Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	**WC Docket No. 06-74**
	)	
AT&T Inc. and BellSouth Corporation	)	
Applications for Approval of	)	
Transfer Of Control	)	**DA 06-2035**

"THE LORAX, THING ONE AND THING TWO"

NOW COMES UTEX COMMUNICATIONS CORPORATION d/b/a FEATURE GROUP IP ("Feature Group IP") and respectfully submits these Comments on the "Proposals" submitted by AT&T on October 13, 2006 that generated the Commission's call for Comments.

"SILENCE! … You stay in your place while I sit here and rule."[1]

I. DESCRIPTION OF FEATURE GROUP IP

Feature Group IP is a CLEC with current operations in Texas and imminent expansions to other states. Feature Group IP's product is the intermediation and interoperation of technologies and networks used for servicing the transmission of human speech or other data configured to track the analog characteristics of human speech[2] between two or more locations. This includes the interconnection of Internet telephony applications and networks with Plain Old Telephone Service networks. In order for all for the positive externalities of a Communication Network – and in order for a "network of networks"[3] to truly exist – Feature Group IP's network

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[1] Giesel, Theodor Seuss, *Yeartle the Turtle* by Dr. Seuss©, Random House (1958). The parallel between Yertle and AT&T is remarkable. AT&T has been stacking both lobbyists and ILECs in a Yertle-like attempt to be the highest "king" in the Realm of All Things Communicative. In order to get higher and higher and maintain his throne, however, Yertle must silence all criticism – no matter how valid – of his "stacking" policy.

[2] FAX, modem, and TTY transmissions, for example, appear to the PSTN to be a traditional voice call, but the communication involves exchange of data, not human speech.

[3] The concept of a "network of networks" is not limited to the Internet. The PSTN is also a network of networks in that it is comprised of an interconnected and interoperable set of LEC, IXC and CMRS provider

must interoperate with the PSTN. The interoperability and interconnection obligations set out in §§ 201, 251, 252 and 332(c)(1)(B) (and other provisions) require incumbent carriers to connect their networks with those of new technology entrants on a national basis and to interoperate with them on reasonable terms.[4]

Feature Group IP's business is principally wholesale in nature, and involves intermediation between the Internet and the Public Switched Telephone Network ("PSTN"). Feature Group IP provides wholesale PSTN connectivity to non-carrier Enhanced Service Providers ("ESPs")[5] that in turn provide Internet Protocol ("IP") enabled enhanced/information services to their customers. Feature Group IP's ESP customers obtain PSTN connectivity through Feature Group IP, as a wholesale service. Feature Group IP's service to these ESPs is a federally tariffed interstate telecommunications service. The ESPs then use the Feature Group IP-supplied telecommunications service as an input to the retail enhanced/information service

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facilities. Second Notice of Proposed Rulemaking, *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket 94-54, FCC 95-149, 10 FCC Rcd 10666, ¶ 24 (rel. Apr. 20 1995) (*CMRS Interconnection 2nd NPRM*"); *see also* 47 C.F.R. § 20.3 (definition of "public switched network").

[4] The 104th Congress understood the societal value propositions inherent to both Metcalfe's and Reed's law. Feature Group IP is attempting to make both the legacy telecommunications network and the Internet more valuable to society by gluing the networks together for users of each network. Artificial restrictions on passage to or from either the "Internet" or to or from the "legacy telecommunications network" would create a policy imbalance favoring one network over the other, or worse, encourage each network to "island" itself and refuse communications with the other, thus artificially limiting the value of each and the total value to society that would accrue if interoperability is maximized.

[5] Feature Group IP will refer to providers of enhanced and/or information service as "ESPs" for shorthand purposes. AT&T often pretends that the only "ESPs" that are relevant are unaffiliated "ISPs" and only entities that provide "Dial Up Internet Service" are ISPs, and then it implies the concern is only related to "ISP-bound" traffic (*e.g.*, traffic addressed <u>to</u> a Dial Up Internet Service provider). This Commission has to know better. Enhanced services were defined long before there was a public Internet. ESPs do far more than just hook up "modems" and receive calls. They provide a wide set of services and many of them involve calls <u>to</u> the PSTN. *See*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket Nos. 96-262, 96-263, 94-1, 91-213, FCC 96-488, 11 FCC Rcd 21354, 21478, ¶ 284, n. 378 (rel. Dec. 24, 1996); Order, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, FCC 88-151, 3 FCC Rcd 2631, 2632-2633. ¶ 13 (rel. April 27 1988); Memorandum Opinion and Order, *MTS and WATS Market Structure*, Docket No. 78-72, FCC 83-356, 97 FCC 2d 682, 711-22 ¶ 78 (rel. Aug. 22, 1983). As was noted in the first decision that created what is now known as the "ESP Exemption" ESP use of the PSTN resembles that of the "leaky PBXs" that existed then and continue to exist today, albeit using much different technology.

output they provide to their ultimate customers. In other words, the ESPs provide their non-telecommunications service "via" telecommunications "offered over common carrier transmission facilities." The ESP traffic processed by Feature Group IP is not the kind of traffic addressed in the *AT&T Declaratory Ruling*,[6] because Feature Group IP's tariffed information access services are only available to non-carriers that certify to Feature Group IP they are not carriers subject to access charges under 47 C.F.R. § 69.5 and their traffic is therefore entitled to the ESP exemption.

Feature Group IP's business plan revolves around supporting new technology services and applications. Unlike the rest of the wireline industry, Feature Group IP does not require its ESP customers to deploy equipment or processes that turn IP systems into TDM systems, nor does Feature Group IP extract a premium for bestowing the privilege of touching the PSTN.

II. ISSUES FOR NEW TECHNOLOGY PROVIDERS

Feature Group IP feels a bit like the Lorax trying to speak for the Truffula trees. And just like the Lorax we are being confronted by a business that is intent to grow at any cost, regardless of its impact on our society.[7] Feature Group IP's customers are NOT carriers and they do not understand the regulatory swamp. They do not know what do, say or request.[8] They are confused and hesitant because FCC policy makers/implementers[9] appear to be in the in the throes of a

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[6] Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, 19 FCC Rcd 7457 (rel. April 21, 2004) ("*AT&T Declaratory Ruling*").

[7] Giesel, Theodor Seuss, *The Lorax* by Dr. Seuss©, Random House (1971): "All you do is yap-yap and say, Bad! Bad! Bad! Bad! Well, I have my rights, sir, and I'm telling *you* I intend to go on doing just what I do! and, for your information, you Lorax, I'm figgering on biggering and BIGGERING and BIGGERING and BIGGERING."

[8] But we certainly get an earful from our customer base complaining about the FCC and the ILEC activities with regard to their accelerating regulation of all Internet based voice communications.

[9] The FCC alternates between trying to make policy and then stating that it is up to Congress to make policy. The issue of who "makes" policy both broad and not so broad seems to be a political hot potato and often fluctuates

"digital era of regulatory capture"[10] with respect to Internet technologies because everything is viewed from a BellHead lens. Feature Group IP chose to wade into the swamp and is more familiar with the muddy waters and its denizens. The new technology providers, however, are being forcibly immersed in a world that is anathema to their entrepreneurial and competitive way of life and which imposes onerous regulatory burdens and costs that yield only problems and few solutions. They face a bewildering array of regulations and technical requirements that are incompatible with the technology and functionally dumbs it down rather than using its capabilities. They are forced into additional dependency on the very ILECs (or ILEC sycophants) that are trying to extract extraordinary profits, force a transfer of all the value of the new services and ultimately drive them out of business.

Feature Group IP – unlike other CLECs that are also threatened by new technology and business plans – occupies a unique place in the industry and is here speaking on behalf of its customers. This case presents an opportunity for Commission to take at least some minor steps to safeguard the potential for inter-model[11] competition between the legacy ILECs and new Internet based services providers.

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based upon the flow of lobby money. When actions like merger approval show up, however, the potato falls squarely in the lap of the FCC even though many in Congress choose to let their views be known.

[10] *See* "The Ambulance, the Squad Car and the Internet," by Susan Crawford, Associate Professor, Cardozo School of Law, draft for Berkeley Tech. L. J. 2006, available at http://scrawford.net/courses/ambulance_for_ssrn.pdf. Regardless of the kind of regulatory capture at work, there can be no doubt that the new regulations act in ways that benefit support legacy participants and those who have always worked with them.

[11] "Inter-model" is not a typo. The FCC has been blinded to – and is therefore blindly stepping on – communications business models other than the three "modal" types (wireline, cable, wireless) it seems to be trying to support to the exclusion of all others. "Facilities-based" competition is not the end-all and be-all and squashing all models that do not include placement of redundant local broadband is extraordinarily short sighted. Two alternative models (non-monetary business models such as Skype) and wholesale business models involving intermediation between legacy systems and the newer IP-based systems (like that of Feature Group IP) actually present the best opportunity for continued freedom and growth precisely because they are not tied to legacy technology or legacy business models. There is no discernible or coherent policy vision on how to deal with "free" and "wholesale" business models aimed at increasing network efficiency and interoperation. But new business models are exactly what one would expect when a disruptive technology is introduced into a legacy industry. The legacy providers have no real incentive to allow the disruption to their revenue streams or the accelerated obsolescence of the old

III. ARGUMENT

1. Merger Shmerger. We are only two more mergers away from re-vesting AT&T with its old empire, with a sweetener in the form of what used to be the largest independent (GTE) as a result of the combination that is now Verizon. The only question is whether AT&T or Verizon will swallow Qwest before they then join.[12] The former Western Electric may not be stacked back up – at least for a while.[13] But all the other parts plus large swaths of licensed and unlicensed wireless properties are floating back together into a reconstituted super-company, much like the old super continent Pangea will someday come back together as "Pangea Ultima."[14]

It appears that those in control of communications competition are deaf to history, and are intent on both repeating the mistakes they made, as well as – this time – making the mistakes they avoided on previous go-arounds. The Justice Department is now totally quiescent, unlike its prior actions against AT&T in 1913 (which precipitated the Kingsbury commitment to stop snapping up independents and to allow interconnection with those that remained), 1925 (anti-trust threats lead to voluntary sale of the international arm of Western Electric), 1956 (original consent decree limiting AT&T to telecommunications service), and the investigation starting in

technology, so they do all they can to obstruct deployment and use by others until the incumbents can gradually deploy and replace while still maintaining control. This Commission needs to follow its own longstanding policy now codified in §§ 153 and 253. Section 253 sets out a policy that that "small entrepreneurs" and "enhanced service providers" be allowed to use technological advancements to enter the communications market and provide telecommunications and information services. Section 157 – passed in 1983 – mandates that regulators and incumbents not obstruct new technology and innovation until they prove the technology is not in the public interest.

[12] The other question is which of the remaining two will then acquire the other, and the name that will be used.

[13] Western Electric was started by Elisha Gray, a contemporary of Alexander Graham Bell who was beat to the patent office by only a few hours. The Bell System purchased a controlling interest in 1881. http://www.lucent.com/corpinfo/history.html. Lucent is attempting to merge with Alcatel at present. AT&T may well ultimately reacquire the merged company as part of its agglomerative frenzy.

[14] *See*, http://antwrp.gsfc.nasa.gov/apod/ap001002.html. The estimate is it will take some 250 million years for the cycle to complete. AT&T likely will be able to pull off its recombination on a much shorter time frame given its pace to date.

1974 that lead to the 1982 modification of final judgment with its divestiture and line of business requirements.

The Commission has forgotten, consciously undercut or just no longer cares about the principles that lead to *Hushaphone* in 1957, *Carterphone* in 1968, and the *Computer Inquiries* in 1966. The decisions that led to interexchange competition and gave rise to MCI and others are now meaningless. They continue today only to preserve access charge revenue streams and bottleneck traffic ingress/egress control by incumbent LECs. The 1996 amendments have been so badly implemented that there remains only a niche group of local competitors hanging on by their toenails and waiting for the *coup de grace* now that UNEs are toast, the Commission will not enforce interconnection rules and there is no realistic prospect of truly rational and cost-based intercarrier compensation rules within our lifetime. Of course, the RBOCs did fairly rapidly get their relief from the line of business restrictions under § 271 while still not meaningfully implementing the checklist items in § 271(c)(2)(B)(iv),(v), (vi) or (x) that are independent of the similar obligations in §§ 251 and 252.

If you think that horizontal and vertical duopoly control between the cable companies and AT&T of all things communicative in specific service markets is what we need, then this merger is just the thing for you. That whole competition experiment was obviously a big mistake, so we have to do all we can to return to a nice, comfortable total monopoly. We must let Once-ler get bigger, chop more Truffula Tress and thereby produce the Thneeds that "everyone needs."[15]

Sadly, there is little chance this merger will be rejected. So, the question becomes: what half-hearted steps can AT&T take to make the pill easier to swallow? Why not propose to take

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15 "Everyone" does not "Thneed" fat wasteband that can be used
Only to pass bits at&t has approved.

some piddling commitments to do what we are already supposed to have done (but did not) and use the commitments to not only sanitize our past failures but to also minimize and put an end date to them? All we have to do is hang on a few years – hoping the Commission will continue its history of not fully enforcing promises made in prior mergers – and then we will have turned what was once a restriction against specific activity into an express (albeit slightly delayed) permission to engage in that activity.

Feature Group IP objects. AT&T's proposals make the pill easier to swallow for all concerned. For consumers and competitors, however, the sugar coating will soon turn into poison. Feature Group IP does not support the merger; it should be rejected outright. AT&T's proposals are insufficient; indeed they are harmful in their own way because they reward AT&T's past obstreperous and anti-competitive behavior ("if you reward me for my past acts by letting me grow even bigger, I will make an empty promise to suspend those bad acts for a very short time") with no sanction when AT&T returns to that behavior once the constraints are no longer convenient.

But, if the Commission heedlessly insists on moving forward, it should at least try to save a few Truffula seeds by adopting the enhancements to AT&T's proposals that other parties make in this round of comments. It should also take two additional steps. First, AT&T should waive any right it has to recover universal service support, either directly or indirectly. Their shopping spree for Baby Bell siblings clearly demonstrates they have no need or entitlement to corporate welfare. Second, they should drop the frivolous lawsuits against enhanced service provider customers of competitive carriers. This SLAPP-like[16] litigation – while meritless – has led to considerable risk and increased cost, with the obvious dampening effect on entry and capital investment in those enterprises. When (if) the Commission devises its Grand Unifying Theory

[16] Strategic Litigation Against iP Providers.

for intercarrier compensation, the rules governing access charges or reciprocal compensation for IP Enabled services will presumably be clear on a going forward basis.

THING ONE
Stop Corporate Welfare in the form of USF support to AT&T

The FCC recently began to forcibly yoke new technology providers into the existing regulatory scheme. ESPs that handle voice are more like red headed stepchildren, however, because they have no birthright in the carrier family. The plan seems to be to force ESPs to bear much of the burden while enjoying few of the prerogatives.

Many of these providers would have no problem with a forward-looking economic policy of fostering use and availability of new communications technology for the poor and hard to reach, if it were balanced and fair. The problem is that the Commission has apparently decided to tax new entrants to fund the program while simultaneously denying them the opportunity to participate as recipients, since they are not carriers and do not provide telecommunications service. It does not require rocket science to deduce that they are being shaken down only to support their ILECs adversaries, and in very large part because the Commission needed the money after it exempted ILEC DSL revenues from assessment. The ILECs still receive direct and indirect payment from the program, even though their relative contribution has decreased. ESPs pay more than before because their revenues are now directly assessed – and many also continue to pay USF pass through charges from their underlying carrier suppliers.[17] This is not a good way to put out the welcome mat. This is not consistent with either § 157 or § 253.

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[17] Report and Order and Notice of Proposed Rulemaking, *In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services*, WC Docket Nos. 06-122, 04-36, CC Docket

Many new entrants (who are often start-ups) rightfully view the existing USF administration as nothing more than a scheme to subsidize the incumbents who will use the cost-free funds to build broadband networks that will remain private and may well be totally closed off to the entrants – or priced in ways that garner additional anti-competitive subsidies – in relatively short order. While the Commission cannot directly reform USF in this proceeding, it can condition approval of the merger on AT&T waiving any right to partake from the fund.

This condition would reduce the economic and anti-competitive impact on new entrants by eliminating the current unneeded support payments to the integrated AT&T/BellSouth/Cingular with respect to USF. It would also give the Commission some breathing room to overhaul USF by eliminating some of the upward pressure on the program while it devises a better distribution method that focuses on consumer benefits – rather than incumbent telco bottom lines – by identifying the lowest cost and best technology provider that will reach clearly stated societal goals. AT&T does not need any more corporate welfare it will only use to build closed networks and roll up its remaining siblings.

THING TWO
Drop the SLAPP suits

AT&T has sued several ESPs and some of the CLECs that provide PSTN connectivity to ESPs in Missouri.[18, 19] AT&T has also sought a declaratory ruling on the topic, after a primary

Nos. 96-45, 98-171, 90-571, 92-237, 95-116, 98-170, 99-200, NSD File No. L-00-72, FCC 06-94, 21 FCC Rcd 7518, 7547-7549, ¶¶ 58-59 (rel. June 27, 2006).

[18] *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303 (CEJ), 2005 WL 2033416 (E.D. Mo. Aug. 23, 2005). The defendants from which SBC sought payment were VarTec Telecom, Inc. (VarTec); UniPoint Enhanced Services, Inc. (d/b/a PointOne), UniPoint Services, Inc., and UniPoint Holdings, Inc. (UniPoint); and Transcom Communications, Inc. and Transcom Holdings, LLC (Transcom). VarTec was acting as a CLEC and IXC. The UniPoint and Transcom defendants are not carriers. Both VarTec and Transcom were forced into bankruptcy soon after the case was filed. SWBT (now AT&T) has settled with VarTec, but is still seeking relief against the remaining defendants – in some cases for the traffic subject to the VarTec settlement.

[19] *Southwestern Bell Telephone, LP v. Global Crossing, et al*, No. 4:04-CV-1573 (E.D. Mo.). SWBT (now AT&T) also sued several other carriers in this case, including McLeod, Nuvox, XO and Xspedius, in part because they provided PSTN connectivity to VoIP providers AT&T claims owe access charges.

jurisdiction referral.[20] AT&T routinely uses the threat of similar litigation against other ESPs. The obvious intent and effect is to strategically raise risk, maintain uncertainty and prevent entry in competition with AT&T's legacy services and its own enhanced service on any terms other than those acceptable to AT&T. The strategy has worked. VarTec and Transcom Enhanced Services were driven into bankruptcy. Other companies settled on undisclosed terms. An unknown number have simply sat on the sidelines awaiting FCC guidance that may never come.

AT&T has also threatened other CLECs that provide connectivity to ESPs. AT&T proposed to settle unrelated state-level disputes with a local carrier in Texas if it would agree to stop serving Transcom and certain other ESPs. AT&T and Feature Group IP have a long-running battle over this very issue, even though the current interconnection agreement has a negotiated provision expressly providing for "no [intercarrier] compensation" for traffic "to or from" ESPs, and all parties knew that provision was intended to apply to IP telephony. AT&T is trying to cut off sources of capital for ESPs and has been engaged in a three year jihad against CLECs in an attempt to deny connectivity to ESPs – unless they <u>all</u> pay access charges to AT&T.

Feature Group IP can handle AT&T's direct assault, but the overreaching and duplicative sham SLAPP litigation against Feature Group IP's customers and all other ESPs must stop until the Commission finally gets around to – once again – setting out the rules relating to ESP connections to the PSTN and the intercarrier compensation between LECs that jointly support ESP traffic <u>to and from</u> the Internet.

The Commission cannot rely on "competition" from VoIP as a basis to approve the merger if AT&T is free to continue its unyielding barrage of litigation designed to stop, deter and control the very competitive activity it claims justifies the merger. A condition of any approval

[20] *Petition of the SBC ILECs for a Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket 05-276 (filed Sept. 21, 2005).

must be a promise by AT&T to withdraw its Missouri SLAPP suits and to not file or threaten any others.

WHEREFORE, PREMISES CONSIDERED, Feature Group IP COMMUNICATIONS CORPORATION respectfully requests that the Commission deny the requests for transfer of control of BellSouth and BellSouth's share of Cingular to AT&T. The merger was not in the public interest before AT&T's latest "proposals" and those proposals (as offered by AT&T) do not change the result. In the alternative, Feature Group IP requests that the Commission not approve the transfers unless and until – among other things – AT&T (1) waives any right to directly or indirectly recover Universal Service support and (2) agrees to dismiss with prejudice its access charge litigation against ESPs that provide VoIP and to not file any others.

Respectfully Submitted,

UTEX COMMUNICATIONS CORPORATION
d/b/a FEATURE GROUP IP
by: _____

W. Scott McCollough
General Counsel
1250 Capital of Texas Highway South
Building Two, Suite 235
Austin, TX 78746
(V) 713.231.2315
(FAX) 512.692.2522
wsmc@smccollough.com

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