

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**OPPOSITION OF  
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.**

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## Summary

The several currently pending petitions filed by AT&T for relief from dominant carrier regulation for provision of service on an integrated basis, without a separate affiliate, highlight the invalidity of AT&T's arguments. If elimination of dominant carrier regulation is warranted for broadband services essentially because they are broadband and relief is also justified for interexchange narrowband services, it is clear that it really makes no difference to AT&T what services are at issue. Rather, its goal is the removal of important safeguards that will permit it to discriminate against competitors in provision of last mile connections for which it remains dominant for both broadband and narrowband services.

AT&T remains dominant in provision of last mile connections. The Commission in recent orders has recognized that there is little potential for competitive entry for the provision of local transmission services and that the barriers to competitive deployment of loops are substantial. The Commission has found that the only substantial intermodal competitor, cable, does not provide a substitute for ILEC wireline facilities in the business market.

AT&T retains the ability to discriminate against competitors. It charges unconscionably high prices for interstate special access which it uses to subsidize its provision of competitive services. Price cap regulation is ineffectual to protect against this cross-subsidy because BOCs have been granted special access pricing flexibility in most markets. Intermodal competition does not prevent discrimination because there are no significant intermodal competitors in the business market. Nor does the possibility of customers migrating to AT&T's own wireless services safeguard against discrimination.

Dominant carrier regulation is not burdensome. BOCs are familiar with this regulation and comfortable operating in a regulated environment. AT&T may also avoid this regulation by continuing to operate the former AT&T Corp. as a separate affiliate.

The Commission should deny the petition.

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**OPPOSITION OF  
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.**

McLeodUSA Telecommunications Services, Inc. files this Opposition to the above-captioned Petition<sup>1</sup> filed by AT&T Inc. requesting that the Commission forbear from dominant carrier regulation of in-region interstate interexchange service provided by any AT&T company even if provided on an integrated basis by AT&T ILECs.

**I. THE MULTIPLE AT&T PETITIONS SEEKING RELIEF FROM SEPARATE AFFILIATE OBLIGATIONS DEMONSTRATES THAT THEY ARE ALL WITHOUT MERIT**

In the above-captioned petition, AT&T seeks relief from dominant carrier regulation for traditional narrowband interexchange services if provided on an integrated basis, without a separate affiliate, by AT&T ILECs. In a separate petition, AT&T has sought a waiver of separate affiliate requirements to permit it to offer broadband services on an integrated non-

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<sup>1</sup> *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. S 160(c) With Regard To Certain Dominant Carrier Regulations for In-Region Interexchange Services*, Public Notice, WC Docket No. 06-120, DA 06-1302, released June 23, 2006.

dominant basis.<sup>2</sup> It contends in that petition that a waiver is justified because, among other reasons, this will permit the Commission to better achieve the goals of Section 706 of the 1996 Act.<sup>3</sup>

While both petitions are without merit when examined individually, together they highlight the invalidity of AT&T's arguments. If elimination of separate affiliate safeguards is justified for broadband services essentially because they are broadband and relief is also justified for narrowband services, it is clear that it really makes no difference to AT&T what services are at issue and that all its arguments concerning the competitive nature of broadband and narrowband markets are beside the point.

In reality, AT&T wants the Commission to remove important safeguards for entirely different reasons. It wants those safeguards removed because they hinder its ability to discriminate against competitors that remain dependent on its last mile connections to provide either narrowband or broadband services. For the reasons stated in these comments and other comments concerning both petitions, and as well for all the reasons that the Commission established separate affiliate obligations as a condition of non-dominant treatment in the first place, the Commission should deny the requested relief.

## **II. AT&T SIDESTEPS THE REAL ISSUE**

AT&T uses nearly all of its petition to discuss irrelevant matters. Its lengthy discussion of competition in the interexchange market including an alleged glut of long-haul fiber,<sup>4</sup> the

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<sup>2</sup> *Pleading Cycle Established for Comment on Petition of AT&T Inc. for Expedited Interim Waiver of Certain Structural Separation Rules for Advanced Services*, Public Notice, WC Docket No. 06-130, DA 06-1394, released July 5, 2006.

<sup>3</sup> Petition, WC Docket No. 130, p. 17.

<sup>4</sup> Petition p. 9.

growth of wireless, cable, and VoIP long distance,<sup>5</sup> the allegedly low entry barriers into the interexchange market, the structurally competitive nature of the interexchange market,<sup>6</sup> the alleged non-importance of AT&T's large in-region market share,<sup>7</sup> and other asserted characteristics of the long distance market are not germane to whether the Commission should remove safeguards that have permitted these competitive developments to take place.

Competition in the interexchange marketplace has been made possible in the first instance by the break-up of the Bell System and the subsequent application of structural separation safeguards as a precondition of BOC non-dominant treatment for their provision of long distance services. It is only the vigorous application of these safeguards that has made interexchange competition possible. Therefore, the success of these safeguards cannot justify removal of them. Rather, the relevant issue is whether safeguards are required because AT&T continues to possess market power in the provision of last mile access to customers and, therefore, has the ability to harm competitors and undermine competition in the provision of long distance services.

### **III. AT&T REMAINS DOMINANT IN PROVISION OF WHOLESALE ACCESS**

AT&T's brief characterization of concerns that it may possess market power in the provision of in-region wholesale local access services as "lingering" and "misguided" could not be more wrong.<sup>8</sup> Overwhelming evidence submitted to the Commission as well as its

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<sup>5</sup> Petition. p. 13.

<sup>6</sup> Petition p. 8.

<sup>7</sup> Petition p. 7.

<sup>8</sup> Petition p. 25.

determinations in other proceedings demonstrate that in the vast majority of cases there are no alternatives to BOC services for reaching customers.

For example, in the recent *Verizon/MCI Merger Order*, the Commission found that “there is little potential for competitive entry” for the provision of local transmission services.<sup>9</sup> In the *Triennial Review Remand Order*, the Commission found that it is not possible for competitors to construct DS1 and DS3 loops on an efficient basis in most areas of the country.<sup>10</sup> The Commission explicitly found that ILECs retain market power in all relevant business markets, concluding that “the barriers to entry impeding competitive deployment of loops are substantial.”<sup>11</sup> The Commission found that CLECs “face substantial operational barriers to constructing their own facilities;”<sup>12</sup> that competitors still face “steep economic barriers” to the deployment of last mile facilities;<sup>13</sup> and that these barriers “typically make duplication of such facilities uneconomic.”<sup>14</sup> It is not surprising then that competitors have only built their own last

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<sup>9</sup> Verizon Communications, Inc. and MCI Inc., Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18433 (“*Verizon/MCI Merger Order*”) ¶. 39.

<sup>10</sup> *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005)(“*TRRO*”) ¶. 149-154., affirmed, *Covad Communications Co. v. FCC*, Nos. 05-1095, *et al.* (June 16, 2006).

<sup>11</sup> *TRRO*, ¶ 153.

<sup>12</sup> *Id.* ¶ 151.

<sup>13</sup> *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (“*TRO*”) ¶ 199., corrected by Errata, 18 FCC Rcd 19020 (2003), *aff’d in part, remanded in part, vacated in part*, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat’l Ass’n Regulatory Util. Comm’rs v. United States Telecom Ass’n*, 125 S. Ct. 313 (2004).

<sup>14</sup> *TRRO* Separate Statement of Commissioner Kathleen Abernathy.

mile facilities to a very small percentage of business customers.<sup>15</sup> Facilities-based CLECs still rely on ILEC-provided loop facilities at 75% of their customer locations.<sup>16</sup> Even AT&T Corp., before it merged with SBC, in previous proceedings before this Commission, informed the Commission that it relied on ILEC loops to serve approximately 95% of its business customers.<sup>17</sup>

In the *Omaha Order*, the Commission declined to find Qwest nondominant in provision of high capacity loops and transport even though it also found that Cox was a significant intermodal competitor.<sup>18</sup> In that decision, the Commission also found that Qwest was the only wholesale provider in Omaha.<sup>19</sup>

Moreover, the FCC has already determined that the only other substantial intermodal competitor in the market - cable operators – are not a substitute for ILEC transmission facilities. The FCC cannot escape its conclusion in recent orders that “cable companies predominantly compete in the mass market for broadband services throughout the country,” but “in other product markets, *like the enterprise services market*, such competition is evolving more slowly

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<sup>15</sup> See WC Docket 04-405, Time Warner Telecom *et al* Comments at 9 *citing* RBOC 2004 UNE Report, WC Docket 04-313, filed Oct. 4, 2004 at I-2.

<sup>16</sup> See WC Docket 04-405, Time Warner Telecom *et al* Comments at 10.

<sup>17</sup> Reply Decl. of Lee Selwyn, *AT&T Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, ¶ 18 (FCC RM No. 10593 (filed on behalf of AT&T Corp. Jan. 23, 2003)).

<sup>18</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, FCC 05-170, released December 2, 2005 (“*Omaha Order*”) ¶ 51.

<sup>19</sup> *Omaha Order* ¶ 67.

and in more limited geographic areas.”<sup>20</sup> Cable systems “do not have the capacity to serve large numbers of business customers requiring ... high speed services”.<sup>21</sup>

In the *TRRO*, the Commission made numerous findings that cable does not provide a substitute for ILEC wireline facilities in the business market. The FCC determined that there is “little evidence that cable companies are providing service at DS1 or higher capacities” required by business customers.<sup>22</sup> In the business market, the FCC has acknowledged that cable companies do not provide the services that compete with ILEC provided broadband services. Cable companies typically do not provide service to businesses and their networks are deployed in residential not business areas.<sup>23</sup> Further, the technology of the cable network that requires users to share bandwidth is not conducive to business users as many corporate users tend to be on the network at the same time and the shared bandwidth represents a security risk.<sup>24</sup> Because of these issues, cable high capacity service has not been widely used in the business market.<sup>25</sup>

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<sup>20</sup> *TRRO*, ¶ 39 (emphasis supplied).

<sup>21</sup> HAI Consulting, Inc., *The Technology and Economics of Cross-Platform Competition in Local Telecommunications Markets* (dated April 4, 2002), CC Doc. Nos. 02-33, 95-20, 98-10, Attachment A to Kelley Decl. of WorldCom Comments (filed May 3, 2002).

<sup>22</sup> *TRRO*, ¶ 193.

<sup>23</sup> *Declaration* of Daniel Kelley, attached to Joint Comments of WorldCom, Inc., The Competitive Telecommunications Association, and The Association for Local Telecommunications Services, CC Docket Nos. 02-33, 95-20, 98-10 (filed May 3, 2002), ¶ 42.

<sup>24</sup> Declaration of Stephen E. Swiek and Su Sun, Economists Inc., Washington, DC, filed in CC Docket Nos. 01-338, 96-98 & 98-147 (November 2002), attached to Letter from Jason Oxman, Vice President and Assistant General Counsel, Covad Communications Company, to Marlene H. Dortch, Secretary, FCC, WCB Docket 01-338 (filed November 20, 2002), ¶ 14.

<sup>25</sup> Declaration of Daniel Kelley, attached to Joint Comments of WorldCom, Inc., The Competitive Telecommunications Association, and The Association for Local Telecommunications Services, CC Docket Nos. 02-33, 95-20, 98-10 (filed May 3, 2002), ¶ 42.

Nor are other technologies, such as wireless, satellite, or BPL, adequate substitutes for ILEC wholesale services. According to the FCC's own data, the combined market share for broadband technologies other than cable or DSL has decreased since 1999. These statistics show that fixed wireless and satellite combined now have 1.3% of the market compared to 2.8% in 1999,<sup>26</sup> and analysts expect little movement upwards.<sup>27</sup> Other technologies such as WiMAX, mobile wireless and BPL have not been deployed on a generally available commercial basis, if deployed at all.<sup>28</sup>

Apart from all these technical and economic barriers to the availability of alternatives to ILEC wholesale services, cable and other providers simply choose not to offer service to CLECs even though they were able to do so. Because there are no viable alternatives to ILEC wholesale alternatives, the original premises requiring structural separation as a precondition of non-dominant treatment remain valid. If anything, AT&T's market power has increased. SBC's merger with AT&T Corp. has given the new AT&T enormous resources and ability to discriminate against competitors. Accordingly, the Commission may not eliminate safeguards designed to assure that AT&T does not exploit its market power.

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<sup>26</sup> FCC, *High Speed Services for Internet Access: Status as of December 31, 2003* (June 2004), Tables 1-4.

<sup>27</sup> See Gartner, Inc., *Consumer Telecommunications and Online Market: United States 2002-2007* (Dec. 2003) at 3.

<sup>28</sup> See BellSouth, Qwest, SBC, and Verizon report, *Competition in the Provision of Voice Over IP and Other IP-Enabled Services* (May 28, 2004), attached to Letter from Evan T. Leo, Counsel for BellSouth, Qwest, SBC, and Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36 (filed May 28, 2004), at A13.

#### IV. AT&T RETAINS THE ABILITY TO DISCRIMINATE AGAINST COMPETITORS

AT&T contends that price cap regulation in the states has eliminated any incentive or ability for AT&T to cross-subsidize.<sup>29</sup> This ignores a different cross-subsidization, *i.e.* AT&T is already gouging its special access customers (including long distance providers) in order to subsidize its provision of service in other markets. BOCs are the sole source of dedicated access connectivity at roughly 98% of all business premises nationwide, even for the largest corporate users.<sup>30</sup> AT&T and other BOCs have used this bottleneck control to charge unconscionable prices that grossly exceed costs. As noted in the *Special Access Proceeding*, the BOCs are earning grossly excessive rates-of-return based on their own reporting to the Commission.<sup>31</sup> Therefore, AT&T clearly has the ability to cross-subsidize long distance and other services by gouging its special access customers, especially since BOCs are not subject to price cap regulation where they have received pricing flexibility.

AT&T contends that it is not able to engage in non-price discrimination against competitors, such as degrading the quality of access, because the competitor's retail customer would "cut the cord" and move to an intermodal competitor. As already explained, however, there are no intermodal competitors that can meet the needs of business customers. Nor is migration of mass market customers to wireless likely to be a significant deterrent in comparison to the benefits to AT&T of harming competitors when customers are likely to migrate to

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<sup>29</sup> Petition p. 26.

<sup>30</sup> Declaration of Susan M. Gately on behalf of Ad Hoc Telecommunications Users Committee, at paras. 16-19, June 13, 2005, WC Docket No. 05-25 and RM-10593; Comments of PAETEC Communications, Inc. at 6 (Even in "high density markets ...PAETEC is dependent on the ILECs for 95 percent of its special access lines.)

<sup>31</sup> *Special Access Rates for Price Cap Local Exchange Carriers*, Notice of Proposed Rulemaking. WC Docket No. 05-25, FCC 05-18, released January 31, 2005, para. 27.

AT&T's own wireless operations. Therefore, AT&T has not shown that it could not engage in non-price discrimination.

AT&T's bland references to statutory prohibitions against discrimination are unpersuasive. While these statutory provisions provide the Commission appropriate authority, they need to be implemented by safeguards. That is why the Commission determined in the first place that structural separation is a necessary precondition of non-dominant treatment.

## **V. FORBEARANCE WOULD FACILITATE DISCRIMINATION**

In the wholesale market in particular cross-subsidization is a very real and readily viable strategy for the ILECs. ILECs need only price the wholesale rate too high, and make up for this rate to its own long distance operations by accepting lower or no earnings. This is particularly true if, as AT&T claims, long distance service is now a "fringe" service.<sup>32</sup> AT&T's dominance in provision of wholesale transmission services enables it to consign, with impunity, independent IXC's and CLEC's to inferior provisioning, maintenance, and access to network information.

Moreover, the Commission has recognized that when a BOC increases its service area through a merger it has an increased incentive to discriminate against competitors.<sup>33</sup> AT&T will therefore, have an increased incentive to discriminate if its merger with BellSouth is permitted to go forward. As the Commission observed: "This increased incentive to discriminate will result in a public interest harm, because it will adversely affect national competitors' provision of services in the new, combined region, and, as a further result, will harm consumers who ultimately will be forced to pay more for retail services, with reduced quality and choice."<sup>34</sup>

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<sup>32</sup> Petition p. 3.

<sup>33</sup> *SBC/Ameritech Merger Order*, at 84.

<sup>34</sup> *Id.*

Similarly, in addressing the ILEC ability to exercise its market power in the broadband market, the Commission found that because ILECs “compete with other providers of advanced services they have an incentive to discriminate against companies that depend on them for evolving types of interconnection and access arrangements necessary to provide new service to consumers.”<sup>35</sup>

The Commission should deny the requested forbearance for the single reason that it would facilitate AT&T’s ability to act on its incentive to discriminate against competitors.

## **VI. DOMINANT CARRIER REGULATION IS NOT BURDENSOME**

AT&T describes dominant carrier regulation as encompassing tariffing, price cap regulation, and entry and exit regulation. It claims these requirements are burdensome and produce no public interest benefits.

These contentions are unpersuasive for several reasons. First, dominant carrier regulation is optional. If AT&T wants to avoid these burdens it may continue to operate the former AT&T Corp. as a separate affiliate. Second, none of these aspects of dominant carrier regulation is particularly burdensome. BOCs are quite familiar with this regulation and very comfortable operating in a regulated environment. The regulatory burden of filing cost support for wholesale tariffs is minimal since AT&T knows what its costs are. Moreover, since the ILECs’ wholesale broadband services face very little competition, and their CLEC and IXC customers cannot easily switch back and forth between providers for the vast majority of locations, short delays in tariff effective dates have no material effect on the AT&T’s ability to “compete” in the wholesale market. Entry and exit regulation is essentially a non-issue since it is not likely that AT&T will be either entering or exiting any interexchange markets in a way that

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<sup>35</sup> *Id.*, ¶ 202.

would trigger this regulation. Nor is price cap regulation burdensome. Again, BOCs are well able to meet the burdens of that regulation. BOCs chose it in preference to rate-of-return regulation and should not now be heard to complain that it is burdensome. Price cap regulation also provides for considerable pricing flexibility.

Finally, there are vital public interest benefits to application of dominant carrier regulation. Absent these safeguards, or optional structural separation, BOCs will have an enhanced ability to discriminate against competitors, which in turn will harm competitors and consumers.

Accordingly, AT&T has not shown that forbearance should be granted because of burdens of dominant carrier regulation.

## **VII. CONCLUSION**

For these reasons, the Commission should deny the requested forbearance.

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