative providers.”³³

Despite the Applicants’ claims of the public interest benefits of the proposed merger,³⁴ the fact is that AT&T will be lost as the most capable actual and potential competitor of competitive special access services in the BellSouth region. Moreover, competitive wholesale providers will be less willing to enter or expand into the BellSouth market. Those carriers that might make the attempt to remain economically viable will face additional difficulties because there will be few available customers left to purchase their services. This lack of competition will only further entrench the merged entity’s market power over vital special access services needed for the provision of competitive retail services. Because current competition is limited and there is little to no new competition on the horizon, it is critical that the FCC deny the proposed merger or, at a minimum, grant the merger with significant conditions.

II. GRANT OF THE PROPOSED MERGER WITHOUT SIGNIFICANT CONDITIONS LIKELY WILL LEAD TO MATERIAL INCREASES IN WHOLESALE PRICES

The record is clear that the proposed merger will almost assuredly lead to significantly increased prices for special access services in the AT&T/BellSouth region.³⁵ Many of the Group Commenters submitted evidence that such increases were likely to occur after SBC

³² See, e.g., Sprint Nextel Comments at 5, 11-12.

³³ Sprint Nextel Comments at 12.

³⁴ AT&T/BellSouth Public Interest Statement at 5-54.

³⁵ See, e.g., CFA Petition-Joint Declaration at 42; COMPTTEL Petition at 8; EarthLink Petition at 24-25; Sprint Nextel Comments at 6-9; Time Warner Petition at 9, 19.

and AT&T merged, and they now have evidence that such increases are in fact occurring post merger. The CLECs appealing the recent AT&T/SBC and Verizon/MCI mergers provided evidence that, since the AT&T/SBC merger closed on November 18, 2005, AT&T has raised prices for its Local Private Lines nine times, or more than once a month.³⁶ The rate increases cover seven states and range from a low of 5.8 percent to a high of 20.6 percent for various components of the Local Private Line service.³⁷ These examples amply demonstrate that, if the Application is granted, sufficient conditions must be imposed to eliminate the ability and incentive of AT&T and BellSouth to increase their special access rates, because no substantial competitors will remain following the swallowing of AT&T in BellSouth's region to exert a restricting force on those rates. Nor will the rate increases likely be constrained by the market, since AT&T and BellSouth will benefit if their competitors are forced out of business.

Time Warner, Access Point and COMPTTEL all noted that a combined AT&T and BellSouth will be even more likely to raise their special access rates because the effect of the increase will be magnified by the fact that it will apply to the new, larger combined 22-state

³⁶ See AT&T Accessible Letters dated May 5, 2006 (RATE CHANGES DS1 Service – Missouri), April 25, 2006 (RATE CHANGES Fractional DS1 Service – IL, IN, OH, WI), April 24, 2006 (RATE CHANGES DS1 Service – IL, IN, OH, WI), April 24, 2006 (RATE CHANGES DS3 Service – IL, IN, OH, WI), January 6, 2006 (RATE CHANGES Ds3 MTM and Service Packs Rate Changes – Illinois, Michigan), January 10, 2006 (RATE CHANGES DS3 MTM and Service Packs Rate Changes Revision – Illinois, Michigan), December 21, 2005 (RATE CHANGES DS1 Service – Illinois, Michigan), February 20, 2006 (RATE CHANGES Megalink III (DS1) Service – Texas), February 17, 2006 (RATE CHANGES Megalink III (DS1) Service – Texas) at <https://clec.att.com/clec/acclatters/home.cfm>.

³⁷ *Id.*

service region, rather than just AT&T's current 13 states.³⁸ Sprint Nextel summarized the situation well when it stated: "AT&T and BellSouth are currently the second and third largest providers of special access in the United States, and combined would be the largest by far, controlling over 45 percent of that [national] market. Therefore, any change in prices adopted by the merged company would have a larger effect on potential competitors nationwide than the same change would have if adopted by either BellSouth or AT&T alone."³⁹ The combination of the need for special access facilities by the CLECs, wireless providers and interexchange providers and the elimination of the largest and strongest competitors for those services in each of the BellSouth and AT&T regions would permit the combined AT&T and BellSouth to raise their special access rates without limit. The enlarged AT&T/BellSouth footprint is especially significant in light of the exclusionary service contracts discussed above which require customers to purchase services only from AT&T within AT&T's region. As a result of the merged entity's enlarged, combined service region, AT&T will strengthen its market power by expanding the area within which it is able to compel its customers to purchase its services.

Access Point, COMPTTEL, and others note that the proposed merger's reduction of RBOCs from four to three would facilitate rate coordination and increases between the remaining RBOCs.⁴⁰ Verizon is the only theoretical competitor for a combined AT&T and

³⁸ See, e.g., Sprint Nextel Comments at 8-9; Access Point Petition at 21-23 ("By adding BellSouth's nine states to its own thirteen, AT&T will render its footprint enormous and thereby dramatically increase its incentive to discriminate"); Time Warner Petition at 32-35 ("despite Applicants' assertions to the contrary, the proposed merger will result in even greater harms than was the case in the SBC-Ameritech and Bell-Atlantic-GTE mergers since the combination of BellSouth and AT&T would result in a combined ILEC footprint that is far larger than the footprint created by the previous BOC mergers.").

³⁹ Sprint Nextel Comments at 8-9.

⁴⁰ See, e.g., Access Point Petition at 17-20 (citing the Commissions' SBC/Ameritech Merger Order regarding collusion.); COMPTTEL Petition at 10-13; EarthLink Petition at 24 ("the post-merger AT&T and Verizon would be able much more easily to coordinate pricing strategies designed to thwart competition.").

BellSouth entity in the BellSouth region. If past history is any measure, the companies would have the incentive and ability to agree, either tacitly or informally, to coordinate prices or to not compete in each other's service region.⁴¹ Several commenters reported problems with AT&T and BellSouth that seem to exemplify the types of issues that can arise when two companies coordinate their efforts to dominate the market. For example, EarthLink reported what appears to be collusive activity between AT&T and BellSouth in anticipation of the instant proposed merger,⁴² noting that when it sought to renew certain contracts with BellSouth, it was required to accept several anti-competitive limits on the service.⁴³ While AT&T originally was willing to discuss a contract for broadband transmission arrangements with EarthLink, it later refused to provide a written draft or continue the discussions.⁴⁴ Similarly, SwiftTel reports that it endured numerous problems with service it purchased from BellSouth and that performance penalties aimed at deterring these problems were ineffective.⁴⁵ SwiftTel noted that these remedies would be even less effective if AT&T and BellSouth merged because the performance penalties would be only an "infinitesimal" amount to the combined entities.⁴⁶ Another commenter, Saturn Telecommunications, noted its efforts to obtain services from BellSouth and detailed the lengthy

⁴¹ See, e.g., EarthLink Petition at 25 (stating that "the incumbent LECs have engaged in well-known litigation strategies designed to delay and hamstring the implementation of the provisions of the 1996 Act and impede competitors"); Comments of behalf of the New Jersey Division of the Ratepayer Advocate at 17 ("NJ Ratepayer Advocate Comments") (noting that "Bell's efforts to compete out-of-region have been lackluster, indicating either that competing in ILEC-dominated local markets is more difficult than the Applicants assert, or indicating that Bells have tacitly decided to avoid inter-bell competition."); Petition to Deny of Cbeyond Communications *et al.*, WC 05-65 at 41-59 (filed April 25, 2005) (detailing SBC/AT&T and Verizon/MCI collusion and failure to compete in each other's region); Petition to Deny of Cbeyond Communications *et al.*, WC Docket 05-75 at 51-65 (filed May 9, 2005) (same).

⁴² EarthLink Petition, Declaration of Christopher Putala, ¶¶1-16.

⁴³ *Id.*, ¶¶3-4, 8-9.

⁴⁴ *Id.*, ¶¶5, 10-11.

⁴⁵ Comments of SwiftTel Communications, Inc. at 5-8 ("SwiftTel Comments").

⁴⁶ *Id.*, at 8.

interconnection agreement negotiation process.⁴⁷ Saturn attributed the problems it experienced to BellSouth's "inten[t] to harm its competitor or drive it out of business" and asserted that the merger would create a larger organization that would enhance BellSouth's "anticompetitive and monopolistic behavior."⁴⁸

Whatever form the coordination takes, it would benefit the combined AT&T/BellSouth by permitting it to increase the special access rates they charge to customers without fear that Verizon will enter the region and offer the services at a lower price. Because there will be only three RBOCs, and likely only two – Verizon and the combined AT&T/BellSouth - among which the collusive practices can be compared, it will be extremely difficult for the Commission to detect or evaluate the collusive practices.

Regardless of whether the increases are the result of simply the gross size of a combined AT&T/BellSouth, tacit collusion between the combined entity and Verizon, or the merged entity's ability to benefit from discriminatory practices over a substantially greater combined service area, the net effect will be harm to CLECs in the BellSouth and AT&T service regions. The Commission must ensure that the combined entity is not permitted to impose anticompetitive rate increases by requiring that the Applicants comply with significant conditions on any grant of the merger.

III. COMMENTERS AGREE THAT MERGER APPROVAL MUST BE SUBJECT TO SIGNIFICANT CONDITIONS

In their Petition, the Group Commenters explained at length why, due to the serious ramifications for competition and consumers across the board, the merger as proposed by

⁴⁷ Saturn Telecommunication Services, Inc.'s Comments on Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corporation at 2-10 ("Saturn Comments").

⁴⁸ Saturn Comments at 10.

the Applicants does not serve the public interest, convenience and necessity. In the event that the Commission were to grant the Application, the Group Commenters underscored the need for the imposition of exacting and enforceable conditions upon the Applicants and the post-merger entity pursuant to the Commission's section 214(c) authority, as the Commission demonstrated in the conditional grants of the AT&T/SBC and Verizon/MCI mergers last year.⁴⁹

Accordingly, the Group Commenters proposed a set of conditions in their Petition that, when taken as a whole, are designed to partially remedy the harms of the proposed merger of AT&T and BellSouth, focused principally, but not exclusively, on offsetting the loss of AT&T as a competitive presence with BellSouth territory.⁵⁰ (The only way to fully remedy the harms is to deny the merger outright which, in light of the lack of public interest benefit from the proposed merger – as opposed to the benefit to AT&T, BellSouth, and Cingular and their shareholders – would in no manner of speaking be contrary to the public interest.)⁵¹ These conditions should be more stringent than those adopted in the just completed AT&T/SBC merger because the proposed transaction is unprecedented as a merger not only between an RBOC and an IXC and an RBOC and a CLEC, but is also an RBOC-RBOC merger and an RBOC-Wireless merger.

Indeed, it would not be unfair for the Commission to step back and consider the current transaction as simply the second phase of a unitary transaction resulting in the merger of

⁴⁹ Talk America does not propose that any condition proposed should alter the pricing of services and facilities included in any executory AT&T Local Wholesale Complete agreement for the duration of the initial term of any such commercial agreement.

⁵⁰ Group Commenters' Petition at 95-110.

⁵¹ Ironically, the *only* public interest benefit from the merger may very well be the merger conditions that are imposed. As discussed above and in the comments of several parties, in prior mega-mergers, few if any public interest benefits, despite the promises of the merger partners, have materialized. *See, e.g.*, Comments of the National Association of State Utility Consumer Advocates at 3-4 ("NASUCA Comments"). *See also* EarthLink at 18 (RBOC mergers have time and again lessened innovation and reduced competition).

SBC, BellSouth, AT&T, and Cingular. In the circumstances, the Commission has the opportunity to assess whether, in light of these two mergers – SBC with AT&T and AT&T with BellSouth – simply rubberstamping the smattering of conditions imposed in the AT&T/SBC merger would be sufficient.⁵² The Group Commenters suggest that the perspective of AT&T’s Chairman and CEO is a reliable barometer that the previous conditions are woefully inadequate. AT&T itself thinks it was not subjected to any meaningful conditions. Several weeks ago, at a Sanford C. Bernstein & Co. conference, Chairman and CEO, Ed Whitacre, answered as follows when asked whether there would be conditions imposed by regulators on an AT&T/BellSouth merger: “I don’t think we’ll have to give back one thing to gain approval of the BellSouth merger. And we really did not on the AT&T merger; I think the same conditions exist here, I don’t expect to giveback anything.”⁵³ The Commission need not look further to ascertain whether the conditions imposed in the AT&T/SBC merger are an adequate remedy for what would be a considerably larger and more dominant post-merger AT&T.⁵⁴

Comments of other interested parties reinforce the notion that significant conditions are needed if the Application is not denied outright.⁵⁵ Indeed, many of the petitioners and commenters, including numerous purchasers of wholesale services, requested conditions that echoed those proposed by the Group Commenters to curb anti-competitive effects in wholesale

⁵² Of course, no action should be taken by the Commission in addressing the instant proposed merger which directly or indirectly reduces any of the conditions previously imposed on AT&T upon its merger with SBC.

⁵³ See Final Transcript, T-AT&T at Sanford C. Bernstein & Co. Strategic Decisions Conference at p. 6 (excerpt attached hereto as Exhibit A).

⁵⁴ Accord Access Point Comments at 6 (AT&T/SBC merger conditions are inadequate for an AT&T-BellSouth merger.)

⁵⁵ See, e.g., Access Point Comments at 64-75; Global Crossing Comments at 10-14; MSV Comments at 13-15; PAETEC Comments at 9-10; Sprint Nextel Comments at 12-15.

markets. The following are conditions proposed by the Group Commenters which also were independently proposed by one or more of the other petitioners and commenters:

Special Access Rate Cap – The merged AT&T/BellSouth entity shall not increase the rates in their interstate special access tariffs for 30 months, including contract tariffs for special access services.⁵⁶

Fresh Look on Special Access Contracts – The merged AT&T/BellSouth entity shall permit customers with negotiated service arrangements to terminate their agreements and pay no termination liability for a period of twelve (12) months and provide a six (6) month post-termination transition period without shortfall charges and at discounted rates.⁵⁷

Non-Discrimination in the Provision of Special Access Circuits – The merged AT&T/BellSouth entity shall not (i) give any of its affiliates (including Cingular) rates, terms, and conditions that are not effectively available in service options purchased by third parties; and (ii) favor itself in the provisioning, maintenance, customer care, OSS functionalities, and grooming of special access circuits.⁵⁸

File Special Access Contracts – The merged AT&T/BellSouth entity shall file pursuant to section 211, all currently effective contracts for special access or other wholesale services with other carriers.⁵⁹

Continued Offering of AT&T's Wholesale Service – For a thirty (30) month period, the merged AT&T/BellSouth entity shall not increase the rates for existing and new

⁵⁶ See PAETEC Comments at 9; Sprint Nextel Comments at 13; Comments of Access Integrated Networks, Inc. at 3 (“Access Integrated Comments”); MSV Comments at 14. At least one commenter, Access Point, proposes that AT&T wholesale service prices not be raised for five years. Access Point Comments at 72. PAETEC further proposes that before a contract tariff can be provided to any of its affiliates, AT&T/BellSouth will have to certify that the service is already provided to an unaffiliated customer. PAETEC Comments at 9-10. The Group Commenters support the strengthening of this condition proposed by PAETEC and Access Point.

⁵⁷ See CFA Petition at 9; Sprint Nextel Comments at 14-15.

⁵⁸ See Access Point Comments at 67; PAETEC Comments at 9-10; Sprint Nextel Comments at 13; Access Integrated Comments at 4; MSV Comments at 15 (adding that the merged entity should offer special access arrangements to all under the same rates, terms, and conditions which it offers equivalent services to its affiliates.). Access Point added the extra refinement that volume and term thresholds should not apply to get the same rates, terms, and conditions as the merged entity's affiliates. Comments of Access Point Inc., et al at 67. The Group Commenters support this additional condition.

⁵⁹ See Access Point Comments at 67; PAETEC Comments at 9-10; Sprint Nextel Comments at 13.

customers of the DS1 and DS3 local private line services that AT&T provides in BellSouth's territory.⁶⁰

Implementation of Service Quality Measurement Plan – The merged AT&T/BellSouth entity shall implement in the BellSouth territory a Service Quality Measurement Plan for Special Access services with reporting requirements.⁶¹

Special Access Plan Portability and Commercial Agreement Plan Portability – The merged AT&T/BellSouth entity shall permit a requesting telecommunications provider to port the entirety of an existing special access plan or commercial agreement (except for state-specific rates) from an AT&T/BellSouth state where it currently is effective to another state in the AT&T/BellSouth territory.⁶²

UNE Rate Cap – State-approved rates for AT&T and BellSouth UNEs shall be capped at the levels in effect at the Merger Closing Date.⁶³

Establishment of Rates for Section 271 Checklist Elements – The merged AT&T/BellSouth entity shall file with each state in its 22-state incumbent LEC operating territory a tariff to offer section 271 network elements (including line sharing) at just and reasonable rates and terms.⁶⁴

Removal of DS1 Loop and Transport Caps – The merged AT&T/BellSouth entity shall provide requesting carriers with DS1 loop and transport UNEs (where section 251(c)(3) impairment exists) without limitation regardless of whether impairment exists for DS3 UNEs.⁶⁵

Provision of DS1 Loops Required Regardless of Loop Plant – The merged AT&T/BellSouth entity shall provide access to DS1 UNEs where section 251(c)(3) impairment exists, regardless of whether available loop facilities are hybrid loops or fiber loops.⁶⁶

⁶⁰ See Access Point Comments at 67-68; PAETEC Comments at 9; Sprint Nextel Comments at 13.

⁶¹ See Access Point Comments at 67-68; PAETEC Comments at 9; Comments on behalf of the New Jersey Division of the Ratepayer Advocate at 22 (“NJ Ratepayer Advocate Comments”); Sprint Nextel Comments at 13.

⁶² See Access Point Comments at 74.

⁶³ See Access Point Comments 72; CFA Comments at 9; Sprint Nextel Comments at 13; Comments of Fones4all Corporation at 19 (“Fones4all Comments”); NJ Ratepayer Advocate Comments at 22.

⁶⁴ See Access Integrated Networks Comments at 4; Access point Comments at 71-72.

⁶⁵ See Access Point Comments at 72.

⁶⁶ See, *id.* at 72.

Commingling of UNEs and 271 Elements – The merged AT&T/BellSouth entity shall permit requesting carriers to commingle UNEs obtained pursuant to section 251 and network elements obtained pursuant to section 271.

Access to Decommissioned Copper Loops – The merged AT&T/BellSouth entity shall not retire decommissioned copper loops and shall provide unbundled access to such section 251(c)(3) UNEs upon request.⁶⁷

Line Sharing – The merged AT&T/BellSouth entity shall provide the high frequency portion of unbundled copper loops as a UNE.⁶⁸

Eliminate EEL Eligibility Criteria – The merged AT&T/BellSouth entity shall not subject EELs to any requirements or restrictions other than those that apply to individual section 251(c)(3) UNEs.⁶⁹

Divestiture of AT&T Wireline Facilities in the BellSouth Region – AT&T's Metro Private Line Assets in the BellSouth territory, including all facilities and related operations, should be auctioned within six (6) months from the Merger Closing Date.⁷⁰

Divestiture of Wireless Spectrum – BellSouth's wireless assets, including licenses, in the 2.5 GHz band shall be auctioned within six (6) months from the Merger Closing Date.⁷¹

⁶⁷ *Accord*, *id.* at 73; Comments of Fones4all at 19. *See also* NJ Ratepayers' Advocate Comments at 22 (legacy AT&T customers in BellSouth territory must not be harmed).

⁶⁸ In addition, Mobile Satellite Ventures and others would require the merged entity to make available DSL service to providers and consumers on a stand-alone basis, without the need to purchase voice services, in other words, so-called "naked DSL" service. *See* MSV Comments at 16. *See also*, *e.g.*, Access Point at 67; Comments of the Georgia PSC at 2-3.

⁶⁹ *Accord* Access Point Comments at 72-73 (requiring Applicants to terminate any EELS audits).

⁷⁰ *Accord* Access Point Comments at 65-66 (in addition, all local exchange and exchange access facilities of AT&T in the BellSouth region should be divested); CFA Comments at 9 (same).

⁷¹ *Accord* Petition to Deny of Center for Digital Democracy at 6 ("CDC Petition"); Petition to Deny or in the Alternative, to Condition Consent of Clearwire Communications at 12-13 ("Clearwire Petition"); J. Rubin Comments at 12-13.

In addition to the record supporting many of the conditions proposed by the Group Commenters, the petitions and comments of other parties proposed several conditions which the Group Commenters support and believe should be added to those set forth in their Petition. For example, Mobile Satellite Ventures would ensure that the merged entity does not discriminate against non-affiliates in the provision of special access service arrangements by requiring the merged entity to offer, under an open most favored nation arrangement, special access arrangements to any requesting provider under the same rates, terms, and conditions which it offers equivalent services to Cingular or any other of its affiliates.⁷² The Group Commenters agree with this condition, and it should be available for at least five years after the merger is approved.

The Group Commenters also agree with Access Integrated Networks that existing commercial arrangements with BellSouth or AT&T should be available for extension or renewal for at least five years, at the election of the competitive carrier, through good faith negotiations.⁷³ Such renewal and extension should be subject to Commission or state regulator oversight, with requirements that loops, ports, transport, and switching be made available at just and reasonable rates.⁷⁴ To the extent that this applies to rates, terms, and conditions that are not subject to section 251, section 271, or special access tariffs, the Group Commenters agree that affected providers should have the option for extension and renewal to obtain additional certainty and stability under their commercial agreements.

⁷² MSV Comments at 15.

⁷³ Access Integrated Comments at 2.

⁷⁴ *Id.* at 2-3.

The Group Commenters propose the additional condition that the post-merger AT&T/BellSouth be prohibited from seeking to foreclose competitors' access to local facilities and services critical to competitors' ability to service existing operations and expand through the filing of forbearance petitions at the Commission.

Finally, as noted above, the Group Commenters propose a variety of measures to ensure that special access and other wholesale equivalents continue to be made available in a stable price environment. Additional special access services or options may become available after the merger is announced. These must be made available at just and reasonable and non-discriminatory rates. To ensure that the post-merger entity does not engage in discriminatory or unreasonable practices regarding the provision of special access services, in addition to the remedies discussed by the Group Commenters, where a carrier seeks to negotiate a special access arrangement with the post-merger entity, the Commission should provide that either party may request arbitration, which will be decided in a "final offer" or "baseball" style.⁷⁵ Not only will this tend to force the post-merger company to be more reasonable, but it will allow for a swift resolution of disputes, which is necessary if competition is to have a chance to grow despite the loss of AT&T's presence in the BellSouth region. This condition should apply to the entire post-merger AT&T/BellSouth entity.

⁷⁵ Comments of Global Crossing at 7-14.

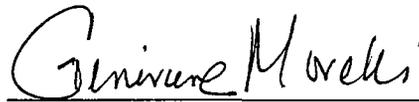
IV. CONCLUSION

As discussed above and in the Group Commenters' Petition, the Application should be denied due to the proposed merger's generation of significant harm to both wholesale and retail competition without any offsetting public benefits. In the alternative, if the Commission is inclined to nonetheless approve this unprecedented merger of giants, it must adopt and enforce the merger conditions outlined in the Group Commenters' Petition and in these Reply Comments.

Respectfully submitted,

**CBEYOND COMMUNICATIONS
GRANDE COMMUNICATIONS
NEW EDGE NETWORKS,
NUVOX COMMUNICATIONS
SUPRA TELECOM
TALK AMERICA INC.
XO COMMUNICATIONS, INC., AND
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EXHIBIT A

FINAL TRANSCRIPT

Thomson StreetEventsSM

T - AT&T at Sanford C. Bernstein & Co. Strategic Decisions Conference

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Jeff Halpern - Sanford C. Bernstein - Analyst

Looking at the BellSouth merger, two questions that were so far hit in the stack. The first one is how much of the merger savings do you anticipate the regulators are going to demand get returned to customers as part of the approval process? And then what's your sense about how the confirmation of Robert McDowell of the SBC affects the BellSouth approval process?

Ed Whitacre - AT&T Inc. - Chairman, CEO

I think the new commissioner -- I guess it remains to be seen whether he'll vote on the BellSouth merger or not. I think you can find it both ways. But in any case, I don't think it makes any difference in the BellSouth merger. And number two, and I'm reasonably confident of this, is I don't think we'll have to give back anything. I don't think we'll have to give back one thing to gain approval of the BellSouth merger. And we really did not on the AT&T merger; I think the same conditions exist here, I don't expect to give back anything.

Jeff Halpern - Sanford C. Bernstein - Analyst

Do you think that the net neutrality issue is going to get tossed into the debate though as far as -- and I personally hate the word "net neutrality", it's really (indiscernible) prioritization opportunities to the consumer market -- as something that will be debated as part of the approval process?

Ed Whitacre - AT&T Inc. - Chairman, CEO

I don't think so. I don't think net neutrality is going to be a part of the approval process. We seem to be having a lot of trouble even defining net neutrality these days or one what it means. No, I don't think it's going to into the process at all.

Jeff Halpern - Sanford C. Bernstein - Analyst

There is a --

Ed Whitacre - AT&T Inc. - Chairman, CEO

And we're looking forward to pretty early approval in that, I might add, certainly this fall.

Jeff Halpern - Sanford C. Bernstein - Analyst

Great. There's persistent concern that either due to your covering only half the households in your region with Lightspeed or due to some of the early challenges of the Lightspeed technology that AT&T is going to go out and buy a DBS company. First of all, do you see owning DBS as offering significant synergies versus reselling a DBS product the way you do today? And could those synergies potentially justify the premium necessary to either buy Dish or DirecTV?

Ed Whitacre - AT&T Inc. - Chairman, CEO

Well, we've set all along that satellite TV is going to be an important part of our strategy to reach different parts of our geography. I don't think we see any change in that at this point in time. We'll cover a great deal with IP TV or Project Lightspeed, but satellite TV, Dish is going to be part of our strategy for a long time. And it's just like we're operating now, they're going to be out in the suburban and the rural areas and they're an important partners of ours. I don't see that changing.