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September 8, 2006

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SEP - 8 2006

Federal Communications Commission
Office of Secretary

VIA HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

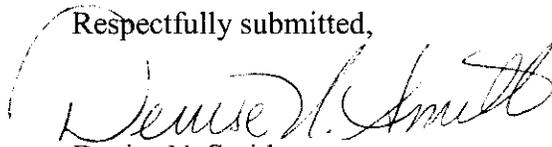
Re: Notice of Ex Parte Presentation, WC Docket No. 06-74

Dear Secretary Dortch:

Yesterday, Julia Strow of Cbeyond Communications, Susan Berlin of Nuvox Communications, Lisa Youngers of XO Communications, Jim Falvey of Xspedius Communications, and Brad Mutschelknaus and Tom Cohen of Kelley Drye & Warren LLP met with Michelle Carey, Senior Legal Advisor to Chairman Martin, and Ian Dillner, Legal Advisor to Commissioner Tate, to discuss the proposed merger of AT&T and BellSouth.

At these two meetings, they distributed copies of two presentations (attached), both entitled "Competitive Harms from the Proposed AT&T/BellSouth Merger and Conditions Necessary to Partially Offset Such Harms." One presentation contained non-confidential material and one contained confidential and highly confidential material subject to the First and Second Protective Orders in Docket 06-74. A copy of the latter presentation is being filed under separate cover and under seal pursuant to those Protective Orders. A redacted copy of that presentation is submitted with this letter for inclusion in the public file.

Respectfully submitted,



Denise N. Smith

Attachments:

10/10/06 10:00 AM
1st ABCDE 0

Ms. Marlene H. Dortch
September 8, 2006
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- (1) Non-Confidential -- Competitive Harms from the Proposed AT&T/BellSouth Merger and Conditions Necessary to Partially Offset Such Harms
- (2) Redacted -- Competitive Harms from the Proposed AT&T/BellSouth Merger and Conditions Necessary to Partially Offset Such Harms

cc: Michelle Carey
Ian Dillner

NON-CONFIDENTIAL MATERIAL

**Competitive Harms from the Proposed
AT&T/BellSouth Merger and
Conditions Necessary to Partially Offset Such
Harms**

**Cbeyond Communications, NuVox Communications, XO
Communications and Xpedius Communications**

**Dockets 06-74
September 7-8, 2006**

Ed Whitacre Opines on the Proposed Merger & the Odds of Regulatory Approval

Business Week Chicago Bureau Chief:

“Is it a possibility that SBC would acquire BellSouth?”

Ed Whitacre, AT&T CEO:

“It sure would be nice, but it doesn’t have much chance of happening because of market power, size, etc. I think it would be real hard to do. I don’t think the regulators would let that happen, in my judgment.”

MARKETS DEFINED

RELEVANT MARKETS:

Product:

LOCAL PRIVATE LINE – WHOLESALE & RETAIL

Geographic:

MSAs THROUGHOUT AT&T AND BS REGIONS

COMPETITIVE HARMS FROM THE PROPOSED MERGER

- **The proposed merger would eliminate the strongest actual – and potential – competitor (AT&T) to BS in the local private line market in the BS region**
- **The proposed merger would eliminate an actual – and potentially much stronger – competitor (BS) to AT&T in the local private market in the AT&T region**
- **The loss of Cingular as an independent contractor would materially reduce competition in the local private line market**
- **The proposed merger would frustrate the ability of regulators to use comparative oversight to implement and enforce the market opening provisions of the 1996 Act**
- **The proposed merger would increase the incentive and ability of the combined AT&T/BS to discriminate against rivals and decrease the ability of regulators to police this discrimination**

AT&T AS BS' STRONGEST COMPETITOR IN THE LOCAL PRIVATE LINE MARKET

Evidence =

- **AT&T'S 11+ METRO FIBER NETWORKS AND OTHER NETWORK FACILITIES**
- **AT&T'S BUILDINGS SERVED**
- **AT&T'S CUSTOMER BASE**
- **AT&T'S USE OF OTHER CLECS**
- **AT&T'S FINANCIAL RESOURCES**
- **AT&T'S BRAND**

BS IS AN ACTUAL (AND POTENTIALLY SIGNIFICANT) COMPETITOR TO AT&T IN THE LOCAL PRIVATE LINE MARKET IN AT&T'S REGION

Evidence =

- BS' CURRENT AGREEMENT WITH QWEST**
- BS' NEW AGREEMENT WITH SPRINT NEXTEL**
- BS' DISCUSSIONS WITH AT&T**
- BS' BUSINESS PLANS**

CINGULAR, AS AN INDEPENDENT ENTITY, PROVIDES A CHECK ON ANTICOMPETITIVE ACTIVITIES OF AT&T/BS

- While owned by AT&T and BS, Cingular is an independent entity
- Cingular has the nation's largest digital and voice network and is a major purchaser of special access services from AT&T and BS
- AT&T and BS have made it a priority to provide special access services to wireless carriers and not to lose these providers to competitive carriers
- Cingular thus has leverage today to provide a check on the wholesale prices, including the special access prices of AT&T and BS

THE PROPOSED MERGER WILL SIGNIFICANTLY WEAKEN THE EFFECTIVENESS OF BENCHMARKING

- The Commission itself noted in the *SBC/Ameritech Merger Order* that “there will be some point at which further reduction in the benchmark firms renders such comparisons ineffective.” If this proposed merger is approved, we will have reached that point. With only two major BOCs remaining, current distinguishing practices will be lost, and there is little chance that major “new practices” will be developed.
- Examples of Current Differing Practices
 - Xspedius – BS requires special construction for unconditioned loops when no facilities are available; AT&T does not. BS requires the payment of large security deposits; AT&T does not. BS rarely honors expedite requests; AT&T usually fulfills reasonable requests.
 - XO – BS’ terms governing volume and term special access agreements are far more favorable than those of AT&T. BS pays stipulated damages when it fails to meet a state performance metric; AT&T does not.

THE PROPOSED MERGER WILL INCREASE THE INCENTIVE AND ABILITY OF THE COMBINED FIRM TO DISCRIMINATE AGAINST RIVALS

- Post-merger, the value to the combined firms from capturing the benefits of external (spillover) effects will increase significantly – resulting in either higher costs for end users or a reduction in competition.
- Because of the loss of a benchmarking firm, the Commission is less likely to be able to detect this discriminatory behavior.

LAST YEAR'S MERGERS DEMONSTRATE THAT THE COMPETITIVE HARMS LEAD TO PRICE INCREASES TO CUSTOMERS

- Commenters in Last Year's SBC/AT&T and VZ/MCI Mergers Predicted Rates Would Rise Because of Loss of Entities with Major Market Presence
- AT&T Raised Prices for SBC Local Private Line Services Post Merger
- AT&T's Senior Executives have Touted these Increases on Wall Street:
 - Ed Whitacre (5/31/06) – “Prices [which had been declining] have stabilized in our judgment and even in some cases, believe it or not, there's some upside to pricing, which is a good thing.”
 - Rick Linder (7/25/06) – “...pricing is at a point in terms of point-of-sale pricing where we are still seeing some declines, but at a much reduced level from where we were seeing even a few quarters ago.”

PROPOSED CONDITIONS TO PARTIALLY OFFSET COMPETITIVE HARMS

- **Conditions Related to UNE Loops and Transport**
 - UNE Rate Cap
 - UNE Availability Freeze
 - Establishment of Rates for Section 271 Checklist Elements
 - Removal of DS1 Loops and Transport Caps
 - Provision of DS1 Loops Required, Regardless of Loop Plant
 - Required Escalation Procedures for Chronic Loop Problems

- **Wire Center Related Conditions**
 - Recalculation of Business Lines and Fiber-Based Collocators and Eliminate the One-way Ratchet
 - Recalculation to Exclude Non-Fiber-Based Collocators
 - Business Line Recalculation to Exclude AT&T Special Access Lines
 - Recalculation to Address AT&T's New Affiliation with BS
 - Permit Commingling of UNEs and 271 Elements

PROPOSED CONDITIONS TO PARTIALLY OFFSET COMPETITIVE HARMS

- **Conditions Related to Other UNEs and 252 Interconnection Arrangements**
 - Eliminate EEL Eligibility Criteria
 - Ensure Access to Decommissioned Copper Loops
 - Require Line Sharing
 - Permit Interconnection Agreement Portability
 - Freeze SQM/PMA/SEEMS Performance Measurement Plans
 - Ensure Continued Availability of “Katrina” Caused Loop Upgrades
 - Change Control Related to OSS

PROPOSED CONDITIONS TO PARTIALLY OFFSET COMPETITIVE HARMS

- **Conditions Related to Special Access and other Wholesale Services**
 - Special Access Rate Cap
 - Fresh Look
 - Non-Discrimination in the Provision of Special Access Circuits
 - File Pursuant to Section 211 all Special Access/Wholesale Carrier Contracts
 - Continue Offering AT&T's Wholesale Services in BS territory
 - Implement a Service Quality Measurement Plan for Special Access
 - Permit Special Access and Commercial Agreement Plan Portability

- **Divestitures**
 - Divest all Overlapping Metro Private Line Assets
 - Divest Wireless Spectrum