September 29, 2006

BY ECFS

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

Re: AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, WC Docket No. 06-74

Dear Ms. Dortch:

In utter disregard of the Commission's consistent admonition that it will impose merger conditions "only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms),"[1] a handful of parties to this proceeding continue to litter the record with ever-expanding wish lists of proposed conditions that have no connection to any conceivable impact of this transaction.[2] As the robust record in this proceeding overwhelmingly confirms, the merger of AT&T and BellSouth will produce enormous public interest benefits and will not harm competition in any relevant market. Thus, although each of the merger condition advocates' self-serving proposals would be contrary to the public interest (and, in many cases, patently unlawful) in *any* context, there is no basis even to consider them in this merger proceeding.

With few exceptions, these are the same conditions that merger condition advocates proposed to remedy claimed special access harms – and that the Commission properly rejected – in the SBC-AT&T and Verizon-MCI merger proceedings. Here, as in the prior merger proceedings, they ask the Commission to repeal virtually all of the unbundling relief it granted in its recently affirmed *Triennial Review Remand Order*[3] and to flout court mandates by requiring unbundling in the absence of impairment. Here as in the prior merger proceedings, they ask the

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[1] *SBC-AT&T Merger Order*, 20 FCC Rcd. 18290, ¶ 19 (2005); *Time Warner-America Online Merger Order*, 16 FCC Rcd. 6547, ¶ 6 (2001) ("It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies and objectives of the Communications Act that flow from the proposed transaction – *i.e.*, harms and benefits that are 'merger-specific'").

[2] *See Ex Parte* Letter from Karen Reidy (Comptel) to Marlene H. Dortch (FCC), WC Docket No. 06-74 (Sept. 22, 2006) ("*Sept. 22 Comptel Letter*"); *Ex Parte* Letter from Comptel, Ad Hoc Telecommunications Users Committee, Mobile Satellite Ventures Subsidiary LLC, Time Warner Telecom, Inc. to Marlene H. Dortch (FCC), WC Docket No. 06-74 (Sept. 22, 2006) ("*Sept. 22 Coalition Letter*"); *Ex Parte* Letter from John J. Heitmann (counsel for ScanSource Inc.) to Marlene H. Dortch (FCC), WC Docket No. 06-74 (Sept. 22, 2006).

[3] *See* Order on Remand, *In the Matter of Unbundled Access to Network Elements*, 20 FCC Rcd. 2533 (Feb. 4, 2005), *aff'd Covad Communications* v. *FCC*, 450 F.3d 528 (D.C. Cir. 2006).

Commission to dismantle the rules the Commission found necessary to implement its unbundling rules and to prevent clear abuses of that regime.[4] Here, as in the prior merger proceedings, they demand that the Commission grant them all of the expansive – and wholly unnecessary – new special access regulations they are seeking in the pending industrywide rulemaking proceedings that the Commission has repeatedly held are the only appropriate fora for consideration of those baseless requests.[5] And here, as in the prior merger proceedings, they ask the Commission to engage in the wholesale abrogation of private contracts and to supplant the dispute resolution processes established by the Communications Act with one-sided arbitration processes rigged to reach the outcomes they desire.[6] The Commission properly rejected these proposals last year. The same result is compelled here.

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[4] *Compare Sept. 22 Comptel Letter*, Proposed Merger Conditions at 1-2 (proposing, *inter alia*, that the merged company unbundle "dark fiber, fiber, copper and hybrid loops," provide "DS1 loop and transport UNEs in every wire center without limitation," offer "section 271 network elements at just and reasonable rates and terms, which shall not exceed 115% of the UNE rates," and not subject EELS to the Commission's service eligibility criteria or 10 DS1 transport cap) *with Ex Parte* Letter from Bridgecom Int'l, Inc., Broadview Networks, Inc., Cbeyond Communications, Conversent Communications, CTC Communications, Inc., Lightship Telecom, Inc., NuVox Communications, SNiP LiNK, LLC, Talk America, Inc., TDS Metrocom, LLC, Xspedius Communications, and XO Communications to Marlene Dortch (FCC), WC Docket No. 05-65, Attachment at 1, 3 (Oct. 18, 2005) ("*2005 Bridgecom et al. Letter*"), *Ex Parte* Letter from ATX Communications, Inc., Bridgecom Int'l, Inc., Broadview Networks, Inc., BullsEye Telecom, Inc., Cavalier Tel. Mid-Atlantic, LLC, Eureka Telecom, Inc., Granite Telecomms., LLC, Lightyear Network Solutions, LLC, Pac-West Telecomm, Inc. US LEC Corp., and U.S. TelePacific Corp. to Marlene H. Dortch (FCC), WC Docket No. 05-65, at 6 (Oct. 19, 2005), *Ex Parte* Letter from Jonathan Lee (Comptel) to Marlene H. Dortch (FCC), WC Docket No. 05-65, at 2 (Oct. 21, 2005) ("*2005 Comptel Letter*") *and with SBC-AT&T Merger Order* ¶¶ 35, 45, 55 & n.161.

[5] *Compare Sept. 22 Coalition Letter* at 10, 11, 18 (proposing, *inter alia*, that the merged company "[e]liminate Phase II pricing flexibility for DS1, DS3, certain Ethernet services, and any other local transmission services that offer similar revenue opportunities" and offer all such services under price caps, "reinitialize" its special access price cap rates "at the level that would have applied had the FCC set the X factor applicable to that basket at 6.5 percent for 2004, 2005 and 2006," and "be prohibited from enforcing" any special access tariff condition "that is not reasonably related to the efficiencies yielded by volume and/or term commitments") *with 2005 Bridgecom et al. Letter*, Attachment at 1-3, *Ex Parte* Letter from Ad Hoc Telecommunications Users Committee, Broadwing Communications LLC, BT Americas Inc., Level 3 Communications LLC, Qwest Communications Int'l, Inc., SAVVIS, Inc., and XO Communications, Inc. to Marlene H. Dortch (FCC), WC Docket No. 05-65, at 2-3 (Oct. 21, 2005) ("*2005 Coalition Letter*") *and with SBC-AT&T Merger Order* ¶¶ 35, 55 & nn.161, 506.

[6] *Compare Sept. 22 Coalition Letter* at 18 ("All purchasers of special access service from the Merged Firm shall be entitled to void their existing special access service contract(s) or tariff arrangement(s) if they so choose"), *id.* at 14-16 (proposing detailed "rules of arbitration" that would, *inter alia*, "give the greatest weight to whether similar or identical terms are included in similar contracts involving a non-ILEC seller"), *Sept. 22 Comptel Letter*, Proposed Merger

Indeed, the Commission's findings that these types of conditions were unnecessary to remedy any special access impacts of the SBC-AT&T and Verizon-MCI mergers foreclose any possible claim that they are an appropriate response to *this* merger, which has even *less* of an impact on special access competition. Applicants have repeatedly shown that (i) AT&T is an insignificant supplier of wholesale special access services in the BellSouth franchise areas, (ii) many other facilities-based suppliers compete aggressively and effectively with BellSouth in the few metropolitan areas where AT&T does operate local networks, and (iii) after applying the competitive screens employed by the Commission and the Department of Justice in prior mergers, there is no basis for any public interest concern in any of those metropolitan areas. In recognition of these marketplace realities, 18 state commissions have approved this merger without *any* of the conditions these parties request.

The merger condition advocates simply refuse to confront these dispositive facts. They seek conditions, not to address any impact of this merger, but solely to advance their own interests and misguided policy agendas and no longer even bother to pretend otherwise. For example, one merger condition advocate asks that AT&T and BellSouth be required to withdraw their pending petitions for forbearance from outdated and one-sided long distance regulations that are affirmatively harmful to consumers and competition in today's robustly competitive environment. This party goes so far as to suggest that AT&T be prohibited from filing *any* additional forbearance petitions for the duration of the permanent merger conditions they seek.[7] Under its proposal, apparently *any* forbearance request by AT&T seeking elimination of *any* unnecessary regulation, no matter what the subject, would be *permanently* prohibited. Wholly apart from the obvious over-reaching, it is difficult to conceive of a more anticompetitive, non-merger-specific and unlawful request. If forbearance is unwarranted, a forbearance request can be denied. But the public interest certainly is not served by denying AT&T – and AT&T alone – the right to seek relief from outdated regulations that are no longer consistent with the public interest, much less to suggest that such an anticompetitive prohibition be imposed permanently. Nor would such a condition be lawful, in any event, since AT&T has a statutory right to seek forbearance, and the Commission has a statutory obligation to grant forbearance requests that meet the statutory test.

While this one proposed condition is a particularly egregious example of the attempts by merger condition advocates to co-opt the merger review process to their own ends, it is emblematic of their overall effort. *All* of these attempts are improper because *none* of these proposed conditions is designed to address any merger-related harm. Because the proposed

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Conditions at 3 ("Pending a subsequent ruling by the Commission, these merger conditions are permanent") *with 2005 Comptel Letter* at 4, *2005 Coalition Letter* at 4, *Ex Parte* Letter from T-Mobile USA, Inc. and Global Crossing North America, Inc. to Marlene H. Dortch (FCC), WC Docket No. 05-65 (Oct. 7, 2005), *Ex Parte* Letter from Broadwing Communications, LLC and SAVVIS, Inc. to Marlene H. Dortch (FCC), WC Docket No. 05-65, at 6-7 (Oct. 21, 2005) *and with SBC-AT&T Merger Order* ¶ 178 & n.499.

[7] *Sept. 22 Comptel Letter*, Proposed Merger Conditions at 1.

merger of AT&T and BellSouth will unquestionably serve the public interest and will not cause competitive harm, it should be expeditiously approved without conditions.

Sincerely,

/s/ Gary L. Phillips

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