

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
Application Pursuant to Section 214 of the)
Communications Act of 1934 and) WC Docket No. 06-74
Section 63.04 of the Commission's) DA 06-2035
Rules for Consent to the Transfer of)
Control of BellSouth Corporation to)
AT&T, Inc.)

JOINT COMMENTS

IMAGE ACCESS, INC. D/B/A
NEWPHONE
ABC TELECOM D/B/A HOME
PHONE
ALTERNATIVE PHONE, INC.
AMERIMEX COMMUNICATIONS
CORP.
CGM, INC.
CONNECT PAGING, INC. D/B/A GET
A PHONE
DPI TELECONNECT
EXPRESS PHONE SERVICE, INC.
FLATEL, INC.
GANOCO, INC. D/B/A AMERICAN
DIALTONE LOST KEY TELECOM
QUALITY TELEPHONE
SEVEN BRIDGES COMMUNICATIONS
SMART TELECOM CONCEPTS, LLC
NALA/PCA - THE NATIONAL
ALTERNATIVE LOCAL EXCHANGE
CARRIER ASSOCIATION/ PREPAID
COMMUNICATIONS ASSOCIATION

Date: October 24, 2006

SUMMARY

The proposed merger of AT&T, the nation's largest incumbent local exchange carrier, and BellSouth, the nation's third largest incumbent local exchange carrier, is an affront to consumers of local exchange telecommunications services. The proposed merger will inhibit local exchange competition, which will undoubtedly result in higher prices to American consumers.

Specifically, the merger will only exacerbate BellSouth's unjust, unreasonable and discriminatory resale practices in violation of the Telecommunications Act of 1996, and the Federal Communications Commission's rules and policies governing the resale of telecommunications services.

Congress has declared that resale is instrumental to the promotion of local exchange competition by weaving the incumbent local exchange carriers' resale obligations into the very fabric of the Act. In order to preserve resale as a viable method of competition, the Commission must either deny the proposed merger or subject the combined company to significant conditions to ensure that it does not discriminate against resellers in an attempt to stifle any remaining vestige of resale local exchange competition.

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JOINT COMMENTS

Pursuant to the *Public Notice* issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on October 13, 2006,¹ Image Access, Inc. d/b/a NewPhone ("NewPhone"), ABC Telecom d/b/a Home Phone, Alternative Phone, Inc., AmeriMex Communications Corp., CGM, Inc., Connect Paging, Inc. d/b/a Get A Phone, dPi Teleconnect, Express Phone Service, Inc., FLATEL, Inc., Ganoco, Inc. d/b/a American Dialtone, Lost Key Telecom, Quality Telephone, Seven Bridges Communications, Smart Telecom Concepts, LLC, and the National Alternative Local Exchange Carrier Association/Prepaid Communications Association ("NALA/PCA"), on behalf of all of its member companies² (collectively, the "Joint Resale Commenters"), through undersigned counsel, hereby file their comments on the proposed conditions submitted by AT&T Inc. ("AT&T") and BellSouth Corporation

¹ *Commission Seeks Comment on Proposals Submitted by AT&T Inc. and BellSouth Corporation*, Public Notice, DA 06-2035 (rel. Oct. 13, 2006).

² NALA/PCA is a non-profit association dedicated to ensuring that the concerns of the prepaid dialtone industry are heard in federal and state regulatory and legislative arenas.

(“BellSouth”) (jointly, the “Applicants”) as set forth in the October 13, 2006 letter to Chairman Martin from Robert W. Quinn, Jr. of AT&T.³

I. INTRODUCTION

On October 13, 2006, Commissioners Michael J. Copps and Jonathan S. Adelstein in a letter to Chairman Kevin J. Martin stated that “the record [in WC Docket No. 06-74] raises serious questions about whether the combination [of AT&T and BellSouth] as proposed would satisfy the public interest, convenience, and necessity.”⁴ The Commissioners further stated that they seek to work with the Chairman to resolve these concerns by fashioning specific and sufficient conditions that would ameliorate the potential competitive harms.⁵ In response to the Commissioners’ concerns, AT&T on October 13 filed the above-referenced letter in which it listed several potential conditions to which it might agree.

The Joint Resale Commenters maintain that the conditions offered by the Applicants fall far short of what is necessary to offset the competitive harms that will result from the merger of AT&T and BellSouth. Indeed, for avoidance of doubt, the Joint Resale Commenters believe that no set of conditions can truly cure all of the anti-competitive effects of the proposed merger. As indicated in its prior filing in this proceeding,⁶ however, a properly crafted remedial conditions may at least partially offset the likely harm resulting from the merger. To that end, the Joint Resale Commenters

³ *Ex parte* letter of Mr. Robert w. Quinn, Jr., AT&T, to the Honorable Kevin Martin, FCC Chairman, dated October 13, 2006.

⁴ Letter of FCC Commissioners Michael J. Copps and Jonathan S. Adelstein to the FCC Chairman Kevin J. Martin, dated October 13, 2006 (“*Copps/Adelstein Letter*”).

⁵ *Copps/Adelstein Letter* at 1.

⁶ *See Joint Comments of NewPhone et al.*, WC Docket 06-74, filed June 5, 2006.

strongly encourage the Commission to seek conditions from the Applicants to ameliorate the competitive harms that will be inflicted upon the resale market as a result of the merger.

II. ARGUMENT

A. **BellSouth's Promotional Practices are Unreasonable and Discriminatory in Violation of Federal Law**

As the Joint Resale Commenters have already noted in this matter and in another pending Commission proceeding,⁷ BellSouth has severely restricted, and in some cases altogether prohibited, the resale of certain telecommunications services at wholesale rates by refusing to make promotional price discounts given to retail subscribers available to resellers, or by prohibiting resale in the first instance.⁸ Having effectively limited local exchange competition via unbundled network elements, BellSouth is now focused on systematically destroying all resale competition through the use of its unreasonable and discriminatory resale practices.

Specifically, BellSouth has engaged in an extensive campaign throughout its nine-state operating region to win back customers and to retain existing customers through the use of various promotions specifically designed to discriminate against and eliminate its resale competitors. BellSouth discriminates against and attempts to eliminate its resale competition through the use of two types of promotions which it refers to as “marketing incentives.” At the core of each, however, is an unlawful attempt by BellSouth to limit its resale obligations and application of the wholesale avoided cost

⁷ See *NewPhone Petition for Declaratory Ruling*, WC Docket 06-129, filed June 13, 2006; see also, *Joint Reply Comments of NewPhone et al.*, WC Docket 06-129, filed August 10, 2006.

⁸ *NewPhone Petition for Declaratory Ruling* at 2-3.

discount to *tariffed* products and the *tariffed* rates associated with them that increasingly consumers do not pay. The Commission, however, has from the very beginning, recognized that the Section 251(c)(4) resale obligations are tied to “retail” service offerings and the “retail rate” – rather than to “tariffed” offerings or a “tariffed rate.”⁹

The first type of promotion used by BellSouth is a cash-back or a non-cash-back¹⁰ offer lasting greater than 90 days, which effectively reduces the price of the telecommunications service purchased by subscribers by the value of the promotion to result in an “effective retail rate” that is less than the tariffed rate for the same service. Although BellSouth makes the telecommunications services available for resale at the applicable state commission avoided cost discount rate, BellSouth insists on applying that discount to the tariffed rate and not to the real or effective “retail rate” that results from use of the cash-back/non-cash-back promotion. This is an unlawful restriction on resale and an otherwise outright refusal to comply with the Act’s resale obligations and the Commissions corresponding regulations – none of which limit application of the wholesale avoided cost discount to what is increasingly becoming a fictitious *tariffed* rate.

The second type of promotion used by BellSouth to discriminate against and attempt to eliminate BellSouth’s resale competition is a promotion of greater than 90 days in duration in which BellSouth offers a mixed service bundle, *i.e.*, a bundle consisting of both telecommunications and information service(s). By bundling a

⁹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15954, ¶948-51 (rel. Aug. 8, 1996) (“*Local Competition Order*”) (“We conclude that the ‘retail rate’ should be interpreted in light of the pro-competitive policies underlying the 1996 Act”).

¹⁰ Examples of non-cash back offers include gift cards and other items of value that are not in the form of cash or a bill credit.

telecommunications service together with an information service, BellSouth attempts to disguise the real or effective “retail rate” for the telecommunications service. With regard to these mixed service bundles, BellSouth discriminates against its resale competitors and violates the Commission’s resale requirements by insisting that the wholesale avoided cost discount be applied only to the tariffed retail rate for equivalent stand-alone telecommunications service offerings rather than to the actual “retail rate” at which BellSouth offers the bundled telecommunications service to its own subscribers (the “effective retail rate”).

BellSouth also discriminates against resellers by refusing to allow competitive carriers to resell its long-term until BellSouth has already marketed them for 90 days. BellSouth’s efforts to hamstring competitors by making them wait 91 days to resell its promotions is directly contrary to section 251(c)(4). Indeed, the Joint Resale Commenters submit that such conduct is *prima facie* anticompetitive, unreasonable and discriminatory in violation of the Act and the Commission’s rules and policies. By requiring Joint Commenters to wait three months to offer customers the same promotions that BellSouth and other ILECs offer immediately, the ILEC has the clear first mover advantage and can effectively lock-up a significant portion of the market before its competitors can even get out of the blocks. In some cases, such as ILEC promotions that run only a short period longer than 90 days, Joint Commenters are effectively precluded from reselling the promotion in the first instance, never mind playing catch-up. Similarly, the Joint Resale Commenters have experienced problems timely obtaining BellSouth’s short-term promotions for resale as of the first day BellSouth offers the

promotion to retail end users, despite that the Commission's rules clearly require ILECs to make such promotions available, albeit without a wholesale discount.¹¹

The merger of BellSouth and AT&T will only exacerbate BellSouth's already unreasonable and discriminatory resale practices by further inhibiting local exchange competition, undoubtedly resulting in higher prices to American consumers across a wider service territory. As explained below, resale is an important method of local competition which must be preserved by the Commission. Exacting the resale conditions set out herein will ensure that AT&T and BellSouth will comply with *existing* federal law and, thus, the conditions will go a long way toward preserving this valuable form of competitive entry.

B. Resale is an Important Method of Local Exchange Competition and Must Be Preserved

Congress expressly recognized that resale is an important method of competitive entry into the local exchange market. The resale obligations are woven into the very fabric of the market opening provisions of the Act by imposing distinct obligations upon different categories of carriers. First, Section 251(b)(1) of the Act, which applies to all local exchange carriers, provides that no local exchange carrier shall "impose unreasonable or discriminatory conditions or limitations on [] the resale of its telecommunications services."¹² By contrast, the resale obligations under Sections 251(c)(4) and 271(c)(2)(B)(xiv), apply only to ILECs and RBOCs, respectively. Section 251(c)(4) requires ILECs:

¹¹ 47 U.S.C. 251(c)(4). *See also, Local Competition Order* 11 FCC Rcd 15954 at ¶949.

¹² 47 U.S.C. §251(b)(1).

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) ***not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service***, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.¹³

Section 271(c)(2)(B)(xiv) provides that, in order for a Bell Operating Company to provide in-region interLATA services, it must offer telecommunications services for resale in accordance with section 251(c)(4) and the avoided cost pricing standard enunciated in Section 252(d)(3).¹⁴

In the *Local Competition Order*, the Commission explained “the strategic importance of resale to the development of competition,” by stating that “[r]esale will be an important entry strategy for many new entrants, especially in the short term when they are building their own facilities. Further, in some areas and for some new entrants, we expect that the resale option will remain an important entry strategy over the longer term.”¹⁵ Indeed, resale allows competitive providers the flexibility to increase their market presence through resale beyond the reach of their existing networks. It also allows competitive providers to increase their market share more quickly than would be possible solely through expansion of their own networks.

¹³ 47 U.S.C. §251(c)(4) (emphasis added).

¹⁴ 47 U.S.C. §271(c)(2)(B)(xiv). 47 U.S.C. §252(d)(3) provides, in pertinent part, “a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.”

¹⁵ *Local Competition Order*, ¶907.

The Commission reemphasized the important policy concerns that make restrictions on resale undesirable in granting BellSouth Section 271 authority. In its *South Carolina 271 Order*, the Commission stated, “[r]esale is one of three mechanisms Congress developed for entry in the BOCs’ monopoly market.”¹⁶ The Commission cited to its *Local Competition Order*, in which it found that

[t]he ability of [I]LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by [I]LECs to preserve their market position. In a competitive market, an individual seller (an [I]LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers. Recognizing that [I]LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale.¹⁷

The Commission also recently reaffirmed the importance of resale in its *Qwest Omaha Forbearance Order*.¹⁸ In that order, the Commission granted, in part, and denied, in part, Qwest’s petition for forbearance from numerous statutory and regulatory obligations related to Qwest’s provision of service in the Omaha Metropolitan Statistical Area (“MSA”). In denying Qwest’s petition for forbearance from the resale obligations of Section 251(c)(4), the Commission stated that “Qwest has not persuaded us that section 251(c)(4) resale is no longer necessary in the Omaha MSA to ensure reasonable and nondiscriminatory pricing, and ensure that customers’ interests are protected . . .

¹⁶ *In the Matter of Application of BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina*, Memorandum Opinion and Order, 13 FCC Rcd 539, ¶223 (rel. Dec. 24, 1997) (“*South Carolina 271 Order*”).

¹⁷ *Id.*, quoting *Local Competition Order*, 11 FCC Rcd at 15966, ¶939.

¹⁸ *In the Matter of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, FCC 05-170, rel. Dec. 2, 2005, ¶63 (“*Qwest Omaha Forbearance Order*”).

[W]e conclude that section 251(c)(4) resale continues to be necessary to existing competition and makes future competitive entry possible.”¹⁹

Given the Commission’s recent series of orders limiting ILEC unbundling obligations, resale is now an even more important method of local exchange competition. Central to this reality, however, is that the barriers to resale entry remain low and that resellers are able to obtain service upon reasonable rates, terms and conditions in order to compete with the ILECs.

As explained above and in more detail in comments already submitted in this docket, BellSouth employs resale practices that are an affront to the Commission’s section 251 resale requirements. In order to ensure that resale remains a viable alternative for competitors and consumers in any expanded territory served by the Applicants, the Commission must act to preserve resale as a viable competitive alternative by subjecting the Applicants to following conditions:

- (1) for all promotions greater than 90 days in duration, at the option of the requesting telecommunications carrier, AT&T and BellSouth shall *either* (i) in addition to offering the telecommunications service that is the subject of the promotion at the wholesale avoided cost service discount, offer to telecommunications carriers throughout the entire local exchange footprint of the combined company the value of all cash-back, gift card, coupon, or other similar giveaways or incentives that AT&T and BellSouth provide to retail end-users; *or* (ii) apply the wholesale avoided cost service discount to the “effective retail rate” of the telecommunications service that is the subject of the AT&T or BellSouth promotion,²⁰
- (2) for all promotions greater than 90 days in duration, AT&T and BellSouth shall make available for resale the telecommunications services contained within mixed bundle promotions, *i.e.*, bundles consisting of both telecommunications service

¹⁹ *Id.*, ¶88.

²⁰ The “effective retail rate” should be determined by subtracting the face value of the promotional incentive from the tariffed rate, and the value of such discount should be distributed evenly across any minimum monthly commitment up to a maximum of three months.

and information service, and apply the wholesale avoided cost discount to the “effective retail rate” of the telecommunications services contained within the mixed bundle;²¹ and

- (3) telecommunications carriers shall be entitled to resell the Applicants’ short-term and long-term promotions as of the first day the Applicants offer such promotions to retail subscribers.

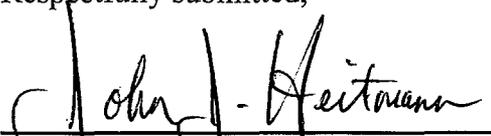
Thus, the Joint Resale Commenters simply ask that the Commission exact a commitment from the combined companies that they will comply with *existing federal law* by providing resale competitors with the ILECs’ long-term cash-back, non-cash-back and mixed bundle promotions at the effective retail rate minus the wholesale avoided cost discount, as of the first day the ILECs offer those promotions to retail end users.

III. CONCLUSION

As demonstrated herein (and more fully in our comments previously filed in this docket), the Joint Resale Commenters contend that the combination of AT&T and BellSouth will substantially reduce resale competition in virtually all markets in the AT&T and BellSouth regions and therefore is not in the public interest. In order to partially offset the competitive harm caused by the merger, the Joint Resale Commenters maintain that the Commission must preserve resale as a viable competitive alternative by subjecting the combined company to the conditions outlined above.

²¹ The “effective retail rate” of the telecommunications component of a mixed service bundle shall be determined by prorating the telecommunications service component based on the percentage that each unbundled component is to the total of the mixed service bundle if added together at their retail unbundled component prices (for example, if the individual components comprising a mixed service bundle have a combined retail price of \$150 if purchased on a stand-alone basis, and the telecommunication service component has an stand-alone retail price of \$30, the telecommunications service component would have an “effective retail rate” of 20% of the total mixed service bundled price).

Respectfully submitted,



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* Not admitted in D.C. Practice limited to matters and proceedings before federal courts and agencies.