

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

In re)
)
Petition of AT&T Inc. for Expedited)
Interim Waiver of Certain) WC Docket No. 06-130
Structural Separation Rules for)
Advanced Services)
)

OPPOSITION OF EARTHLINK, INC.

EarthLink, Inc. (“EarthLink”), by its attorneys and pursuant to the Commission’s Public Notice,¹ files this Opposition to the AT&T “Petition for Expedited Interim Waiver” dated June 30, 2006 (the “AT&T Waiver Petition”). EarthLink urges the Commission to dismiss or, alternatively, deny the AT&T Waiver Petition as completely lacking merit.

Well-established precedent demands that for a waiver request to be granted, the requesting party must demonstrate there are special circumstances justifying a waiver from the rule *and* that the waiver will serve the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), *citing WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). While “[a]n applicant for waiver faces a high hurdle even at the starting gate,”² AT&T has failed to show in this case either special circumstances to justify a waiver, or that such a waiver would comport with the public interest.

There are no “special circumstances” supporting AT&T’s request. In 2003, the FCC declined to determine that SBC was nondominant in its provision of advanced services, instead granting SBC a partial and conditional forbearance from certain dominant carrier regulations.

¹ FCC Public Notice, DA No. 06-1394 (July 6, 2006).

² *WAIT Radio*, 418 F.2d at 1157.

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As the AT&T Waiver Petition (at 3-4) describes, the FCC offered SBC a choice of taking one of two paths: either (1) accept a partial forbearance of dominant carrier regulation so long as it maintains, among other conditions, the structural separation requirements of SBC-ASI, which had been set in the *SBC-Ameritech Merger Order*; or (2) decline the partial forbearance and re-integrate the advanced services into the SBC incumbent LECs, which would mean those services would be subject to dominant carrier regulation. AT&T (then SBC) chose the former. The crux of the AT&T Waiver Petition essentially requests that the FCC now revisit the partial forbearance compromise³ that was struck by the full Commission in the *ASI Forbearance Order*.⁴

It is wholly improper, however, for AT&T to re-litigate the terms of the *ASI Forbearance Order* in the context of a waiver request. Well-established precedent is clear that a waiver request may not do exactly what the AT&T Waiver Petition does – argue that the initial rule or order was wrongly decided.⁵ As it recently explained this principle, “the Commission may grant

³ See, e.g., AT&T Waiver Petition at 2 (requesting waiver relief from the *ASI Forbearance Order* because “these restrictions increase AT&T’s costs, deny it the ability to structure its operations efficiently, and limit its flexibility in providing customers with the best possible service”); *id.*, at 8 (“Our experience has shown that the 272-like separation requirements with which ASI must comply under the *ASI Detariffing Order* to avoid tariff regulation exact too great a toll on efficiency, cost and customer service.”); *id.*, at 10-11 (asserting that recent FCC orders are inconsistent “with the continued imposition of any section 272-like structural separation requirements on AT&T’s advanced services affiliate. . . .”) AT&T attempts to have the FCC reevaluate the entire premise of the *ASI Forbearance Order*, the cost-benefit judgment, by arguing that the separation costs the FCC previously decided on are too high. See AT&T Waiver Petition at 10, 12.

⁴ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, 17 FCC Rcd. 27000 (2002) (“*ASI Forbearance Order*”).

⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969) (“The very essence of waiver is the assumed validity of the general rule . . .”).

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a waiver of its rules in a particular case *only if the relief requested would not undermine the policy objective of the rule in question* and would otherwise serve the public interest.”⁶

Moreover, it would be a fundamental error to treat AT&T’s pleading here as a waiver request because SBC-ASI petitioned for and voluntarily accepted the terms of the forbearance offered by the Commission in the *ASI Forbearance Order*. A waiver, by contrast, is appropriate relief from an FCC rule of general applicability only where special circumstances demonstrate that the application of a general rule would not otherwise serve the public interest in a specific context.⁷ Thus, the AT&T Waiver Petition should be dismissed because it seeks to strike a different deal than the one granted in the *ASI Forbearance Order* is fundamentally not a waiver request.

The AT&T Waiver Petition requests for the FCC to reconsider the terms of structural separation set forth in the *ASI Forbearance Order*. A reconsideration petition at this late date, however, is barred by Section 405 of the Communications Act.⁸ As such, AT&T’s request for the FCC to re-examine the public interest balance reached in granting partial forbearance must be pursued using other means. Indeed, FCC precedent explains that a request for re-evaluation of a

⁶ *Mobile Satellite Ventures Subsidiary LLC, Order and Authorization*, 20 FCC Rcd. 9752, ¶ 21 (2005) (emphasis added). See also, *Petitions for Waiver of the Emergency Alert System Rules filed by Various Cable Television Systems, Order*, 20 FCC Rcd. 14818, ¶ 8 (2005) (“The Commission may grant a waiver of any of its rules if the petitioner can show *that the request would not frustrate the underlying purpose of the rule*, that in view of the unique or unusual circumstances of the case, application of the rule would be inequitable or unduly burdensome, and that granting the requested waiver would be in the public interest.”) (emphasis added).

⁷ *WAIT Radio*, F.2d at 1157. The *ASI Forbearance Order*, by contrast, did not establish any rule of general applicability, but was specific to the circumstances presented by SBC, *ASI Forbearance Order*, ¶ 15, and was heavily negotiated by SBC, *id.*, ¶ 11.

⁸ 47 U.S.C. § 405(a); *Reuters, Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986) (FCC acted beyond its lawful authority when it entertained petition for reconsideration which was filed outside statutorily prescribed 30 day period under 47 U.S.C. 405).

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forbearance decision should be taken through a petition process⁹ which is an entirely separate process from a waiver request, and which would require adherence to a different set of legal standards.¹⁰ Thus, the only appropriate course of action for the relief AT&T seeks is to petition the FCC to review its prior forbearance order. It may not use the waiver filing process to ask the FCC to revisit the terms of the *ASI Forbearance Order*.

Moreover, AT&T's asserted "special circumstances" are meaningless and unsupported. AT&T asserts that the special circumstances supporting its request are that AT&T can't wait any longer for the FCC to declare its ATM and Frame Relay services nondominant: "AT&T has endured those inefficiencies [of the terms of the *ASI Forbearance Order*] with the expectation that relief through deregulation would be coming. But AT&T is at a point where it can no longer wait." AT&T Waiver Petition at 8. This "circumstance" is plainly invalid. AT&T's "expectation" for a quick and favorable outcome in the *Dom/NonDom NPRM*¹¹ is entirely of AT&T's own making. The FCC has set no expectation that it will inexorably decide AT&T is nondominant in the provision of ATM and Frame Relay services. Rather, every indication from the FCC is to the contrary. The fact that the *Dom/NonDom NPRM* has been pending for five

⁹ *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272*, Memorandum Opinion and Order, 19 FCC Rcd 5211, n.66 (2004) ("To the extent carriers believe, in the future, that circumstances have changed and discriminatory practices have emerged with respect to these particular routes, they are free to file petitions with the Commission."); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, n. 84 (2005) (same).

¹⁰ Logically, to obtain FCC review of the *ASI Forbearance Order*, AT&T would have presented evidence and arguments relevant to meeting the three-prong Section 10 forbearance standard. 47 U.S.C. § 160(a).

¹¹ *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd. 22745 (2001) ("*Dom/NonDom NPRM*").

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years would reasonably indicate the Commission considers it quite difficult to resolve the issues presented, contrary to AT&T's "expectation." This is further confirmed by FCC orders, including in the *ASI Forbearance Order*, that have declined to address the question of incumbent LEC advanced services nondominance. Thus, the assertion of AT&T's lawyers that the company held an "expectation that relief through deregulation would be coming" cannot be taken at face value. Indeed, in light of SBC's prior assertions to the FCC that the pre-merger AT&T was "dominating" the provision of ATM and Frame Relay services,¹² it is difficult, at best, to accept AT&T's assertion that it reasonably expects the FCC to treat it now as nondominant.

AT&T also lists a parade of horrors that it might occur if the waiver relief is not granted. AT&T Waiver Petition at 11-15. All of these claims are far too speculative for the Commission to rely upon. The assertions of AT&T's lawyers – e.g., "millions of dollars" of back office costs, "great costs" and "crippling delays" absent a waiver -- are both vague and completely unsupported by any factual evidence or appropriate affidavit attesting to the accuracy of these allegations. This vague and unsubstantiated pleading violates a core principle for evidentiary support for waiver requests:

The agency is not bound to process in depth what are only generalized pleas, a requirement that would condemn it to divert resources of time and personnel to

¹² "Today, the market for broadband services, such as Frame Relay and ATM, continues to be dominated by the large interexchange carriers (IXCs). The big three providers (AT&T, WorldCom and Sprint) collectively account for 70 percent of the market for these services nationwide, whereas the incumbent LECs account for only about 14 percent." Comments of SBC Communications, Inc., *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Dkt. No 01-337 (Mar. 1, 2002).

hollow claims. The applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary.¹³

Moreover, AT&T asserts some allegations that border on the absurd, such as the claim that “ASI employees possess the key expertise and resources in VoIP 911 connectivity [and so] [t]he sharing restrictions thus stand in the way of effective provisioning and maintenance of VoIP connectivity to the PSTN” AT&T Waiver Petition at 15. Absolutely no facts have been presented to corroborate that SBC-ASI, which is strictly a wholesale provider of advanced services, would possess such specialized knowledge or skill concerning the retail VoIP E911 obligations or processes.

Finally, AT&T has failed to demonstrate that the requested waiver would be in the public interest. The full Commission weighed the public interest costs and benefits of the specific structural separation requirements that would warrant forbearance from the dominant carrier regulations that otherwise would have applied to SBC-ASI’s advanced services operations, and determined that:

*to the extent SBC operates in accordance with the separate affiliate structure established in that Order, with SBC's commitments made in this record, and with the safeguards set forth below, it is not necessary to impose the burdens of tariff regulation on ASI's rates, terms, and conditions for the advanced services subject to this petition. Therefore, in this limited instance and subject to all of the conditions set forth herein, forbearance from applying tariffing regulation to ASI's advanced services operations meets the statutory criteria.*¹⁴

¹³ *WAIT Radio*, 418 F.2d at 1157 n.9 (citing *Rio Grande Radio Family Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968)). The Commission has historically denied waiver requests for lack of evidentiary support. See, e.g., *Application of Stoner Broadcasting System, Inc., Memorandum Opinion and Order*, 49 F.C.C.2d 1011 (1974); *Applications of New England Wireless, Inc., Order on Reconsideration*, 11 FCC Rcd. 7469 (1996).

¹⁴ *ASI Forbearance Order*, ¶ 13.

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The *ASI Forbearance Order* is the full Commission's final decision of how the public interest is best calibrated, and the AT&T Waiver Petition, which would significantly change that prior balance, cannot now be deemed to be in the public interest.¹⁵ Aside from attacking the FCC's evaluation of the public interest harm and benefits in the *ASI Forbearance Order*, AT&T offers no public interest justification for the relief requested. Instead, what it requests now is immediate nondominance treatment for its ATM and Frame Relay services without the key separations requirements, which is far more deregulatory relief than the FCC was willing to grant in either the *ASI Forbearance Order*¹⁶ or the *Wireline Broadband Order*.¹⁷ While AT&T may believe steadfastly that such nondominant regulatory relief is appropriate, a grant of this waiver request would wrongly prejudge the FCC's public interest determination in the pending *Dom/NonDom NPRM*.

¹⁵ *ASI Forbearance Order*, ¶ 15 (“We also wish to make clear that this Order is conditional, and only applies to the extent SBC chooses to continue to offer those services through a structurally separate affiliate and in accordance with its commitments it has made in this record.”).

¹⁶ *Id.*, at ¶ 14 (“We wish to make clear, however, that we make no finding regarding whether SBC's operating companies or ASI is non-dominant in the provision of any service . . .”).

¹⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853, ¶ 9 (2005) (FCC declines to deregulate ATM and Frame Relay services of incumbent LECs not used in conjunction with Internet access).

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For the foregoing reasons, EarthLink respectfully requests that the Commission dismiss or, in the alternative, deny the AT&T Waiver Petition.

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