COMPTEL

The Communications Association of Choice

September 22, 2006

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 – 12th Street, SW
Washington, DC 20554

Re: AT&T/BellSouth Merger Application – WC Docket No. 06-74;
Proposed UNE-Related Remedial Conditions

Dear Ms. Dortch:

In previous comments and ex parte submissions by many interested parties, the Commission received evidence regarding (1) AT&T's presence in the local private line market in the BellSouth region,[1] (2) AT&T's critical role either directly or indirectly in supplying circuits to wholesale customers,[2] and (3) the fact that new wholesale market entry post-merger is unlikely to be timely or sufficient.[3] Consequently, there is almost certain to be substantial competitive harm in BellSouth's region if the merger is approved, with prices rising significantly for wholesale customers and the retail customers they serve.[4] In addition to the harm to competition in BellSouth's region, the Commission also received information to the effect that BellSouth had extensive plans to provide competitive telecom services outside the BellSouth region.[5]

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1 Comments of Cbeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc., XO Communications and Xspedius Communications at 63-65 ("Joint CLEC Comments"); Petition to Deny of Comptel at 7-8 ("Comptel Petition"); Petition to Deny of Time Warner Telecom at 16-18 ("TWT Petition").

2 Joint CLEC Comments at 63-65; Comptel Petition at 7-13; TWT Petition at 33-37.

3 Joint CLEC Comments at 67-74.

4 Joint CLEC Comments at 76. *See also,* Letter from Denise N. Smith, Kelley Drye & Warren LLP, Counsel to Cbeyond Communications, NuVox Communications, XO Communications and Xspedius Communications to Marlene Dortch, Secretary, Federal Communications Commission (transmitting Ex Parte letter in WC Docket No. 06-74) (Aug. 22, 2006) at 4-8 ("August 22, 2006 Ex Parte").

5 Letter from Gary Phillips of AT&T and Bennett Ross of BellSouth to Marlene Dortch, Secretary, Federal Communications Commission (filed in WC Docket No. 06-74) (Sept. 14, 2006) at p. 4 [denying the assertion.]

Moreover, there is actual and potential harm caused by this proposed merger beyond this horizontal network overlap. First, commenters have put into the record that AT&T's market presence in the BellSouth region involves much more than the deployment and operation of its own network. AT&T is a major customer of other competitors (providing revenues that enable such competitors to expand their networks and operations) and has powerful brand recognition[6] as well as significant financial resources. Second, there is the actual and potential competition from another BOC,[7] which the Commission has adjudged to be vital to the development of local competition nationwide.[8] Third, there is the check provided on local private line rates by Cingular, a currently independent entity that would be swallowed post-merger.[9] Clearly, the public interest is best served by a swift rejection of this application.

With the loss of AT&T in BellSouth's region and BellSouth in AT&T's region – and given the inability of other competitors to fill this void in a timely and sufficient fashion – competitive providers will have little choice but to turn to wholesale alternatives provided by the merged entity. Unfortunately, at the very same time access to incumbent unbundled loops and transport facilities (as well as special access facilities) takes on greater importance, the regulations governing their use are either riddled with loopholes or under attack, with the incumbents seeking their complete repeal. Thus, the existing UNE rules as they now stand cannot be counted upon to address the harms from the proposed merger. Accordingly, the proposed merger is inherently and substantially anticompetitive; and the application should be denied as not being in the public interest.

The Commission cannot approve this proposed merger unless it finds that the merger will serve the public interest, convenience and necessity. However, if the Commission nonetheless chooses to approve the merger, it has an obligation to adopt substantial, enforceable conditions to address the competitive harms arising from the transaction. The starting point for these conditions is those proffered by the merging parties and accepted in last year's SBC/AT&T merger.[10] These conditions alone, however, are not sufficient, especially since the proposed merger extends the harmful impacts the Commission identified in the previous mergers.[11] It is for that reason that we propose the attached conditions to ensure continued access to unbundled

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6 August 22, 2006 Ex Parte 6-7.

7 August 22, 2006 Ex Parte 5-8.

8 *See SBC/Ameritech Merger Order* ¶ 102.

9 Joint CLEC Comments at 77.

10 *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, Appendix F (2005); *see also Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, Appendix G (2005).

11 COMPTEL does not believe that the previous conditions were sufficient to address the harms posed by the previous mergers.

loops and transport in the AT&T and BellSouth regions.[12] When taken as a whole – and when read in conjunction with remedies for access to special access services that COMPTEL and others address in a separate letter – these "unbundling" conditions can help mitigate the harms.

Respectfully submitted,

/s/ Karen Reidy
Vice President, Regulatory Affairs

cc: Michelle Carey
Ian Dillner
Scott Deutchman
Scott Bergmann
Thomas Navin
Renee Crittendon
Nick Alexander
Don Stockdale

Attachment

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[12] This list of UNE conditions is not an all inclusive list of the conditions that the Commission should impose on this merger. Various parties have proposed other conditions that should also be imposed. For example, COMPTEL has joined others in a letter, being submitted in this docket under separate cover, which proposes special access conditions that are a necessary, but not sufficient, pre-condition to a finding that the merger is in the public interest.

Proposed Merger Conditions Related To
Unbundled Network Elements ("UNEs")

I. Forbearance

- AT&T and BellSouth shall withdraw their pending forbearance petitions before the FCC (CC Docket Nos. 06-120 and 06-125) and shall not file any additional forbearance petitions with the FCC.
- The merged entity will not seek a ruling, including through a forbearance petition under section 10 of the Communications Act (the "Act"), 47 U.S.C. 160, or any other petition, altering the status of any facility being currently offered as a loop or transport UNE under section 251(c)(3) of the Act.

II. Access to Loops

- The merged entity shall provide unbundled access to dark fiber, fiber, copper and hybrid loops in its 22-state incumbent LEC operating territory.
- The merged entity shall not retire decommissioned copper loops and shall provide unbundled access to such UNEs pursuant to section 251(c)(3).
- The merged entity shall provide requesting carriers with DS1 loop and transport UNEs in every wire center and without limitation.
- The merged entity shall be subject to rigorous performance measures and self-effectuating remedies governing its performance in processing orders, provisioning, repairing, and maintaining network elements for its competitors. This includes the establishment, by the merged entity, of a process to ensure enhance monitoring and expedited/escalated maintenance on loop facilities that are subject to three or more trouble tickets in a 60-day period or are otherwise perceived as circuits with difficult-to-detect problems (perceived as such by the competitive LEC using the loop or its customers.)

III. 251 UNE Pricing

- The merged entity shall continue to offer and shall not seek any increase in State-approved rates for UNEs or collocation that are in effect as of the Merger Closing Date.

IV. 271 UNE Pricing

- The merged entity shall offer section 271 network elements at just and reasonable rates and terms,[1] which shall not exceed 115% of the UNE rates most recently approved by the applicable state commission, until

[1] Section 271 network elements are any elements that have been listed, or interpreted by the FCC to be part of, the competitive checklist in 47 U.S.C. 271(c)(2)(B) including, but are not limited to, loops, transport, dark fiber, multiplexing and line sharing. CLECs will be permitted to convert circuits from special access, including volume and term plans, to section 271 elements without penalty. The merged entity shall permit CLECs to combine section 271 loop and transport network elements and to commingle section 271 loop and transport facilities with alternative wholesale arrangements (including, but not limited to, section 251, special access, and any commercially negotiated arrangements).

such time as the state sets different rates for network elements under section 271.

- These rates, once approved, shall be incorporated into section 252 interconnection agreements.
- The merged entity agrees, to the extent necessary, to arbitrate rates, terms and conditions for section 271 network elements before state commissions, in accordance with the section 252 arbitration process, and shall not oppose any petitions for such arbitrations on the grounds that state commissions have no authority to establish rates, terms and conditions for section 271 network elements or are otherwise preempted from doing so.

V. Wire Center Recalculations

- The merged entity shall recalculate its wire center calculations for the number of business lines and fiber-based collocators and, for those that no longer meet the non-impairment thresholds established in 47 C.F.R. §§ 51.319(a) and (e), provide appropriate loop and transport access.[2] In identifying wire centers in which there is no impairment pursuant to 47 C.F.R. §§ 51.319(a) and (e), the merged entity shall exclude the following:
  i. fiber-based collocation arrangements established by AT&T or its affiliates;
  ii. entities that do not operate (*i.e.*, own or manage the optronics on the fiber) their own fiber into and out of their own collocation arrangement but merely cross-connected to fiber-based collocation arrangements; and
  iii. special access lines obtained by AT&T from BellSouth as of the day before the Merger Closing Date.
- The merged entity shall only count each DS1 UNE loop, and DS1 equivalent circuits, as one business line.

VI. Transit Service

- The merged entity will provide transit service for traffic between any two parties that are interconnected with the merged entity pursuant to an interconnection agreement. The transit service will be subject to sections 251 and 252 of the Act and will be subject to prices at UNE switching rates. The merged entity will not assert that transit service is not subject to sections 251 and 252 of the Act.

VII. EELs Eligibility Criteria

- The merged entity shall not subject EELs to the 10 DS1 transport cap associated with 47 C.F.R. § 51.319(e)(2)(ii)(B), the service eligibility criteria associated with 47 C.F.R. § 51.318(b), or the service eligibility criteria previously established by the FCC that applied to EELs (see Supplemental Order Clarification FCC 00-183).

[2] CLECs that previously obtained special access in lieu of UNEs in affected wire centers may convert to UNEs without any special access termination penalties.

- The merged entity shall cease all ongoing or threatened EEL audits and shall not initiate any subsequent EEL audits.

VIII. Portability of Interconnection Agreements

- The merged entity shall make available to requesting carriers within the merged entity's 22-state incumbent LEC operating territory any new interconnection arrangements, UNEs, and provisions of an interconnection agreement (including the entire agreement) secured by the merged entity outside of this territory.
- Any interconnection arrangement, UNE, or provision of an interconnection agreement (including the entire agreement) to which the merged entity or its affiliate is a party, in one of the states of the merged entity's 22-state incumbent LEC operating territory, shall be made available to requesting carriers in all other states throughout the territory subject to state-specific pricing.

IX. Multi-State Interconnection and/or Resale Agreements

- Subject to technical feasibility and state-specific pricing, the merged entity shall offer requesting carriers an interconnection and/or resale agreement covering the merged entity's 22-state incumbent LEC operating territory no later than two months after the Merger Closing Date and upon request, shall make such an agreement on a state-specific basis.

X. Assurance of Reasonable Winback Practices.

- The merged entity is prohibited from: (1) offering retail pricing that is below TELRIC wholesale deaveraged zone pricing for the equivalent service, and (2) charging CLECs disconnect fees for UNEs when the customer switches back to the ILEC.
- The merged entity shall not engage in winback pricing that is geographically focused on where CLECs are competing.

XI. OSS Change Process

- The merged entity may not implement any significant OSS changes without CLEC consultation and concurrence.

XII. Term of Conditions

- Pending a subsequent ruling by the Commission, these merger conditions are permanent. The merged entity agrees not to petition to remove these conditions for a minimum of 7 years and then only on the grounds that the conditions are no longer necessary in the public interest.
- The merged entity agrees that any prior or future grant of forbearance under section 10 of the Act shall not diminish, alter or in any way affect the merged entities obligations or responsibilities under these merger conditions.

This list of UNE conditions is not an all inclusive list of conditions that the Commission should impose on this merger. Various parties have proposed other conditions, including additional UNE conditions, that should also be imposed.