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October 4, 2006

ECFS

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

**Re: AT&T and BellSouth Merger Application, WC Docket No. 06-74
Written *ex parte* presentation
Proposed Merger Condition Regarding Microwave Collocation
Response to AT&T *ex parte* dated September 25, 2006**

Dear Ms. Dortch:

On September 18, 2006, counsel for XO Communications (“XO”) submitted a written *ex parte* presentation requesting, as an *additional* condition of merger *if* the Commission approves the pending merger application, that the Commission require AT&T to adopt and adhere to the microwave collocation terms and conditions contained in the XO-BellSouth interconnection agreements in Florida, Georgia, North Carolina, and Tennessee throughout the post-merger company’s territory.¹ As background, XO explained its recent difficulties in obtaining microwave collocation at AT&T wire centers as an alternative to fiber-based entrance facilities for purposes of accessing unbundled network elements (“UNEs”) or to interconnect, and exchange traffic, with AT&T, despite terms and conditions in XO’s interconnection agreements with AT&T and in AT&T’s tariffs that seemingly allow for such collocation. XO’s experiences contrast sharply with the plain and comprehensive way in which AT&T’s merger partner, BellSouth, has accommodated XO’s intentions to implement microwave collocations. Building upon this benchmark comparison that formed the heart of the *September 18 Letter*, XO

¹ Letter of Brad E. Mutschelknaus and Edward A. Yorkgitis, Jr., Kelley Drye & Warren, LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in WC Docket No. 06-74 (dated Sep. 18, 2006) (“September 18 Letter”).

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requested the additional merger condition described above should the Commission otherwise be inclined to grant the proposed merger of AT&T and BellSouth.

On September 25, 2006, AT&T responded to XO's *ex parte* presentation.² AT&T opposed the proposed merger condition on two grounds: (1) XO, according to AT&T, is improperly seeking resolution of a collocation dispute in this proceeding, making XO's request irrelevant to this merger proceeding and (2) XO, according to AT&T, is not in any event seeking microwave collocation for the purpose of accessing unbundled network elements or interconnection. XO hereby briefly responds to AT&T's indefensible allegations.

First, XO is not seeking the resolution of a dispute in this proceeding that is more appropriately addressed through adjudication or litigation. It is true that XO, in its *September 18 Letter*, provided substantial detail about its (to date) unsuccessful attempts to obtain microwave collocation with AT&T as provided for, or so XO was led to believe, in AT&T's interconnection agreements and tariffs. AT&T, in practice, has refused to recognize XO's requests in Missouri and, more recently, has questioned XO's attempts to obtain microwave collocation in California.³ XO provided this detail in the *September 18 Letter* as background to demonstrate, as part of a benchmark analysis in this merger proceeding, how AT&T was engaging in anticompetitive activity to frustrate XO's attempts to achieve microwave collocation as an alternative to fiber-based entrance facilities. AT&T's behavior contrasts sharply with BellSouth, which negotiated with XO reasonable and comprehensive procedures and terms for microwave collocation. Importantly and as refutation of AT&T's argument in the *Phillips Letter*, XO does not seek from the Commission in this docket a resolution regarding the specific disputes XO has had with AT&T regarding microwave collocation at any of the six wire centers at issue in the two states. Rather, because of the much more favorable procedures contained in XO's BellSouth interconnection agreements, which were reached through negotiation, XO asks that, *as a condition to any merger approval*, AT&T be required to adopt and implement the more pro-competitive terms and conditions of its merger partner throughout the merged company's

² Letter of Gary Phillips, AT&T, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in WC Docket No. 06-74 (dated Sep. 25, 2006) ("Phillips Letter").

³ On September 8, 2006, XO representatives notified AT&T to commence the application process for microwave collocation under the XO-AT&T interconnection agreement at four Los Angeles wire centers. AT&T, after an initial review, questioned whether the request was for legitimate purposes under Section 251(c)(6) of the Communications Act of 1934, as amended (the "Act"). After additional explanation from XO, it now appears that AT&T has at least agreed to have XO make a site visit to examine whether the contemplated microwave collocation can be realized at the locations in question (*i.e.*, whether the proposed roof-top antennas will be able to communicate with other XO wireless facilities). See e-mail chain between XO and AT&T representatives appended hereto as Attachment 1.

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territory with respect to XO and any other carrier that seeks to use microwave collocation to interconnect or access UNEs.

XO's benchmark analysis in its *September 18 Letter* is relevant to this merger proceeding. The Commission has, as the major incumbent local exchange carriers ("ILECs") have been swallowed up by AT&T (formerly SBC) and Verizon, noted that these mergers result in the loss of important benchmarks provided by one of the merging ILEC's that justify preserving the more pro-competitive practices of one of the merger partners in the form of a post-merger condition.⁴ Thus, rather than being much ado about nothing, as AT&T contends, XO's request for an additional condition based on a benchmark analysis very much has to do with the pending merger. Significantly, if the merger is *not* approved – the result XO and its fellow opponents urge – then XO does not (at this time) seek any relief from the Commission regarding microwave collocation, although if its concerns with AT&T's practices in response to XO's specific microwave collocations requests remain, XO reserves its rights to seek a resolution of those specific disputes before an appropriate forum.

Second, despite the tempest of AT&T's rhetoric, XO seeks microwave collocation for purposes recognized under Section 251(c)(6) of the Act. XO will not respond measure for measure to all of AT&T's mischaracterizations and innuendo regarding XO's intent. Instead, XO will go to the heart of the matter: AT&T claims that XO wants a "real estate deal" to lease rooftop space to place antennas *solely* for the purpose of communicating with other XO wireless facilities.⁵ This is flatly incorrect. XO has sought microwave collocation only at central offices where XO is already collocated. The requested collocation is for the purpose of accessing UNEs or interconnecting with AT&T's network. The roof-top antennas, and the wireless links to other XO facilities, whether on AT&T central offices or other buildings or structures, are intended to replace fiber entrance facilities. AT&T makes much about the following statement by XO contemporaneous with its failed attempt to apply for microwave collocation in Missouri: "The request is for microwave between the two offices. Radio equipment and antennas will be placed on the roof of both offices and they will transmit between each other."⁶ There is nothing surprising about this description. Any microwave collocation will involve communication between two antennas. The fact that the two antennas are on the roofs of central offices is not in any way shocking given XO's intent. If XO connected a collocation at one AT&T central office that was off-net to XO with a fiber-based circuit to a second XO collocation at another AT&T central office where the traffic was then patched into an XO fiber-ring, AT&T should have no

⁴ *GTE Corporation and Bell Atlantic Corporation, Request For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, ¶¶ 258-259 (June 16, 2000).

⁵ *Phillips Letter* at 2.

⁶ *See id.* (quoting email from David Stauder (XO) to Grace Capitulo (AT&T) (sent July 20, 2006, 12:58 PM).

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objections. In that case, AT&T would have no argument that XO's collocations at each central office, and the fiber circuit between them, were legitimate, provided that XO obtained UNEs or exchanged traffic at each central office in question. XO's proposed microwave collocation using two rooftop antennas is, in essence, no different than this scenario and simply replaces the fiber between the two collocations. This is explained more fully in Exhibit 1, where XO's representative, discussing the proposed collocations in California, notes that the fiber-based connection between the two collocations already exists:

Basically this is the same thing as entrance fiber at the street level. Only instead of going through the ground we are shooting over to another [AT&T] office that is already on our fiber network. Example: Right now [XO's collocation at Central Office A⁷] is considered off net to us. It was turned up using leased facilities. [XO's collocation at Central Office B] is actually turned up by [XO] fiber and is considered on net to us. If we can install microwave then we can disco [read: discard] the leased facilities and turn [XO's collocation at Central Office A] on net via the fiber at [XO's collocation at Central Office B].⁸

XO has, simultaneously with this letter, reiterated with AT&T its intentions in Missouri and in California to use microwave collocation at AT&T wire centers for the purposes supposedly recognized by AT&T's interconnection agreements and tariffs.⁹ XO will persist with AT&T through intercompany discussions regarding specific collocation disputes described in this response and in the *September 18 Letter*.¹⁰ But, given XO's experience now in two states, it is questionable whether AT&T will, as a general matter, facilitate competitors that turn to wireless entrance facilities regardless of what their interconnection agreements and AT&T's

⁷ CLI Codes have been redacted from this quote (and in the e-mails in Attachment 1).

⁸ Attachment 1, email from David Stauder (XO) to Bob Cremen, Jr. (AT&T) (sent September 22, 2006, 10:58 AM).

⁹ Letter from Bob Buerrosse, XO, to Brian Hernandez, Sales Manager, AT&T (dated October 4, 2006), appended hereto as Attachment 2.

¹⁰ The *Phillips Letter* also suggests that despite AT&T's requests for calls to discuss the matter of XO's intentions further, XO simply failed to appear. *Phillips Letter* at 2, n.9 and accompanying text. The e-mails AT&T attached to the *Phillips Letter* make clear that XO was unable to attend due to a family emergency involving XO's participant on the call. Moreover, the correspondence between the two companies provided in the *September 18 Letter* make clear that, ultimately, it was AT&T that chose to forego any discussions unless XO submitted a *bona fide* request. See *September 18 Letter, Attachment E*, email from Ed Ewing, AT&T, to Bob Buerrosse, XO (sent August 7, 2006 5:28 PM) ("My thought would be . . . to postpone the call until we can get an official request [*i.e.*, BFR from XO] into the organization with specific details.")

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tariffs provide. As XO explained in its *September 18 Letter*, BellSouth provides a more favorable process for CLECs seeking to utilize microwave collocation. Accordingly, XO reiterates its request that the Commission, if it is otherwise inclined to grant the merger application of BellSouth and AT&T, impose a condition, among other conditions XO and other competitors urge the Commission to adopt, requiring the post-merger company to make available microwave collocation on the same terms and conditions as exist in XO's interconnection agreement with BellSouth in Florida, Georgia, North Carolina, and Tennessee.

This *ex parte* written presentation is being filed pursuant to the Commission's Rules.

Do not hesitate to contact the undersigned if there are any questions or if the Commission desires any further information on the subjects discussed in this letter.

Respectfully submitted,



Brad E. Mutschelknaus
Edward A. Yorkgitis, Jr.
KELLEY DRYE & WARREN LLP
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
202-342-8400

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John Branscome
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Jim Bird
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ATTACHMENT 1

**E-Mail Chain Between David Stauder,
Xo, And Frontaine Freeman And Bob
Cremen, AT&T (September 8-22, 2006)**

**[E-mail addresses, telephone numbers, CLLI codes
(and associated street addresses) have been redacted]**

From: Stauder, David [REDACTED]
Sent: Friday, September 22, 2006 14:09
To: CREMEN JR., BOB (PB)
CC:
BCC:
Subject: RE: CA-Microwave

Yes.

From: CREMEN JR., BOB (PB) [REDACTED]
Sent: Friday, September 22, 2006 1:08 PM
To: Stauder, David
Subject: RE: CA-Microwave
Sensitivity: Confidential

Not really. Can you answer this question with a yes or no?

-----Original Message-----

From: Stauder, David [REDACTED]
Sent: Friday, September 22, 2006 10:58 AM
To: CREMEN JR., BOB (PB)
Subject: RE: CA-Microwave
Importance: High
Sensitivity: Confidential

That's sort of a trick question. Basically this is the same thing as entrance fiber at the street level. Only instead of going through the ground we are shooting over to another office that is already on our fiber network. Example: Right now [REDACTED] is considered off net to us. It was turned up using leased facilities. [REDACTED] is actually turned up by fiber and is considered on net to us. If we can install microwave then we can disco the leased facilities and turn [REDACTED] on net via the fiber at [REDACTED]. So I guess the answer is interconnection to access the UNE's we have. Make sense?

From: CREMEN JR., BOB (PB) [REDACTED]
Sent: Friday, September 22, 2006 11:46 AM
To: Stauder, David
Subject: RE: CA-Microwave
Sensitivity: Confidential

David,

Will XO be using the microwave for interconnection or accessing UNE's?
Thanks

Bob

-----Original Message-----

From: Stauder, David [REDACTED]
Sent: Saturday, September 16, 2006 10:18 AM
To: CREMEN JR., BOB (PB); FREEMAN, FRONTAINE A (SWBT)
Cc: Vazquez, Joe
Subject: RE: CA-Microwave
Importance: High
Sensitivity: Confidential

Below are the 4 CO's we'd like to do a SVR at to determine if line of site exists and if placement of microwave equipment is possible between each pair.

[REDACTED] St.
Hollywood CA. [REDACTED]

[REDACTED] Lane
Los Angeles CA. [REDACTED]

And

[REDACTED]
Los Angeles CA [REDACTED]

[REDACTED] St.
Los Angeles CA. [REDACTED]

From: CREMEN JR., BOB (PB) [REDACTED]
Sent: Friday, September 15, 2006 4:42 PM
To: FREEMAN, FRONTAINE A (SWBT); Stauder, David
Subject: RE: CA-Microwave
Sensitivity: Confidential

David,

I cannot find a form for this request. Which CO's do you want to start with?

Bob

-----Original Message-----

From: FREEMAN, FRONTAINE A (SWBT)
Sent: Friday, September 15, 2006 12:07 PM
To: 'Stauder, David'
Cc: CREMEN JR., BOB (PB)
Subject: RE: CA-Microwave
Sensitivity: Confidential

David,

I am going to refer you to your Account Manager to get this started.

Bob,

As always, I am here for you.

Frontaine Freeman
Collocation Service Center Manager
AT&T Collocation Services
AT&T Texas
1410 E. Renner Rd
Richardson, Texas 75082
[REDACTED]

-----Original Message-----

From: Stauder, David [REDACTED]
Sent: Friday, September 15, 2006 1:53 PM
To: FREEMAN, FRONTAINE A (SWBT)
Subject: RE: CA-Microwave
Importance: High
Sensitivity: Confidential

Frontaine-

Have you had a chance to review the below? Let me know. Thanks!

From: Stauder, David [REDACTED]
Sent: Friday, September 08, 2006 8:27 AM
To: 'FREEMAN, FRONTAINE A (SWBT)'
Subject: CA-Microwave
Importance: High
Sensitivity: Confidential

Frontaine-

We are attempting to apply for microwave entrance again. This time in CA since there is language detailing the process. Per the below we may request a Line-Of-Site to be conducted with an ATT rep and XO rep. Is there a form for this? It just says request "in writing". Let me know. Thanks!

Provisioning Process and Fees:

a. **Site Visit Request:** CLEC may, at its option, provide a Site Visit Request to Pacific, in writing, setting forth the names of the Pacific Central Office Building(s) CLEC wishes to visit for potential Microwave Collocation. Such site visit consists of an CLEC representative and appropriate Pacific personnel visiting a Pacific Central Office building for the purpose of determining whether an unobstructed line-of-sight may be technically feasible. Such Site Visit does not obligate CLEC to request, or Pacific to provide, Microwave Collocation on the site. The site visit will take place within 10 business days of receipt by Pacific of CLEC's Site Visit Request or as soon thereafter as can be scheduled by the Parties.

CLEC will submit a Site Visit Request fee of \$250.00 for each site requested with each Site Visit not to exceed two hours. Charges for site visits that take longer than two (2) hours will be charged by Pacific to CLEC at Pacific's loaded labor rates on a per hour basis.

ATTACHMENT 2

October 4, 2006

**Letter from Bob Buerrossee, XO
To Brian Hernandez, AT&T**



XO Communications

5101 NW 21st Avenue
Suite 210
Fort Lauderdale, FL 33309
USA

October 4, 2006

Brian Hernandez
Sales Director
AT&T, Inc.
3033 Chain Bridge Rd.
Oakton, VA 22185

RE: Requests of XO Communications for Microwave Collocation for purposes of interconnection and access to UNEs in Missouri and California

Dear Brian:

XO Communications ("XO"), over the past several months, has without success been seeking microwave collocation at several AT&T central offices, first in Missouri and now in California. XO's intent is to use wireless microwave transmission facilities licensed to its affiliate, Nextlink Wireless, Inc., to connect its network to XO equipment collocated at AT&T's wire centers for purposes of accessing unbundled network elements or to interconnect with AT&T for purposes of exchanging traffic. XO would achieve this by placing microwave facilities on the roof of AT&T central offices and connecting to the collocated XO equipment located in those central offices. As such, XO's roof-top antennas, by connecting to other wireless XO facilities, including other XO microwave antennas at AT&T central offices that are "on-net" to XO's fiber network, will provide XO with entrance facilities to its collocated central office equipment and replace wireline connections (that are either self-provided or leased) with wireless circuits, bringing a measure of intermodal competition to the local telecommunications marketplace. In this way, XO will be able to bring collocations at AT&T's wire centers that are currently "off" XO's network onto its network.

XO's interconnection agreements, either directly or by incorporating relevant tariff terms, appear to allow for such microwave collocation in both Missouri and in California. Inexplicably to XO, AT&T has not been processing XO's requests, questioning the purposes for which XO seeks to place antennas on the roofs of AT&T central offices and erecting procedural barriers, such as demands that XO initiate *bona fide requests*. For example, in an *ex parte* written submission filed September 25, 2006, in FCC Docket No. 06-74, AT&T claims that "XO . . . does not seek to collocate microwave facilities to obtain access to or interconnection with AT&T facilities. Rather, it appears to want some sort of real estate deal with AT&T for the lease of roof-top space for placement of facilities that XO would use to communicate with other XO facilities on other rooftops."¹

¹ Letter from Gary L. Phillips, AT&T Inc., to Marlene H. Dortch, Secretary, FCC, filed in WC Docket No. 06-74, at 2 (dated Sept. 25, 2006) ("September 25 Letter").

Unfortunately, AT&T has misapprehended XO's intentions. It is possible that XO's initial communications were (mistakenly) interpreted to support the conclusion that XO was interested in locating the antennas on the roof-tops without any tie-in to the XO collocated equipment already in place at the AT&T central offices. XO did explain that XO's proposed antennas on the central offices would communicate with other XO antennas on other building and structures, specifically, in some cases, AT&T's other offices. This is necessary, otherwise the collocated microwave facilities could not support either the exchange of traffic with AT&T's network or the access to the unbundled network elements XO has purchased from AT&T, as intended. Given the nature of the wireless portion of XO's network, wireless links of this sort are inherent. Consequently, there is no inconsistency with the configuration of the proposed wireless facilities and XO's purpose for each collocation request it has made, to effectuate interconnection or access unbundled network elements at each respective central office. To the extent any doubt remains, XO reiterates that purpose here.

XO is pleased to see that AT&T, in its *September 25 Letter* to the FCC, recognized that the tools are already in place in both Missouri and in California that should allow AT&T to effectuate microwave collocation requests expeditiously. AT&T acknowledged that, in Missouri, both the XO interconnection agreement and the AT&T tariff "expressly" provide for microwave collocation.² AT&T also confirmed XO's understanding that XO's interconnection agreement with AT&T in California provides for microwave collocation for the purposes of interconnecting with AT&T and access unbundled network elements.³ Given that, as reiterated plainly herein, collocations for these purposes is and have always been XO's intent, XO trusts that there will be no further delays with the microwave collocation requests XO has made in California or Missouri. Concomitantly, XO expects that AT&T will dispense with any requests for XO to commence a *bona fide* request process for the requested placement of roof-top antennas and otherwise will facilitate the timely processing of XO's requests in both Missouri and California, as well as future locations.

XO representatives will be promptly reinitiating XO's requests with their contacts at AT&T with the expectation that the clarification provided in this letter will remove any remaining unwarranted procedural roadblocks to satisfying XO's appropriate applications.

If there are any further questions regarding this matter, please do not hesitate to contact me.

Sincerely,



Bob Buerrosse

² *Id.* at 4.

³ *Id.* at 3.