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September 26, 2006

VIA ECFS

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

Re: *Ex Parte*: WC Docket No. 06-74 - In the Matter of AT&T, Inc. and BellSouth Corporation Applications for Transfer of Control

Dear Ms. Dortch:

On September 7, 2006, Julia Strow of Cbeyond Communications ("Cbeyond"), Susan Berlin of NuVox Communications ("NuVox"), Lisa Youngers of XO Communications ("XO"), Jim Falvey of Xspedius Communications ("Xspedius"), and Brad Mutschelknaus and Tom Cohen of Kelley Drye & Warren LLP met with Michelle Carey, Senior Legal Advisor to Chairman Martin, to discuss the proposed merger of AT&T, Inc. ("AT&T") and BellSouth Corporation ("BellSouth"). At that meeting, Ms. Carey asked the attendees whether the SBC/AT&T and Verizon/MCI merger conditions proved helpful, *i.e.,* presumably whether these companies have been able to use the conditions to at least partially offset wholesale service competition lost by the mergers. In response to Ms. Carey's question, Cbeyond, New Edge Networks, NuVox, Talk America, XO, and Xspedius (collectively, "Joint Commenters") hereby submit the instant *ex parte* letter.

It is important to note at the outset that, to the extent that the Commission is of the opinion that the SBC/AT&T and Verizon/MCI merger conditions are working and that it intends to seek similar voluntary concessions in the instant proceeding, the Joint Commenters believe that the SBC/AT&T and Verizon/MCI conditions, by themselves, are insufficient to offset the competitive harms that will be inflicted upon customers by the merger of the two Bell Operating Companies ("BOCs") involved here. Indeed, as the Joint Commenters have advocated throughout this proceeding, a much more robust and comprehensive set of conditions are needed

even to *partially* offset the litany of competitive harms that will flow from the merger of AT&T and BellSouth.[1] Accordingly, the instant *ex parte* letter addresses only whether the SBC/AT&T and Verizon/MCI merger conditions have been useful in ameliorating at least some of the harm to competition caused by the two mammoth IXC/RBOC mergers last year.

UNE Rate Increase Restrictions

Generally speaking, restrictions on AT&T's and Verizon's ability to seek UNE rate increases are critical to providing the regulatory and economic stability necessary for the remaining competitive LECs to focus on their business plans, rather than litigating. The SBC/AT&T and Verizon/MCI UNE rate increase restriction is helpful but, by itself, insufficient to enable the Joint Commenters and others to replace the competition in wholesale services lost due to the mergers. The main shortcoming with the UNE rate increase restriction is that its duration is too short – only two years. State rate cases are massive undertakings that demand the expenditure of tremendous administrative and monetary resources – resources that will have to grow exponentially if the BOCs file rate cases in many states simultaneously. The old AT&T and MCI were the principal participants in state UNE rate proceedings, expending large sums of money and presenting many expert witnesses on behalf of themselves and the competitive LEC industry. Participation in state rate cases in a post-independent AT&T and MCI environment would sap the resources of even the largest of the remaining competitors. Suspension of BOC-sought UNE rate increases for a duration greater than two years would provide the remaining competitive LECs much more stability and certainty. An additional failing of this condition is that it provides the merging entities with an "out" in the case of UNE rate appeals, instead of requiring that the BOCs withdraw any appeals they filed.

Wire Center Collocators

Although the condition excluding affiliated fiber-based collocations from the BOCs' non-impairment thresholds has been incrementally helpful toward the goal of restoring competition lost through the past mergers, it falls far short of the Commission's objective that the wire center test should reflect real market opportunity. The condition as drafted perpetuates the Commission's "one-way ratchet" requirement, and thus does not necessarily reflect actual, current market conditions. Further, ambiguous language in the existing condition has allowed

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[1] *See, In the Matter of Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T, Inc.*, WC Docket No. 06-74, Comments of Cbeyond Communications *et al.*, filed June 5, 2006; Reply Comments of Cbeyond *et al.*, filed June 20, 2006. *See also, e.g.*, ex parte letter from Denise N. Smith, Kelley Drye & Warren LLP to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-74, dated August 31, 2006.

AT&T to contend that it can count carriers as qualifying fiber-based collocators which are not themselves fiber-based, but instead are simply cross-connected to fiber-based collocators. Thus, like the UNE rate increase restrictions, this condition does not go far enough and, by itself, has not provided the Joint Commenters with an adequate means of replacing the competitive presence lost to the prior mergers.

Wholesale Private Line and Special Access

In regard to the cap on the wholesale private line offerings of the legacy AT&T and MCI, that condition too is helpful but insufficient. Of those individual companies that purchase such private line circuits, many do not purchase private line services from AT&T out of the TCG FCC Tariff No. 2, so the condition capping DS-1 and DS-3 private line rates referenced in that tariff is of no use to them. Any new condition should ensure that the entire array of wholesale private line services are included.

With respect to the SBC/AT&T and Verizon/ MCI special access merger conditions, the Joint Commenters note that they are primarily UNE-based carriers. While the special access rate caps have been helpful to those that purchase special access from SBC/AT&T and Verizon/MCI, the Joint Commenters have no insight into whether SBC/AT&T or Verizon/MCI have offered them the same rates, terms and conditions as those which the BOCs offer to themselves or to other carriers, as they are unable to obtain all of the special access contracts which those carriers have entered into. Without a requirement to file all special access contracts or arrangements with the Commission and/or post all of those contracts on the carriers' websites, the SBC/AT&T and Verizon/MCI special access non-discrimination conditions cannot be effectively monitored by carriers or other purchasers of special access. Moreover, the Joint Commenters believe that a significant failing of the special access merger conditions is that they lack a "fresh look" provision. Competitive LECs that previously purchased special access from legacy AT&T may not want to purchase special access from the new AT&T, but face large termination penalties if they terminate their agreements early or do not meet their volume commitments. A fresh look provision would have given competitive LECs such as the Joint Commenters the ability to choose a competitive special access provider without incurring any penalty for doing so. Finally, the joint competitors believe that in order to ameliorate the harm caused by losing BellSouth as a regulatory benchmark, the Commission should include a special access portability condition. Such a condition would require the merged AT&T BellSouth entity to permit requesting telecommunications providers to port the entirety of an existing special access plan or commercial agreement from one state to another in the merged entity's territory or allow parties with such plans to move circuits between plans without penalty or additional cost.

Sunset

The life span of the SBC/AT&T and Verizon/MCI merger conditions is too short to provide the Joint Commenters with sufficient opportunity to replace the competitive presence lost to prior mergers. The entities that were merged into the new AT&T and Verizon did not build their competitive presence in two years, and it is unrealistic to think that competitive LECs can replace that presence in so short a time.

Respectfully submitted,

Brad E. Mutschelknaus

Cc: Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert McDowell
Dan Gonzalez
Michelle Carey
Scott Deutchman
Scott Bergmann
Ian Dillner
John Hunter
Tom Navin
Don Stockdale