

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Petition of AT&T Inc. for Forbearance)
Under 47 U.S.C. § 160(c) with Regard) WC Docket No. 06-120
To Certain Dominant Carrier Regulations)
For In-Region, Interexchange Services)

OPPOSITION OF COMPTTEL

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY.....1

II. THE COMMISSION MUST REGULATE AT&T AS A DOMINANT
CARRIER WHEN PROVIDING SERVICES ON AN INTEGRATED BASIS.....3

III. THE COMMISSION SHOULD CONTINUE TO ENFORCE EQUAL ACCESS
SCRIPT REQUIREMENTS.....11

IV. CONCLUSION.....12

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COMPTTEL respectfully submits these comments, pursuant to the Federal Communications Commission’s (“Commission”) *Public Notice* released on June 23, 2006 (DA 06-1302), opposing the petition for forbearance filed, on June 2, 2006, by AT&T Inc. (“AT&T”) in the above-referenced docket.

I. INTRODUCTION AND SUMMARY

AT&T, in its petition, asks the Commission to forbear from applying the following: (1) certain dominant carrier regulations to in-region interstate interexchange services, including international services, provided by any AT&T affiliate, (2) certain separate affiliate regulations that apply to AT&T’s provision of these services in the territories of its affiliates that are not Bell Operating Companies (“BOCs”), and (3) inbound call “scripting” obligations that require BOCs to inform new customers that they have a choice of long distance service providers.¹ As explained below, the Commission should deny AT&T’s petition.

¹ Petition of AT&T Inc. for Forbearance, WC Docket No. 06-120 (filed June 2, 2006)(“AT&T Petition”).

A consumer's ability to choose a long distance provider separate from its local exchange carrier is the cornerstone of the BOC's equal access obligations, and a principle the Commission, as well as Congress, has long upheld. Granting AT&T's Petition would put this consumer choice at significant risk. As the Commission has repeatedly recognized, BOCs and incumbent independent local exchange carriers ("independent LECs") are capable of leveraging their control over the local exchange and exchange access markets to exert market power and impede competition in downstream services, such as retail long distance services, by engaging in predatory pricing, discriminating against rivals of their interLATA services, and engaging in other anti-competitive conduct. Consequently, the Commission cannot find that the standards for forbearance, pursuant to Section 10(c) of the Telecommunications Act of 1996, 47 U.S.C. § 160(c), are met with respect to this petition.

The Commission acknowledged these harms and the need for safeguards in its 1997 *LEC Classification Order*.² Accordingly, the Commission's decision in the *LEC Classification Order* that BOC interLATA affiliates should be treated as nondominant carriers "was predicated on the presence of a section 272 separate affiliate and full compliance with the structural, transactional, and nondiscrimination safeguards of section 272 and the Commission's implementing rules."³ These safeguards, however, are not applicable if AT&T begins to offer interLATA services on an integrated basis. If the Commission were to grant AT&T's petition, there would be no meaningful constraints on

² *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order and Third Report and Order, 12 FCC Rcd 15756 (1997) ("*LEC Classification Order*").

³ *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission Rules*, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914, ¶5 (2003) ("*LEC Classification Further NPRM*").

the ability of AT&T to wield its control of bottleneck facilities to the detriment of long distance competition and ultimately consumers. The same would be true if independent LECs are allowed to offer service on a non-dominant basis without application of the Commission's separations regulations.

Consequently, AT&T should be regulated as a dominant carrier when providing in-region long distance services on an integrated basis. Moreover, if the Commission grants forbearance from the structural separation regulations, it should treat independent LECs as dominant carriers. The Commission should also deny AT&T's request for forbearance from enforcing equal access script requirements.

Dominant carrier regulations (in the absence of separate affiliate requirements) and equal access script requirements are necessary to ensure that the public interest is served via a competitive long distance market, to protect consumers and their ability to choose a long distance provider separate from their local carrier, and to ensure that the retail long distance market does not revert to monopoly pricing.

II. THE COMMISSION MUST REGULATE AT&T AS A DOMINANT CARRIER WHEN PROVIDING SERVICES ON AN INTEGRATED BASIS.

AT&T argues that “[t]he Commission has not applied dominant carrier regulation to any provider of interstate services for more than a decade.”⁴ Indeed, it has been more than a decade – pre-divestiture of AT&T - since a dominant LEC has been permitted to offer local and long distance services on an integrated basis. AT&T is now the dominant LEC in 13 states. If its pending application to acquire BellSouth is approved by the Commission, AT&T will be the dominant LEC in 22 states, including the three largest states in the country. AT&T's control of local exchange and exchange access facilities –

⁴ AT&T Petition at 1.

bottleneck facilities that are essential for long distance competition - enables it to engage in predatory pricing, discriminate against rivals of its interLATA services, and engage in other anti-competitive conduct. Commission precedent recognizes that control of the essential local exchange and exchange access bottleneck facilities enables incumbent LECs to impede competition in downstream services, such as the retail market for long-distance services. Therefore, in the absence of the statutory section 272 safeguards or the separate affiliate regulations (47 C.F.R. §§ 64.1901-64.1903), the Commission should not forbear from applying the dominant carrier regulations to AT&T's long distance service affiliates.

A BOC, even without raising the price of its access services, can engage in a predatory price squeeze since access prices are currently above costs. The Commission has previously recognized the ability of a BOC to use its access cost advantage to disadvantage its affiliate's rivals and potentially even "drive them from the market."⁵ Certain factors the Commission considered in the *LEC Classification Order* to address this concern are no longer applicable. For example, the biennial audits required by section 272(d) have been eliminated; the impact of AT&T having to pay terminating access charges to unaffiliated LECs has been reduced by the BOCs' expansion of their in-region territory through mergers; and access reform has not taken place. In fact, AT&T Corp. ("Former AT&T"), in its comments in the *LEC Classification Further NPRM* proceeding, documented evidence of BOCs engaging in price squeezes by setting long

⁵ *LEC Classification Order*, ¶127.

distance rates at or below switched access rates.⁶ Moreover, the Buckingham Research Group, in a July 6, 2006 report on communication services, states the following:

Pricing trends, while varying widely by geography and product, are stabilizing. The greatest improvement appears to be within wholesale voice, which makes up more than half of all enterprise/wholesale revenues. Of note, AT&T and Verizon, which will soon control nearly three-quarters of the market between themselves, continue to look for ways to raise prices on their recently acquired customer bases.⁷

The report further states the following view of the Group:

Prices should continue to improve on the back of less intense competition resulting from recent M&A. We believe AT&T and Verizon, which dominate the current market for enterprise and wholesale services, will drive the market higher by raising the price cards for services inherited from AT&T Corp and MCI, and will find creative ways to get around FCC rate caps on special access prices (as exemplified by the Verizon executive's comments in relation to the recent forbearance petition.)⁸

The Commission has also previously found that a BOC potentially could use its market power in the provision of local exchange and exchange access services to discriminate against its competitors in the long distance market and, thereby, gain an advantage for its long distance affiliate. The Commission has noted various ways in which a BOC could discriminate against unaffiliated interLATA carriers, "such as through poorer quality interconnection arrangements or unnecessary delays in satisfying its competitors' requests to connect to the BOC's network."⁹ The Commission also

⁶ Comments of AT&T Corp., *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission Rules*, WC Docket No. 02-112, CC Docket No. 00-175, at 6 and 26-30 (filed Jun. 30, 2003)(Comments of Former AT&T).

⁷ *Telecom Carriers Upbeat on Non-Consumer Trends*, The Buckingham Research Group, p. 1 (July 6, 2006).

⁸ *Id.* at 2.

⁹ *LEC Classification Order*, ¶111.

acknowledged the difficulty in detecting such conduct.¹⁰ The proliferation of bundled offerings of voice and data services and unlimited calling plans exacerbate the difficulty of identifying such conduct. The section 272(c)(1) nondiscrimination safeguards the Commission relied on in the *LEC Classification Order* will no longer be in effect. The Service Quality Measurement Plan in the merger conditions is not a remedy, as it only addresses special access, is temporary, and the certification requirement seems to contemplate the existence of the section 272(a) affiliate. Notably, AT&T did not even mention these conditions in support of its petition.

The Commission has additionally raised concerns with misallocation of costs by a BOC “because such action may allow a BOC to recover costs from subscribers to its regulated services that were incurred by its interLATA affiliate in providing competitive interLATA services.”¹¹ “In addition to the direct harm to regulated ratepayers, this practice can distort price signals in those markets and may, under certain circumstances, give the affiliate an unfair advantage over its competitors.”¹²

AT&T argues that dominant carrier regulations are not the appropriate means for addressing these concerns, referencing the *LEC Classification Order* where the Commission decided that BOC section 272 separate affiliates should be regulated as nondominant carriers. AT&T fails to acknowledge, however, that the basis of that decision was that there were other statutory and regulatory safeguards in place at the time – such as the section 272 separate affiliate safeguards - that AT&T is seeking to abandon. The importance of these alternative safeguards to the Commission analysis is buttressed by the fact that the Commission simultaneously predicated independent LEC status as

¹⁰ *Id.*

¹¹ *Id.*, ¶103.

¹² *Id.*

non-dominant in the provision of in-region, interstate, domestic, interexchange services on satisfaction of similar separate affiliate requirements that had been adopted in the *Competitive Carrier Fifth Report and Order*.¹³ “In doing so, the Commission determined that some level of separation between an independent LEC’s interstate long distance service operations and its local exchange operations was necessary to guard against cost misallocation, unlawful discrimination, or a price squeeze.”¹⁴ In the absence of separation safeguards, forbearance from dominant carrier regulations is indefensible.

Dominant carrier regulation is necessary to deter and detect the abuse of BOC market power, especially when the BOC provides local and long distance services on an integrated basis. As Former AT&T explained in its comments in the Commission’s pending rulemaking proceeding on this issue, the transparency afforded by the tariff filing and cost support requirements “protect against price squeeze conduct by ensuring that rates are supported by all relevant costs, including both access and non-access costs, such as sales and marketing, billing and collection, uncollectibles, customer care and network costs.”¹⁵ Section 272(e)(2)’s access imputation requirement alone does not provide sufficient safeguards because it does not factor in the nonaccess costs.¹⁶ Dominant carrier tariff filing also would assist in preventing AT&T from assigning the bulk of its joint costs to its regulated operations so as to support discriminatory pricing of its competitive services and to detect such conduct if it did occur.

Contrary to claims made by AT&T in its petition, the Commission specifically found in the *LEC Classification Order* that “certain aspects of dominant carrier regulation

¹³ *LEC Classification Order*, ¶7.

¹⁴ *LEC Classification Further NPRM*, ¶6.

¹⁵ Comments of Former AT&T at 49.

¹⁶ *See Id.*

might constrain a BOC's ability to raise the costs of its affiliate's interLATA rivals or engage in other anticompetitive conduct."¹⁷ The Commission found that requiring the BOCs to file tariffs with advance notice and cost data would assist in detecting and preventing predatory pricing.¹⁸ The Commission also noted that the price cap regulation of long distance services could deter attempts to raise rivals' costs.¹⁹

AT&T also asserts that competition in the long distance market is intense and robust. Yet, at the same time, AT&T discounts the importance of market share in the analysis of dominant carrier regulations. While the Commission, in the *AT&T Non-Dominant Carrier Order*, found that market share alone was not necessarily indicative of dominance in the market, unlike the "new" AT&T, Former AT&T's market share was on the decline at the time and it did not have control of the local exchange and exchange access bottleneck facilities. In contrast, even before the SBC/AT&T merger, the percentage of SBC's residential lines with SBC as the presubscribed interexchange carrier was already increasing, while the percentage of its residential lines with a presubscribed interexchange carrier other than SBC was on the decline.²⁰ In the *SBC/AT&T Merger Order*, in analyzing SBC's and AT&T's market share, and supply and demand factors, the Commission found "that the market share calculations indicate a high level of concentration in most franchise areas in SBC's states for all relevant services."²¹ Indeed, the Commission found that "these market shares suggest *potentially problematic levels of concentration*."²² While the Commission, for purposes of the

¹⁷ *LEC Classification Order*, ¶87.

¹⁸ *Id.*

¹⁹ *Id.*, ¶87, n. 338.

²⁰ *SBC Communications Inc. and AT&T Corp. Application for Approval of Transfer of Control*, Memorandum Opinion and Order, FCC 05-183, ¶ 91, n. 279 (2005) ("*SBC/AT&T Merger Order*").

²¹ *Id.*, ¶102

²² *Id.*

merger, considered the prior decision by Former AT&T to cease marketing mass market long distance service and the fact that SBC was already a vertically integrated participant in both the input and downstream markets to evaluate whether consumers would “be worse off after the merger,” these factors do not reduce the need for the application of dominant carrier regulations.²³

AT&T also claims that the intermodal competition it faces will prevent it from discriminating against its competitors for fear that the customer, receiving poor quality of service, will “cut the cord” entirely and move to an intermodal provider.”²⁴ AT&T, however, fails to acknowledge that AT&T’s retail service will not be affected by the discriminatory behavior, so such behavior is likely to prompt the customer to switch to AT&T’s retail service. Any revenue AT&T would lose in access charges would likely be recovered through increased retail long distance revenue.²⁵ Moreover, especially if the acquisition of BellSouth is approved, AT&T will be the nation’s largest provider of wireless services. Therefore, the fact that a customer may begin to purchase AT&T wireless service is not likely to pose much of a deterrent.

Finally, AT&T’s statements to investors belie the concern that AT&T expresses with regard to losing access lines, as well as demonstrate that the line loss AT&T does experience is often a migration from one type of AT&T service to another type of service offered by AT&T. In its January 26, 2006 investor briefing, AT&T reported that, with regard to the wireline operations of the “former SBC,” total consumer retail connections

²³ See *Id.*, ¶¶ 35, 55, and 103.

²⁴ AT&T Petition at 27.

²⁵ See *LEC Classification Order*, ¶127.

grew for the sixth consecutive quarter.²⁶ In its April 25, 2006 Investor's Briefing AT&T again reported growth in total consumer connections for its regional operations.

Specifically it posted a net gain in total consumer connections of 224, 000 in the first quarter of 2006 and 775, 000 over the past four quarters.²⁷ AT&T's reported net gain of 511,000 regional DSL lines far exceeds its 267,000 decline in retail access lines.²⁸

AT&T reports that a significant portion of its line loss reflects a migration to DSL.²⁹

Given the AT&T's ability to engage in anticompetitive behavior, the Commission cannot find that the standard for forbearance is met. AT&T's petition raises issues with regard to the appropriate factors to consider in determining dominant carrier status and suggests that there are potentially less burdensome means to deter anticompetitive conduct. These are issues that AT&T should address in the pending rulemaking proceeding, not through a forbearance petition. The Commission, in the pending *LEC Classification Further NRPM* proceeding, sought comment on alternative regulatory approaches, in lieu of dominant carrier regulation, that the Commission could adopt to detect and deter anticompetitive behavior.³⁰ In fact, in the *SBC/AT&T Merger Order*, the Commission cited to the pending *LEC Classification Further NPRM* as an example of an existing proceeding where the Commission would address issues related to the incentive and ability of ILECs, as a result of being vertically integrated participants in

²⁶ AT&T Investor Briefing No. 250, "4th Quarter 2005: The New AT&T Delivers Strong Fourth Quarter, With Growth in Wireless and Broadband, Expansion in Business Services" p. 4. (Jan.26, 2006). *Emphasis added.*

²⁷ AT&T Investor Briefing No. 252, "1th Quarter 2006: AT&T Delivers Strong First-Quarter Earnings Growth, with Progress in Wireless, Broadband and Business Services" p. 5. (April 25, 2006).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *LEC Classification Further NRPM*, ¶3.

both input and downstream markets, to raise rivals' costs or discriminate in the provision of wholesale special access service.³¹

The Commission must follow through in ensuring appropriate safeguards are in place to limit the harms of vertical integration. In the meantime, the standard for forbearance is statutory. The Commission must find that enforcement of the dominant carrier regulation is not necessary to ensure that charges and practices of the carrier remain just, reasonable and nondiscriminatory, that consumers are protected, and that the public interest is preserved.³² Considering the competitive effect of forbearance, as is required by statute, unless and until it is determined that anticompetitive conduct can be constrained by other measures and those measures are implemented, the forbearance standard has not met.

III. THE COMMISSION SHOULD CONTINUE TO ENFORCE EQUAL ACCESS SCRIPT REQUIREMENTS.

AT&T claims that, while its customers “overwhelmingly demand all-distance services from a single provider,” it is inconceivable that customers today are unaware that they have a right to have a long distance provider other than their local carrier.³³ AT&T noticeably, however, does not offer any evidence to support this assertion. In today's market where consumers are inundated with bundled product offerings, it is more likely than ever that someone may not know that he still may choose to have separate carriers for his local and long distance services. Yet, this knowledge is crucial to the equal access obligations. A choice has no meaning if consumers are unaware of their options. It is

³¹ *SBC/AT&T Merger Order* ¶ 55, n. 159. *See also, Id.*, ¶35 [“To the extent that SBC, prior to the merger, had any incentive or ability to raise rivals' costs or discriminate in the provision of wholesale special access services, those issues are better addressed in pending general rulemaking proceedings.”]

³² 47 U.S.C. §160.

³³ AT&T Petition at 37.

inconceivable, therefore, that AT&T can claim that the requirement that AT&T inform its customers of their right to choose a different long distance carrier harms consumers and that forbearance from enforcing the requirement would promote consumer protection, one of the statutory criteria for forbearance.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny AT&T's Petition.

Respectfully submitted,

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