MOMENTUM
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October 24, 2006

Marlene Dortch
Secretary
Federal Communications Commission
445 – 12th Street, SW
Washington, DC 20554

RE: AT&T, Inc. and BellSouth Corp. Applications for Approval of Transfer of Control; WC Docket no. 06-74

Dear Ms. Dortch,

I write to thank the Commissioners and their staff members who met with Momentum's representatives on September 28 and October 3, 2006 and to bring to the Commission's attention additional facts which support Momentum's request that further merger conditions are needed beyond those recently proposed by AT&T and BellSouth. Specifically, this merger should be conditioned on AT&T/BellSouth's agreement to recognize the state commissions' authority to arbitrate agreements concerning the provision of network elements required under Section 271, including combinations of such elements with one another and with Section 251 UNEs.

Momentum Telecom is a CLEC operating exclusively in the BellSouth nine state region. Over 90% of Momentum's customers are residential subscribers residing in small towns and rural areas. Momentum has experienced a substantial increase in BellSouth's rates for §271 elements that BellSouth has informed us are *not negotiable*.[1] Consequently, we are forced to exit three states and raise our rates to our customers in the other six. Our growth has been arrested and we have experienced a decline from approximately 160,000 lines to less than 80,000.

Our experience parallels that of the CLEC industry as a whole. For example, an analysis of FCC Local Competition Reports reveals that residential competition is declining 35% in Tennessee and 34% in Alabama on an annualized basis. Given that the FCC report

[1] February 22, 2006 letter from Julie O'Kelley, Manager, Interconnection Services, BellSouth to Momentum Telecom, Inc.

includes lines provided by cable companies, the data shows that CLEC residential lines are declining faster than cable is growing.[2]

This fact comes as no surprise to Momentum. Following the release of the *Triennial Review Remand Order*, Momentum took the FCC's guidance to heart and embarked upon a substantial capital expenditure to develop and deploy a VoIP retail product and a VoIP resale product to small and medium sized cable companies.

Momentum soon discovered, however, that to its customers VoIP is not a viable substitute for POTS. Momentum commissioned two studies of its customers and found that a majority had not completed high school and were in the low-middle to low income bracket.[3] For these customers, high-speed Internet access supporting a VoIP platform is neither a practical nor an affordable alternative.

Compounding the problem is that the vast majority of small to medium sized cable companies do not now--nor do they plan to--have cable plants which can support the VoIP platform. Momentum's extensive marketing analysis revealed that, of the approximately 1100 independent cable operators in the continental United States, less than 200 are able to support a VoIP product.

Closer to home, in Alabama 46 of our 67 counties are "rural," with little or no high-speed access to the Internet and where wireless telephone services[4] are spotty at best. For these Alabamians, it is POTS or nothing.

The urgent need for competitive POTS service and the failure of BellSouth to accommodate that need with "just and reasonable" rates were recognized by the Georgia[5]

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[2] A more in-depth analysis of the entire BellSouth region can be found in my letter to you of October 5, 2006.

[3] ADVO DBM Analysis, Momentum Business Solutions (now Momentum Telecom, Inc.), *Customer Acquisition Profile*, August 25, 2006; ADVO DBM Analysis, Momentum Business Solutions (now Momentum Telecom, Inc.), *Customer Acquisition Profile*, December 22, 2003.

[4] One can drive in Alabama from the Gulf coast to the Tennessee mountains and discover that, more often than not, wireless reception is inadequate. Driving north on I-65, one discovers that only in the larger cities, such as Mobile, Montgomery, Birmingham and Huntsville, can one hope for adequate wireless reception. This experience confirms the findings of Donald Cox, PhD (Harald Trap Friis Professor, School of Engineering, Stanford University), "For the most part, wireless phone coverage depends on the location and density (number in an area) of [base stations]. … In practice, base stations (or additional spectrum) cost money and aren't worth it to phone companies if they can't recoup that investment. For example, in rural areas there just aren't enough paying customers to pay for a high density of base stations." *Ask the Expert*, http://soe.stanford.edu/research/ate_cox.html (January 9, 2006).

[5] *In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc's. Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U (Jan. 20, 2006); *Order Setting Rates*, Docket No. 19341-U, Georgia Public Service Commission (Mar. 10, 2006); *Order on Reconsideration*, Docket No. 19341-U, Georgia Public Service Commission (Mar. 24, 2006).

and Kentucky[6] Public Service Commissions and the Tennessee Regulatory Authority,[7] which exercised their concurrent jurisdiction under section 271 and found that BellSouth had failed to offer just and reasonable rates for section 271 Competitive Checklist network elements in either its interconnection or commercial agreements.

Following its "scorched earth" policy, BellSouth appealed all three decisions, two to federal court[8] and one to the FCC.[9] So uncertain is the interpretation of section 271, that the Alabama and Louisiana Public Service Commissions have declined to assert jurisdiction until the legal issues can be determined by the federal courts, compelling Momentum to seek declaratory relief in the federal district court of Alabama.[10]

All of these federal actions are unlikely to settle the matter because the federal courts themselves are divided over whether (i) states have concurrent jurisdiction to determine section 271 rates, (ii) states are preempted in establishing just and reasonable rates under state law, and (iii) section 271 elements must be included in section 251 interconnection agreements.[11]

In sum, the legal environment is a mess, favoring the monopoly power of AT&T and BellSouth, which only have to wait until the remaining CLECs serving small and medium sized communities are financially exhausted and simply drop by the wayside.

The trend is alarming and – but for the Commission's action in the current merger – irreversible. In the six months between June 2005 and December 2005, residential

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[6] *In the Matter of: BellSouth Telecommunications Inc's. Notice of Intent to Disconnect Southeast Telephone, Inc. for Non-payment*, Case No. 2005-00519 and *Southeast Telephone, Inc. v. BellSouth Telecommunications, Inc.,* Case No. 2005-00533, Kentucky Public Service Commission (Aug. 16, 2006).

[7] *In Re: Petition for Arbitration of ITC-Deltacom Communications, Inc. with BellSouth Communications, Inc. Pursuant to the Telecommunications Act of 1996,* Docket No. 03-00119, Tennessee Regulatory Authority (Oct. 20, 2005).

[8] Bellsouth Telecommunications, Inc. v. The Georgia Public Service Commission et al., 1:06-CV-0162-CC (N.D.Ga); *BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission, et. al,* Case No. 3:06-cv-00065-KKC (E.d.Ky.)

[9] *In the matter of: BellSouth Emergency Petition for the Declaratory Ruling and Preemption of State Action,* WC Docket No. 04-245.

[10] *Momentum Telecom, Inc. v. Alabama Public Service Commission, et. al.,* Civil Action No. 2:06-cv-00577-DRB (N.D. Al.).

[11] See, e. g., *Verizon New England v. Maine Public Utilities Commission,* 403 F.Supp. 2d 96 (D. Me. 2005) (Order denying Plaintiff's Motion for Preliminary Injunction) and also 2006 WL 2007655 (D Me. July 18, 2006) (Order Granting Defendants' Motion for Summary Judgment); *Verizon New England v. New Hampshire Public Service Commission,* 2006 WL 2433249 (D.N.H.) (August 22, 2006); *Deica Communications, Inc., v. Florida Public Service commission* Case No. 4: 06CV72-RH/WCS (N.D. Fla., Sept. 12, 2006); *Qwest v. Public Utilities Commission of Colorado,* 2006 WL 771223 (D. Colo.).

competition in the BellSouth region fell by over 275,000 lines, a 24% decline on an annualized basis.[12]

This Commission has recognized that "it sometimes is not feasible for a reasonably efficient competitive carrier economically to construct all of the facilities necessary to provide a telecommunications service to a particular customer despite not being impaired under the Commission's rules without access to such facilities."[13] Such is precisely the case for CLECs serving rural and small town customers in the southeastern United States. These residents desperately need your help now.

Yours truly,

cc: Michelle Carey
Scott Bergmann
Scott Deutchmann
Ian Dillner

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[12] Please see note 2, *supra*.

[13] *In the Matter of: Petition of Quest Corporation for Forbearance Pursuant to 47 U.S.C. Sec. 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223 (December 2, 2005), p. 53.