

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)
Section 63.04 of the Commission's) WC Docket No. 06-74
Rules for Consent to the Transfer of) DA 06-2035
Control of BellSouth Corporation to)
AT&T, Inc.)

COMMENTS OF COMPTTEL

October 25, 2006

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Pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on October 13, 2006,¹ COMPTTEL, on behalf of its member companies,² hereby provides its comments on the proposed conditions and commitments (hereinafter "conditions") not related to special

¹ *Commission Seeks Comment on Proposals Submitted by AT&T Inc. And BellSouth Corporation*, Public Notice, DA 06-2035 (rel. Oct. 13, 2006). Specific file numbers related to the proposed transaction are hereby incorporated by reference.

² With more than 300 members, COMPTTEL is the leading industry association representing communications service providers and their supplier partners. COMPTTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. COMPTTEL members create economic growth and improve the quality of life of all Americans through technological innovation, new services, affordable prices and customer choice. COMPTTEL members share a common objective: advancing communications through innovation and open networks. For a list of COMPTTEL members visit www.comptel.org.

access that were recently submitted into the record by AT&T Inc. (“AT&T”) and BellSouth Corporation (“BellSouth”) (jointly, the “Applicants”).

I. INTRODUCTION AND SUMMARY

In their letter to Chairman Martin on October 13, 2006, Commissioners Copps and Adelstein 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.”³ COMPTTEL wholeheartedly agrees with this statement. Competitive carriers have placed into the record substantial evidence demonstrating that the proposed merger would have material anti-competitive effects in both BellSouth’s and AT&T’s regions, with prices rising significantly both for wholesale customers and the retail customers who they serve.⁴

Commissioners Copps and Adelstein then stated that they seek to work with the Chairman to resolve their concerns by fashioning specific and sufficient conditions that would ameliorate the potential competitive harms, but that it would first be appropriate to receive public comment on the proposed conditions suggested by the merging parties

³ Letter from Michael J. Copps and Jonathan S. Adelstein, Commissioners, Federal Communications Commission, to Hon. Kevin J. Martin, Chairman, Federal Communications Commission (Oct. 13, 2006)(“Commr’s. Copps/Adelstein Letter”).

⁴ See *Comments of Cbeyond Communications et al.* at 60-78, 88-95 (filed June 5, 2006)(“Cbeyond Comments”); *Reply Comments of Cbeyond Communications et al.* at 2-15 (filed June 20, 2006)(“Cbeyond Reply Comments”); *Petition to Deny of COMPTTEL* at 4 *et. seq.* (filed June 5, 2006)(“COMPTTEL Petition”); *Comments of PAETEC Communications, Inc.* at 3-8 (filed June 4, 2006)(“PAETEC Comments”); *Comments of Sprint Nextel Corporation on Application for Transfer of Control* at 3-9, 11-12 (filed June 5, 2006)(“Sprint Nextel Comments”); *Comments of Global Crossing North America, Inc.* at 3 *et. seq.* (filed June 5, 2006)(“Global Crossing Comments”); *Petition to Deny of Time Warner Telecom* at 16-24, 33-48 (filed June 5, 2006)(“Time Warner Petition”); *Petition to Deny of Earthlink, Inc.* at 21-26 (filed June 5, 2006)(“Earthlink Petition”).

literally at the eleventh hour – proposals “which raise a number of significant questions and complex technical issues.”⁵ Soliciting public comment on proposed remedial conditions is consistent with past Commission practice in evaluating whether Bell Operating Company (BOC) to BOC mergers are in the public interest,⁶ and COMPTEL commends the Commission’s decision to seek public input. To that end, COMPTEL hereby analyzes and comments upon the AT&T/BellSouth Potential Merger Conditions (“AT&T/BellSouth Conditions”) as set forth in the Applicants letter to Chairman Martin dated October 13, 2006.⁷

As is discussed in detail hereafter, some of the conditions proposed by the Applicants would indeed help to partially offset the injuries that would be inflicted upon competition by the proposed merger. However, at least one condition as proposed would actually aggravate the harms to competition. Other of the proposed conditions were carefully worded by AT&T to devalue them and require redrafting to accomplish any constructive, pro-competitive purpose. And the list of proposed conditions simply ignores entire areas where relief is needed in order for the Commission to fashion a

⁵ Commr’s. Copps/Adelstein Letter at 1.

⁶ *See, e.g., Application of GTE Corporation and Bell Atlantic For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of Submarine Cable Landing License*, 15 FCC Rcd 14032, Memorandum Opinion and Order, ¶ 17 (2000); *Application of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5.22.24.25.63.90.95 and 101 of the Commission Rules*, 14 FCC Rcd 14712, Memorandum Opinion and Order, ¶ 39 (1999); *see, also, e.g., Public Notice Pleading Cycle Established for Comments on Conditions Proposed by SBC Communications Inc. and Ameritech Corporation for their Pending Application to Transfer Control*, 14 FCC Rcd 14592 (July 1, 1999).

⁷ Letter from Robert W. Quinn, AT&T to Hon. Kevin Martin, Chairman, Federal Communications Commission (Oct. 13, 2006)(“AT&T/BellSouth Conditions”).

meaningful remedy, requiring that the list of conditions be supplemented to make it reasonably effective. COMPTTEL hereafter specifically identifies the deficiencies in the Applicants' proposal and offers suggestions on how the proposal can be improved. To be clear, COMPTTEL believes that no set of conditions can truly cure all of the anti-competitive effects of the proposed merger. However, as indicated in numerous prior filings of COMPTTEL and our member companies on the topic,⁸ it believes that properly crafted remedial conditions can at least partially offset the likely harm, and our comments are intended to provide guidance regarding how such conditions can be made meaningful.

II. ANALYSIS OF AND AMENDMENTS TO APPLICANTS' POTENTIAL MERGER CONDITIONS

In earlier comments and ex parte communications filed in this proceeding,⁹ COMPTTEL and its member companies proposed that the Commission adopt a series of conditions designed to offset the harms to the public interest likely to be caused by the proposed combination of AT&T and BellSouth. These proposals focused on regenerating the lost competition and innovation should the merger be consummated by ensuring that competitors have a solid and stable foundation upon which to grow, particularly by ensuring that a vibrant wholesale market exists for telecommunications service providers. It is noteworthy that many of the AT&T/BellSouth Conditions reflect the subject matter

⁸ See, e.g., Letter from Karen Reidy, COMPTTEL, *et al.* to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 22, 2006) ("COMPTTEL Sept. 22, 2006 *Ex Parte*"); Comments of PAETEC Communications, Inc. at 9-10 (filed June 4, 2006) ("PAETEC Comments"); Petition to Deny of Access Point, Inc. *et al.* at 64-75 (filed June 5, 2006) ("Access Point Petition"); Cbeyond Comments at 96-110; Reply Comments of Cbeyond Communications *et al.* at 15-22 (filed June 20, 2006) ("Cbeyond Reply Comments"). See also, e.g., Sprint Comments at 12-15; Comments of Mobile Satellite Ventures Subsidiary LLC at 13-16 (filed June 5, 2006) ("MSV Comments").

⁹ See, e.g. COMPTTEL September 22, 2006 *Ex Parte* at 1 *et seq.*, COMPTTEL Petition at 19.

of the proposals filed by COMPTTEL and its member companies. Since a consensus exists on these items, the Commission should adopt them – as modified by refinements set forth in the comments below. But these conditions alone are clearly inadequate for the Commission to protect the public interest. It is equally noteworthy, but highly problematic, that the Applicants’ proposals fall far short in setting forth conditions critical to regenerating competition. With respect to those areas, the Commission should reject the Applicants’ submission and adopt the conditions as set forth below.

A. Duration and Effective Date of Conditions and Commitments

Applicants’ Proposed Duration Condition

“For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter would apply in the AT&T/BellSouth in-region territory, as defined herein, for a period of thirty months from the Merger Closing Date and would automatically sunset thereafter.”

Analysis

The Applicants’ proposed thirty-month limitation with an automatic sunset on conditions and commitments must be considered in light of the substantial competitive harms that would result from the combination of AT&T and BellSouth. The damage to competition and innovation can only be cured by the assurance of a pro-competitive environment that reasonably and effectively invites the entry and expansion of competitive carriers. It will take new entrants many years to expand sufficiently to replace the competition lost due to the merger. When viewed from such a perspective, it is clear that the proposed limitation will cause the conditions to lapse before they are fully and sufficiently implemented and before the pre-merger levels of competition can be replaced.

Therefore, COMPTTEL proposes that the conditions not lapse for a minimum of seven years, with the Commission having the authority to extend the conditions if a competitive market has not developed or the merged entity has delayed its full compliance with the conditions. A term of at least seven years is essential because of the gravity of this proposed merger and its potential significant anti-competitive effects. Put simply, it will take at least seven years for competitive carriers to expand their networks and service offerings sufficiently to replace a significant portion of the competitive activity lost due to the merger. Further, a seven-year term minimum is consistent with the time period recently imposed by the Commission as a pre-condition to the closing of the proposed acquisition of Adelphia cable. The conditions attached to the Adelphia transaction carry a term of six years.¹⁰ Clearly, the Adelphia cable deal is a relatively minor transaction as compared to a BOC to BOC merger affecting nearly one-half of the access lines in the nation, and it is appropriate to make the term of remedial conditions extend for a somewhat longer term than that transaction.

In addition, it is necessary to clarify that each condition is effective immediately, and need not be implemented through time consuming negotiation of new amendments to interconnection agreements.

COMPTTEL's Proposed Duration Condition

For the avoidance of doubt, unless otherwise expressly stated to the contrary, the merged entity agrees that all conditions and commitments apply in the AT&T/BellSouth in-region territory for a minimum period of

¹⁰ *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors to Time Warner Cable Inc. (subsidiaries), Assignees, 21 FCC Rcd 8203, Appendix B – Remedies & Conditions (rel. July 21, 2006).*

seven years from the Merger Closing Date, subject to extension by the Commission. In addition, the merged entity agrees that all conditions and commitments are automatically effective as of the Merger Closing Date, and that the merged entity agrees to give full force and effect to all of the conditions and commitments in this merger agreement and to waive any rights to exercise any conflicting provision of any existing interconnection agreements. For the purposes of this merger agreement, the term "the merged entity" shall include AT&T, BellSouth, and all of their affiliates.

B. Promoting Accessibility of Broadband Service

Applicant's Proposed Accessibility Conditions #1-2

No comment.

Applicants' Proposed Accessibility Condition #3

"3. AT&T/BellSouth will offer to retail consumers in the Wireline Buildout Area who have not previously subscribed to AT&T's or BellSouth's ADSL service broadband Internet access service at a speed of up to 768 Kbps at a monthly rate (exclusive of any applicable taxes and regulatory fees) of \$10 per month."

Analysis

COMPTEL supports the objective of ubiquitous broadband deployment to all Americans. This worthy objective can be – and is best – achieved consistent with the ubiquitous development of robust competition. Unfortunately, the proposed condition seeks to achieve the first objective while completely undermining the second. It would permit AT&T/BellSouth to use a cost-price squeeze to poach current broadband subscribers of other providers and sign-up new subscribers at arbitrary (and, almost certainly, below cost) rates.

Competitive carriers today purchase DSL capable unbundled loops from the Applicants in order to provide the same service, and the wholesale rates charged by the Applicants to provide such UNE loops in most, if not all cases, significantly exceed the

\$10 retail charge contained in the proposed condition.¹¹ The Commission can address this concern by keeping the proposed condition's \$10 per month rate but (1) having it apply to all retail customers in the merged entities service area and (2) enabling other providers to serve retail customers through a discounted wholesale rate for unbundled loops. In that manner, the Commission could preserve the consumer benefits offered by the Applicants' proffer without undermining the competition supplied by competing providers.

COMPTEL's Proposed Accessibility Condition

3. The merged entity will offer to retail consumers in the Wireline Buildout Area broadband Internet access service at a speed of up to 768 Kbps at a monthly rate (exclusive of any applicable taxes and regulatory fees) of \$10 per month. The merged entity will make available ADSL-capable UNE loops to residential premises for purchase by requesting telecommunications carriers to serve those same retail customers at a price not to exceed \$5 per month.

C. Public Safety and Disaster Recovery

No comment.

D. UNEs

Applicants' Proposed UNE Condition #1

"1. The AT&T and BellSouth incumbent LECs shall continue to offer and shall not seek any increase in State-approved rates for UNEs or collocation that are in effect as of the Merger Closing Date. This condition shall not limit the ability of the AT&T and BellSouth incumbent LECs and any other telecommunications carrier to agree voluntarily to any different UNE or collocation rates."

¹¹ For instance, in Florida, the current monthly recurring rate for a DSO UNE loop (2-wire) is \$10.69 in Zone 1, \$15.20 in Zone 2 and \$26.97 in Zone 3. In California, the rates are \$9.48 in Zone 1, \$12.79 in Zone 2 and \$26.43 in Zone 3. The rates are even higher in Texas. \$18.98 in Zone 1, \$13.65 in Zone 2 and \$12.14 in Zone 3.

Analysis

COMPTEL generally supports the Applicants' condition proposing a rate cap on UNEs and collocation, but it believes refinements are necessary to ensure the underlying purpose of the condition – providing a period of stability for competition to grow – is achieved. As it explained in earlier filings, UNE price stability is an essential, albeit incomplete, step toward fostering competition by competitive LECs or “CLECs.” Moreover, after the absorption of AT&T and MCI by the BOCs, competitive carriers simply lack the resources to simultaneously conduct UNE rate cases in the 22 states that would comprise the “in region” territory of the merged entity, much less replicate the previously available competitive wholesale facilities that have been eliminated through the disappearance of the largest owners of competitive wholesale facilities throughout these 22 states.¹²

The Commission should further improve the utility of this condition by making some simple clarifications. First, the condition should extend to the availability of, and the rates for, all key provisions of interconnection agreements, including interconnection itself. Second, the condition should prohibit surcharges of any kind since these could be used to circumvent the condition. BellSouth, for example, currently is attempting to effectively raise UNE rates in Florida by imposing substantial new surcharges there,¹³ and the condition should be clear that such back-door rate increases shall not be permitted.

¹² See, e.g. COMPTEL Petition at 7-8; Cbeyond Comments at 63-74; Sprint Comments at 11-12.

¹³ Before the Florida Public Service Commission Petition to recover 2005 tropical system related costs and expenses by BellSouth Telecommunications, Inc., Docket No. 060598-TL, filed September 1, 2006.

Nonetheless, as noted previously, this condition does not, by itself, go far enough toward ensuring that the post-merger firm would not exercise its market power through the use of strategic pricing against competitors. The post-merger firm could do this, for example, by predatory price discrimination. While limitations on input price increases to certain types of competitors (*i.e.*, those competitors eligible to use UNEs) are helpful in limiting the ability of the post-merger firm to raise its rivals' costs, it does not address the ability of the post-merger firm to reduce rivals' revenue, and thereby foreclose profitable entry and expansion, through selective price discrimination.

Unless the Commission can effectively restrain AT&T's post-merger behavior and ability to discriminate against rivals through the continued application of existing regulatory safeguards – for example the non-discrimination requirements of section 201 of the Communications Act -- AT&T will be free to resort to the types of predatory behavior in which it engaged in order to acquire and maintain its monopoly in the first instance. Such forms of predation include selective price cutting to significant customers of rivals, or aggressive pricing in response to expansion by the rival. The effect of both strategies is that the competitive carriers are ultimately foreclosed from the capital markets, and unable to profitably expand.¹⁴ Thus, for the UNE condition proposed by the applicants (as modified in the COMPTTEL proposal below) to have its intended pro-competitive effect, AT&T's commitment to not seek UNE forbearance must be expanded, as COMPTTEL discusses in the forbearance section below, to include a

¹⁴ See generally, Bolton, Brodley, and Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L.J. 2239, 2304-2310 (August, 2000) (describing recent studies of Bell Company predatory practices prior to the modern era of regulation).

commitment by AT&T and BellSouth to withdraw their petitions seeking to be relieved of Title II regulation for non-TDM packet-switched and optical services.

COMPTEL's Proposed UNE Condition #1

1. The AT&T and BellSouth incumbent LECs, in all states where the merged entity operates as an incumbent LEC, shall continue to offer and shall not seek any increase in State-approved rates (including through the imposition of surcharges of any kind) for UNEs, interconnection, or collocation that are in effect as of the Merger Closing Date. This condition shall not limit the ability of the merged entity's incumbent LECs and any other telecommunications carrier to agree voluntarily to any different UNE, interconnection, or collocation rates.

* * * *

Applicants' Proposed UNE Condition #2

“2. AT&T/BellSouth shall recalculate its wire center calculations for the number of business lines and fiber-based collocations and, for those that no longer meet the non-impairment thresholds established in 47 CFR §§ 51.319(a) and (e), provide appropriate loop and transport access. In identifying wire centers in which there is no impairment pursuant to 47 CFR §§ 51.319(a) and (e), the merged entity shall exclude the following: (i) fiber-based collocation arrangements established by AT&T or its affiliates; (ii) entities that do not operate (*i.e.*, own or manage the optronics on the fiber) their own fiber into and out of their own collocation arrangement but merely cross-connect to fiber-based collocation arrangements; and (iii) special access lines obtained by AT&T from BellSouth as of the day before the Merger Closing Date.”

Analysis

COMPTEL generally supports the Applicants' proposed condition dealing with wire center recalculations, but it believes refinements are necessary to achieve the objective of ensuring the “wire center test” reflects actual competitive conditions and to minimize any uncertainty in the implementation of the condition. COMPTEL cannot stress enough the importance of adding these refinements. Its members have been – and are currently – involved in numerous state proceedings where AT&T is making

arguments counter to its proposed conditions.¹⁵ Precision is therefore essential in ensuring the intent of the condition is fully implemented, and the COMPTTEL proposed language achieves this aim.

First, the condition should state more clearly that it will apply to all wire centers in the combined 22-state AT&T/BellSouth region, including those instances where states have already issued decisions regarding the status of wire centers, where decisions are pending, and in regard to all future wire center designations. Second, as COMPTTEL has previously suggested,¹⁶ the condition should exclude from the calculation not only special access lines obtained by AT&T from BellSouth but also equivalent circuits and facilities, such as unbundled loop and transport facilities. Third, the Commission should clarify that the condition means that AT&T/BellSouth must in the future share all data supporting any wire center calculation with interconnecting carriers on a timely basis, including any confidential information on which the merged entity relies, pursuant to a normal commercial non-disclosure agreement.

COMPTTEL's proposed condition will not unduly burden the Applicants. The California Public Utilities Commission took similar action to address this issue and recently ordered¹⁷ that the following language be included in the SBC-CA amendment that implements the *TRO* and *TRRO*:

¹⁵ See, for instance, *Pacific Bell Telephone Company d/b/a AT&T California (U101 C)*, v. *Cbeyond Communications, LLC (U 6446 C)*, *Covad Communications Company (U5752)*, and *Arrival Communications (U5348C)*, *Opening Brief of AT&T California (U 1001 C) on Disputed Wire Center Issues*, California Public Utilities Commission Case No. 06-03-023 (filed Oct. 20, 2006).

¹⁶ COMPTTEL Sept. 22, 2006 *Ex Parte*, Merger Conditions at 2.

¹⁷ *Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under*

Upon request and subject to the confidentiality requirements of the Agreement, SBC shall provide CLEC... the information and supporting documentation on which SBC based any such designations for each such Wire Center, including but not necessarily limited to, (a) ARMIS or other data SBC used to calculate the number of SBC business access lines, (b) the data SBC used to calculate the number of leased UNE Loop, (c) the identity and number of Fiber-based Collocators, and (d) data demonstrating that these collocators are Fiber-based Collocators.

These requirements which are already applicable to AT&T in California should be applied to the merged entity throughout its region.

COMPTEL's Proposed UNE Condition #2

2. Within 30 days following the Merger Closing Date, the merged entity in all states where the merged entity operates as an incumbent LEC shall recalculate its wire center calculations for the number of business lines and fiber-based collocations and, for those that no longer meet the non-impairment thresholds established in 47 CFR §§ 51.319(a) and (e), provide loop and transport access as UNEs. In identifying wire centers in which there is no impairment pursuant to 47 CFR §§ 51.319(a) and (e), the merged entity shall exclude the following: (i) fiber-based collocation arrangements established by AT&T or its affiliates; (ii) entities that do not operate (i.e., own or manage the optronics on the fiber) their own fiber into and out of their own collocation arrangement but merely cross-connect to fiber-based collocation arrangements; and (iii) special access lines and unbundled loop and transport facilities obtained by AT&T from BellSouth as of the day before the Merger Closing Date. The merged entity shall only count each DS1 UNE loop, and DS1 equivalent circuits, as one business line.

For the avoidance of doubt, with respect to this condition: (i) for all wire center designation disputes that have been decided by a state regulatory authority within the AT&T/BellSouth Region, the merged entity shall recalculate the wire centers and produce all supporting data for the recalculation to be reviewed by the state regulatory authority and the competitive LECs; (ii) any resulting change in wire center non-impairment designations shall be deemed effective as of March 11, 2005, and the merged entity shall true-up amounts in excess of the relevant UNE rates paid by competitive LECs for effected circuits and shall convert such circuits to UNEs at no charge; (iii) in any wire center designation dispute that is pending before a state regulatory authority within the AT&T/BellSouth Region, the merged entity shall withdraw any positions that are inconsistent with these exclusions and will recalculate the wire centers designations; (iv) the merged entity shall also apply these exclusions in all future wire center designations

Sections 251 and 252 of the Telecommunications Act of 1996, Application 05-07-024, Decision adopting Amendment to Existing Interconnection Agreements, at 52-53 (Cal. P.U.C. Jan. 26, 2006) (adopting CLEC language in Section 4.1).

within the AT&T/BellSouth Region; and (v) the merged entity agrees that it will apply the data sharing requirements applicable to AT&T in California for all wire center calculations throughout the AT&T/BellSouth region.

* * * *

Applicants' Proposed UNE Condition #3

“3. AT&T/BellSouth shall terminate all pending audits of compliance with the Commission’s EELs eligibility criteria and shall not initiate any new audits.”

Analysis

COMPTEL supports this condition eliminating EEL audits. As we have made clear in our prior filings, misuse of the out-dated EEL qualification criteria has been a substantial impediment to facilities-based competition by CLECs in the BellSouth region, and termination of the EEL audit threat could significantly enhance competition.

However, COMPTEL is very concerned about potential ambiguity left in the specific language of the condition proposed by the Applicants. The goal should be to end the waste of resources presently committed to such audits, and produce a condition that does not permit the problem to re-emerge.

COMPTEL therefore proposes modified condition language that puts this issue to bed at long last by ensuring that the condition causes the merged entity to cease and desist from *all* EEL audit related activity, regardless of its type or status and regardless of whether the audit pertains to outdated safe harbors and significant local use criteria jettisoned by the Commission years ago, to the high capacity EELs eligibility criteria that replaced it, or to any variation of these standards incorporated into interconnection agreements.

COMPTEL's proposed clarification also eliminates any potential for dispute over whether an audit is "pending." BellSouth's current audit campaign involves audit requests, threats, misuse of CPNI, auditing activity conducted by an auditor and the CLEC that participates in the audit, and dispute resolution/litigation. These varying types of audit activity are at differing stages of severity depending on particular CLECs and by state. To be effective, the condition imposed must put an end to all of it. COMPTEL proposes below a few simple language changes, which should accomplish this result.

COMPTEL's Proposed UNE Condition #3

The merged entity shall cease all ongoing or threatened EEL audits and terminate all EEL audit related rights regarding compliance with the Commission's EELs eligibility criteria (e.g. the Supplemental Order Clarification's significant local use requirement and related safe harbors, and the Triennial Review Order's high capacity EEL eligibility criteria) and shall not initiate any new audits.

E. Special Access

As indicated above, COMPTEL addresses the proposed special access-related conditions in a separate joint filing made on this date. *See Comments of the Special Access Coalition, WC Docket No. 06-74, Oct. 24, 2006.*

F. Wireless

No comment.

G. Transit Service

Applicants' Proposed Transit Condition

"The AT&T and BellSouth incumbent LECs will not increase the rates paid by existing customers for their existing tandem transit service arrangements that the AT&T and BellSouth incumbent LECs provide in the AT&T/BellSouth in-region territory. Footnote: Tandem transit service means tandem-switched transport service provided to an originating carrier in order to indirectly send intraLATA traffic subject to § 251(b)(5) of the Communications Act of 1934, as amended, to a terminating carrier, and includes tandem switching functionality and

tandem switched transport functionality between an AT&T/BellSouth tandem switch location and the terminating carrier.”

Analysis

COMPTEL believes this condition may have superficial appeal, but it is not meaningful in terms of actual market conditions and operations. COMPTEL continues to believe that ensuring just and reasonable rates, terms, and conditions for transit services is a bedrock requirement for the development of competition and that the best way to achieve this goal is by ensuring that such services are subject to all the section 251 and 252 requirements of the Act, especially in markets where an independent network supplier of transit service is not available.

COMPTEL’s Proposed Transit Condition

The merged entity will provide transit service for traffic between any two parties that are interconnected with the merged entity pursuant to an interconnection agreement. The transit service will be subject to sections 251 and 252 of the Act and will be subject to prices at UNE switching rates. The merged entity will not assert that transit service is not subject to sections 251 and 252 of the Act.

H. ADSL Transmission Service

Applicants’ Proposed ADSL Transmission Condition

“AT&T/BellSouth will offer to Internet service providers, for their provision of broadband Internet access service to ADSL-capable retail customer premises, ADSL transmission service in the combined AT&T/BellSouth territory that is functionally the same as the service AT&T offered within the AT&T in-region territory as of the Merger Closing Date. Such wholesale offering will be at prices comparable to those available in the overall market for wholesale broadband services.”

Analysis

While the ADSL Transmission condition may appear on its face to have value, it offers virtually nothing for competitive providers or consumers. First, the condition provides that prices for such service will be set at market rates, but it is clear that the

market for such wholesale service is not sufficiently competitive to ensure prices are cost-based.¹⁸ Consequently, competitors will not likely be able to achieve a sufficient margin to provide the service at competitive retail rates.

Second, the condition is limited to Internet service providers (“ISPs”) and not other providers that may require such service, especially providers who may sell such service as part of a bundle offering. Both of these deficiencies must be cured, or the proposed condition has no value, and would serve only as “window dressing” for an anti-competitive merger. COMPTTEL below offers language that addresses these problems by making the offer applicable to both ISPs and competitive telecommunications carriers and by establishing a reasonable pricing standard. The pricing standard suggested is the last applicable tariff rate, and thus it is a rate previously determined by the Applicants themselves to be “just and reasonable.”

COMPTTEL’s Proposed ADSL Transmission Condition

The merged entity will offer to any service provider ADSL transmission service in the AT&T/BellSouth Region that is functionally the same as the service AT&T offered within the AT&T in-region territory as of the Merger Closing Date. Such wholesale offering will be at the lower of prices comparable to those available in the overall market for wholesale broadband services or the tariff prices in effect on August 4, 2005.

I. Forbearance

Applicants’ Proposed Forbearance Condition

“For thirty months from the Merger Closing Date, AT&T/BellSouth will not seek a ruling, including through a forbearance petition under section 10 of the Communications Act (the “Act”) 47 U.S.C. 160, or any other

¹⁸ See, e.g. Earthlink Petition at 5-6 (noting the importance of broadband transmission services and stating that broadband today is “at best, a duopoly”); COMPTTEL Petition at 18-24 (noting the lack of competitive sources of broadband transmission services);

petition, altering the status of any facility being currently offered as a loop or transport UNE under section 251(c)(3) of the Act.”

Analysis

COMPTEL supports the objective of the Applicants’ Proposed Condition on forbearance, which is to provide for a period of regulatory stability regarding access to loop and transport network elements to foster competitive entry. In order for CLECs to replace the competition in the market lost due to the proposed merger of the Applicants, it is critically important that a reasonable period of “UNE certainty” be established. “UNE certainty” means UNE rate stability, but it also must entail an assurance that critical unbundled facilities are not simply removed from the market through the forbearance process, which allows potentially industry transformative petitions which unfortunately can be “deemed granted” even without action by a majority of commissioners.

However, the actual text of the condition falls short of achieving this aim. First, the duration of the condition is too limited and should be extended to be consistent with the duration of all conditions as set forth above in section II(A). Second, the condition needs to address the possibility of the Commission being unable to enforce a requirement not to file a petition or otherwise seek a ruling by the Applicants. Third, the condition’s language is so circumscribed that it does not address several petitions currently pending before the Commission and may exclude regulatory actions that are equivalent to forbearance. Fourth, it does not encompass access to loop and transport facilities that are equivalent to or may in some instances be substitutes for section 251 facilities. By making modifications to remedy each of these problems, as COMPTEL proposes below, the condition would become truly effective.

COMPTEL's Proposed Forbearance Condition

The merged entity agrees that it will withdraw the AT&T and BellSouth forbearance petitions pending before the FCC (CC Docket Nos. 06-120 and 06-125) and shall not file any additional forbearance petitions dealing with the same or similar service offerings. The merged entity also agrees that it will not file a petition or otherwise to seek a ruling, including through a forbearance petition under section 10 of the Communications Act (the "Act") 47 U.S.C. 160, altering the status of any facility being currently offered as a loop or transport UNE under section 251(c)(3) of the Act or under section 271 of the Act. In addition, the merged entity agrees that it will not give force or effect to any present or future grant of forbearance, or any other decision of the Commission or a court, in a manner that in any way reduces, alters, or otherwise affects their duties under the conditions and commitments of this merger.

J. Annual Certification

Applicants' Proposed Certification Condition

"For three years following the Merger Closing Date, AT&T/BellSouth shall file annually a declaration by an officer of the corporation attesting that AT&T/BellSouth has substantially complied with the terms of these conditions in all material respects. The first declaration shall be filed 45 days following the one-year anniversary of the Merger Closing Date, the second and third declaration shall be filed one and two years thereafter respectively."

Analysis

The annual certification condition is intended to ensure that all of the Applicants' proposed conditions are fully implemented. The condition proposed by the Applicants is insufficient to achieve this goal. Unfortunately, the record is clear that SBC in the past has elected not to comply with conditions imposed on its prior BOC to BOC mergers,¹⁹

¹⁹ See, e.g., *In re: CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications Inc. et al.*, 18 FCC Rcd 7568, ¶ 3 (2003)(finding that SBC "violated paragraph 56 of the SBC/Ameritech Merger Order Conditions, and, in this regard, section 201(b) of the Act"); *In re: SBC Communications Inc.*, 18 FCC Rcd 4997 (2003)(adopting Consent Decree "terminating an investigation into the compliance of SBC Communications Inc. ("SBC") with the Merger Conditions" under the SBC/Ameritech Merger Order)("SBC Consent Decree"); *In re: SBC Communications Inc. Apparent Liability for Forfeiture*, 17 FCC Rcd 19923 (2002)(finding that SBC willfully and repeatedly violated" one of the SBC/Ameritech merger conditions), *aff'd.*, 373 F.3d 140 (D.C. Cir. 2004); *In re:*

and elected instead to monetize their non-compliance by paying relatively paltry fines.²⁰ In a merger of the enormity of the proposed AT&T-BellSouth combination, the Commission cannot take the risk that AT&T/SBC will repeat its prior history of picking and choosing which of its merger commitments to honor post closing. Hence, whatever conditions are imposed must be accompanied by a tough and easily administrable enforcement mechanism. The Commission needs to establish a process where: (i) complaints about failure to properly implement the conditions are processed rapidly and reliably, and (ii) the penalties for non-compliance are sufficient to prevent AT&T from regarding them simply as a “cost of doing business.”

There is no more effective way of ensuring compliance than establishing a system reliant on “private Attorneys’ General,” in which aggrieved parties can file actions to recover damages stemming from any infraction. However, the Commission's complaint processes are not well suited to this task. They are unduly time consuming and expensive. In addition, in the experience of COMPTTEL member companies, the Commission has failed to vigorously implement and enforce pro-competitive conditions it imposed on prior BOC to BOC merger transactions. Accordingly, as is common in telecommunications service and interconnection agreements, COMPTTEL proposes that aggrieved parties be permitted to seek commercial arbitration of any alleged violations

SBC Communications Inc. Apparent Liability for Forfeiture, 16 FCC Rcd 5535 (2001)(finding SBC “willfully and repeatedly failed to report certain performance data” in violation of certain of the SBC/Ameritech merger conditions) (“SBC 2001 Forfeiture”).

²⁰ See, e.g., *SBC Consent Decree*, ¶ 13 (“SBC agrees that it shall make a voluntary contribution to the United States Treasury in the amount of \$250,000 . . . in connection with its compliance with the Performance Plan from January 2001 through February 2003”); *SBC 2001 Forfeiture* ¶ 1 (finding SBC liable for a forfeiture of \$88,000.00 despite noting that “SBC repeatedly filed incorrect reports over a period of 13 months,” *Id.*, ¶ 15).

and recover damages caused by any non-compliance. COMPTTEL believes that arbitration procedures similar to those included in the interconnection agreement between AT&T and Verizon in New York constitute a good model, and it has crafted a proposed condition based on that approach.

COMPTTEL's Proposed Certification Condition

So long as any Merger conditions or commitments are in effect, the merged entity hereby agrees that any party that is damaged by any failure of the merged entity to adhere to any of the merger conditions and commitments expressed herein may seek redress through commercial arbitration. Unless otherwise agreed by the parties, the standard rules and procedures (including those applicable to the selection of an arbitrator) set forth the Commercial Arbitration rules of the American Arbitration Association ("AAA") shall apply and govern any such dispute. The merged entity agrees that the arbitrator shall receive complaints and other permitted pleadings, oversee discovery, administer oaths and subpoena witnesses pursuant to the United States Arbitration Act, hold hearings, issue decisions and maintain a record of proceedings. The merged entity further agrees that the arbitrator shall have the power to award any remedy or relief necessary to redress the harm caused by any failure to adhere to any of the merger conditions including, without limitation, the awarding of damages, pre-judgment interest, specific performance of any obligation created under the merger approval order, issuance of an injunction, or imposition of sanctions for abuse or frustration of the arbitration process. The arbitrator shall not have the authority to limit, expand or otherwise modify the merger conditions and commitments.

K. Access to Section 271 Network Elements

Applicants' Proposed 271 Condition

None.

Analysis

In previous submissions, competitive carriers have pointed out that as access to certain section 251 UNEs are eliminated pursuant to Commission rules, access to equivalent facilities under section 271 takes on added importance to ensure that

competition can continue to evolve.²¹ AT&T/BellSouth have an obligation to provide section 271 network elements²² at just and reasonable rates and terms, but to date, they have refused to voluntarily offer rates and terms that comply with their obligations. They continue to argue that these rates should be the same as special access rates, which would render meaningless the section 271 requirement. The Applicants also continue to contest the concurrent jurisdiction of state commissions over 271 UNE rate setting, a dispute that has led to unsettling and resource-intensive litigation across the nation.²³ The

²¹ See, e.g. Cbeyond Comments at 21-22; Earthlink Petition at 23-24.

²² Section 271 network elements are any elements that have been listed, or interpreted by the FCC to be part of, the competitive checklist in 47 U.S.C. 271(c)(2)(B) including, but are not limited to, loops dedicated transport, dark fiber, multiplexing and line sharing. Under COMPTEL's proposed condition, competitive LECs should be permitted to convert circuits from special access, including volume and term plans, to section 271 elements without penalty. The merged entity should also be required to permit competitive LECs to combine section 271 loops and transport network elements and to commingle section 271 loop and transport facilities with alternative wholesale arrangements (including, but not limited to, section 251, special access, and any commercially negotiated arrangements). In addition, the merged entity should make available under the condition combinations of section 271 elements and combinations of section 271 elements with other wholesale offerings, including but not limited to, section 251 UNEs, special access circuits, and facilities and services in commercially negotiated arrangements, and should be required to perform the functions necessary to commingle section 271 elements with other wholesale offerings, including but not limited to, section 251 UNEs, special access circuits, and facilities and services in commercially negotiated arrangements. This condition is needed because, if a patchwork of 251 and 271 commingling and combinations rules is allowed to exist, then section 271 network elements, which AT&T and BellSouth are obligated to offer, will prove all but unusable.

²³ See, e.g., *Verizon New England, Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission*, 403 F.Supp. 2d 96 (D. Me. 2005) (concluding that state commissions are not precluded from establishing just and reasonable rates under Section 271); *In the Matter of Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of the Justness and Reasonableness of Established Rates*, FCC Docket WC 06-90 (filed April 18, 2006) (seeking clarification that state commissions are not preempted from setting rates for UNES under Section 271 of the Act); *In re: BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, FCC Docket WC 04-245 (filed July 1, 2004) (requesting that the Commission preempt state commission establishment of Section 271 rates). See also, e.g., *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.*

Commission has determined that rates for section 271 network elements must meet the just and reasonable standard contained in sections 201 and 202 of the Act.²⁴ Given the substantial competitive harms that would occur should the Commission approve this merger, COMPTTEL believes that it is essential that the Commission adopt a condition to clarify this situation. COMPTTEL proposes that this condition contain an interim rate set at 115% of the current UNE rates in each state. Permanent rates would be established through the current section 252 arbitration process.

COMPTTEL's Proposed 271 Condition

The merged entity shall offer section 271 network elements at just and reasonable rates and terms, which shall not exceed 115% of the UNE rates most recently approved by the applicable state commission, until such time as the state sets different rates for network elements under section 271. These rates, once approved, shall be incorporated prospectively into section 252 interconnection agreements. The merged entity agrees, to the extent requested by a telecommunications carrier, to arbitrate rates, terms, and conditions for section 271 network elements before state commissions, in accordance with the section 252 arbitration process, and the merged entity further agrees not to oppose any petitions for such arbitrations on the grounds that state commissions have no authority to establish rates, terms, and conditions for section 271 network elements or are otherwise preempted from doing so.

L. Access to Loops

Applicants' Proposed Loop Condition

None.

BellSouth Telecommunications, Inc., Case No. 2005-00533, Kentucky Public Service Commission (Aug. 16, 2006); *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); *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).

²⁴ TRO, paragraphs 663-664.

Analysis

The record is clear that the proposed merger would result in a substantial loss of competition in the relevant markets. One way to replace the competition lost due to the proposed merger is to establish conditions that would allow intramodal competition to flourish. The first of these conditions is that the Applicants should provide unbundled access to dark fiber, lit fiber, copper and hybrid loops in its 22-state ILEC operating area.

The second of these related conditions addresses the harms to competition that occurs when ILECs decommission²⁵ the copper loop plant that competitive carriers rely upon for “last mile” access to their customers. As Applicants convert their loop plant and install more fiber, this critical copper plant is decommissioned and may even be removed. Putting the brakes on this anti-competitive activity, and preserving the copper last mile access required for intra-modal competitors to reach customers, is critical to ensuring that consumers have more than one or two choices of service providers. COMPTTEL has proposed a simple and relatively costless condition, which would preserve this vital source of competition in the marketplace.

In addition, COMPTTEL believes that the Applicants should be subject to rigorous performance measures and self-effectuating remedies governing their performance in processing orders, provisioning, repairing, and maintaining network elements for its competitors. To thwart competitive efforts, the Applicants have every incentive to backslide on these obligations. At the very minimum, Applicants should put forth a plan with respect to UNEs similar to the Service Quality Measurement Plan Applicants that have already agreed to with respect to special access services. This plan should include

²⁵ See 47 CFR 51.319, 47 CFR 51.325, and 47 CFR 51.333 related to decommissioning.

the establishment, by the Applicants, of a process to ensure enhanced monitoring and expedited/escalated maintenance on loop facilities that are subject to three or more trouble tickets in a 60-day period or are otherwise perceived as circuits with difficult-to-detect problems (perceived as such by the CLEC using the loop or its customers.)

COMPTEL Proposed Condition

- *AT&T/BellSouth shall provide unbundled access to dark fiber, FTTH/C and Hybrid loops in its 22-state incumbent LEC operating territory.*
- *AT&T/BellSouth shall not decommission copper loops and shall provide unbundled access to such facilities pursuant to section 251(c)(3).*
- *AT&T/BellSouth shall be subject to rigorous performance measures and self-effectuating remedies governing its performance in processing orders, provisioning, repairing, and maintaining network elements for its competitors. This includes the establishment, by the merged entity, of a process to ensure enhanced monitoring and expedited/escalated maintenance on loop facilities that are subject to three or more trouble tickets in a 60-day period or are otherwise perceived as circuits with difficult-to-detect problems (perceived as such by the competitive LEC using the loop or its customers).*

M. Interconnection Agreement (ICA) Portability

Applicants' Proposed Condition

None.

Analysis

Competitive carriers in previous submissions have demonstrated the harm that would result from losing BellSouth as a regulatory benchmark. In prior BOC to BOC mergers, the loss of the competitive benchmarking tool has been partially offset by enabling CLECs to “port” interconnection agreements from the region of one of the

merging parties to the region of the other merging party.²⁶ COMPTTEL member companies have found this alternative to be a particularly useful mechanism for ensuring that each of the merging parties adopt the “best practices” previously offered by either party, as opposed to using their combination to “race to the bottom” in incorporating their worst practices. One example of how this pertains to the merger proposed here is that BellSouth has incorporated reasonable terms for wireless collocation arrangements in interconnection agreements, whereas AT&T is resisting such overtures.²⁷ Thus, COMPTTEL continues to urge the Commission to ameliorate the loss of benchmarking opportunities by enabling competitive service providers to port current interconnection agreements – with their differing terms and conditions – across state-lines throughout the entire 22-state AT&T/BellSouth operating territory. COMPTTEL’s proposal below would address this benchmarking issue.

²⁶ *In re: GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee, For Consent to Transfer Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, ¶ 300-301 (2000)(establishing a “most favored nation” condition to spread “best practices” by requiring Bell Atlantic and GTE to make available any interconnection agreement or UNE that the companies, as CLECs, secured from other ILECs and to make available to any telecommunications carrier in their region any interconnection agreement in any of their other in-region states.); *In re: Applications of Ameritech Corp., Transferor and SBC Communications Inc., Transferee For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 4, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules*, 14 FCC Rcd 14712, ¶ 388 (1999)(same).

²⁷ The microwave collocation rights that exist throughout the BellSouth territory need to exist throughout the entire new AT&T territory. In addition to bolstering competitive access, microwave collocation helps support network redundancy and physical diversity – a key homeland security goal specifically recognized by Congress and the Executive in Public Law 108-447, Section 414. *See also, e.g.*, Letter from Edward A. Yorkgitis, Jr., Kelley Drye & Warren LLP, Counsel to XO Communications, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Sept. 18, 2006); Letter from Edward A. Yorkgitis, Jr., Kelley Drye & Warren LLP, Counsel to XO Communications, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Oct. 4, 2006).

Indeed, COMPTTEL encourages the Commission to expand upon the agreement portability conditions it has imposed on prior mergers by extending that portability to volume and term special access agreements as well. As UNEs have been decommissioned due to the decisions of the courts and the Commission, such special access volume and term agreements have become an increasingly important supplement to, and/or replacement for, standard interconnection agreements. It is equally important that the best practices of each of the merging parties with respect to such special access volume and term agreements be preserved. For example, the record reflects that BellSouth special access agreements allow for circuit portability, whereas AT&T agreements do not – which make the BellSouth special access agreements a significantly more viable wholesale option for competitive carriers than the arrangements offered by AT&T. COMPTTEL proposes specific language of a condition addressing this problem in our companion filing commenting on the Applicants special access-related conditions.

COMPTTEL's Proposed Portability Condition

The merged entity shall permit a requesting telecommunications carrier to port the entirety of an existing interconnection agreement (except for state-specific rates) from a state where it currently is effective to another state in the AT&T/BellSouth Region.

III. CONCLUSION

It is clear that the combination of AT&T and BellSouth will substantially reduce competition in virtually all telecommunications product markets in the AT&T and BellSouth regions and cannot be found to be in the public interest. Even AT&T and BellSouth implicitly acknowledge this fact by proffering their set of conditions. The Commission has an obligation to ensure that any adopted conditions go as far as reasonably possible to regenerate the competition lost by this merger. COMPTTEL

