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 THE SPECIAL ACCESS COALITION

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October 24, 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] the Special Access Coalition ("Coalition"), which is composed of COMPTEL,[2] the Ad Hoc Telecommunications Users Committee,[3] Mobile Satellite Ventures Subsidiary LLC, and

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

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

[3] Ad Hoc was formed over thirty years ago to represent the interests of enterprise customers in regulatory and judicial proceedings regarding telecommunications. Ad Hoc's membership consists of some of the largest and most sophisticated corporate buyers of telecommunications services in the U.S., including eight of the "Fortune 100" and seventeen of the "Fortune 500" companies. Ad Hoc members represent a broad range of economic sectors (including chemical, automotive, and aerospace manufacturing; banking and financial services; personal and business insurance; transportation services; retail sales; logistics and package delivery; transaction processing; data management; and other information services) and maintain tens of

Time Warner Telecom, Inc. hereby provide comments on the proposed conditions related to special access services[4] that were recently placed on the record by AT&T Inc. ("AT&T") and BellSouth Corporation ("BellSouth")(jointly, the "Applicants").

I. INTRODUCTION AND SUMMARY

These comments are being submitted on behalf of a broad spectrum of buyers and sellers of special access services, including mobile network operators, enterprise customers, competitive local exchange carriers ("CLECs") and interexchange carriers ("IXCs"). These entities purchase special access services from the Applicants not only for their own use, but also as a critical component for numerous downstream products and services. As the Commission recognized in the *SBC-AT&T Merger Order*:

> "[W]holesale special access service is a critical input for: competitive LECs in providing services to their retail enterprise customers, wireless and competitive LECs in connecting their networks to other carriers, long distance carries seeking to connect customers to their long-distance networks, and entities seeking to connect with the Internet backbone."[5]

It is also a critical input for non-carrier enterprise customers who use it as an input for a wide variety of products and services, such as banking, manufacturing, and data management services.

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thousands of corporate premises in every geographic region of the country. As substantial, geographically-diverse customers of telecommunications service nationwide, Ad Hoc members are uniquely qualified to provide a credible, unbiased, and informed perspective on the state of competition in telecommunications markets and the economic rationales for, and impact of, regulatory intervention in those markets.

[4] Many of the signatories hereto also sponsor and support the other comments related to other conditions proposed.

[5] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, ¶ 24 (2005)("*SBC-AT&T Merger Order*").

The record in this proceeding demonstrates that the role of special access services is substantial in the provision of nearly all other telecommunications and information services. For instance, "Sprint has stated that, for its wireless services, the single largest network operating cost is special access."[6] Indeed, AT&T Wireless (which later merged with Cingular) has succinctly explained the critical role of special access to wireless services:

> [Wireless] carriers are major consumers of ILEC special access services. They have no choice. Although wireless services are increasingly viewed as a form of inter-modal competition to wired telephony services, including broadband services, the ironic fact is that wireless networks out of necessity consist largely of wireline facilities. . . . These [facilities] overwhelmingly are made with landline transport facilities purchased from ILEC special access tariffs. [7]

The record demonstrates that competitors and enterprise customers are dependent on the incumbent local exchange carriers ("ILECs") to provide special access. In fact, the record demonstrates that the Applicants have market power throughout their territories, including in locations where they have received pricing flexibility. PAETEC, for example, stated that it relies on ILECs' special access services for 95 percent of its last mile-connections to end-users.[8] Sprint Nextel has no alternative to BellSouth or

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[6] Petition to Deny of COMPTEL, *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74, at 9-10 (filed June 5, 2006)("*COMPTEL Comments*") *citing* Comments of Sprint Corp., *In the Matter of Unbundling Obligations of Local Exchange Carriers*, CC Docket Nos. 01-338, 98-147, and 96-98, at 49 (filed Apr. 5, 2002).

[7] Comments of AT&T Wireless Services, Inc. *In the Matter of AT&T Corp. Petition to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*, RM-10593, at 2-3 (filed Dec. 2, 2002).

[8] Comments of PAETEC Communications, Inc., *Applications for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corporation*, WC Docket No. 06-74, p. ii (filed June 4, 2006).

AT&T for more than 99 percent of its PCS cell sites in the Applicants' service areas.[9] "T-Mobile confirmed that for many types of circuits it must purchase well over 90 [percent] of its demand from the incumbents."[10] And, as Ad Hoc has emphasized, "enterprise customers have nowhere to turn but their local RBOC for special access connections" in the vast majority of commercial locations nationwide.[11]

The Applicants clearly take advantage of their bottleneck control of the special access market – at a sizeable cost to the U.S. economy. Each of the Applicants reported earning more than a 90 percent rate of return on special access investment in 2005.[12] The excessive special access charges have been estimated to have cost enterprise customers over $21.3 million *per day* during 2005.[13] Another study estimates the excess charges at over $10.5 billion *per year,* with an additional annual cost of more than $2.9 billion as a result of diminished demand.[14] "Taken together, the total cost of over-pricing high-

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[9] Comments of Sprint Nextel Corporation, *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74, p. i (filed June 5, 2006)("*Comments of Sprint Nextel Corp.*").

[10] *COMPTEL Comments* at 9-10.

[11] Reply Comments of Ad Hoc Telecommunications Users Committee, *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74(filed June 20, 20006)("*Ad Hoc Committee Reply Comments*"), Attachment B at i.

[12] *Comments of Sprint Nextel Corp.* at 2; *See Ad Hoc Committee Reply Comments*, Attachment B at 9.

[13] *Ad Hoc Committee Reply Comments,* Attachment B at 5.

[14] "Eliminating Access to High Capacity UNE Loops and Transport Will Cost U. S. Businesses $130 Billion," prepared by Willaim Lehr and Mark Bryant, attached to CompTel/ASCENT *Ex Parte Notice*, *Triennial Review Remand Proceeding*, CC Docket Nos. 01-338 and 04-313, at 7, filed Nov. 23, 2004 (The study compared special access pricing to the UNE pricing for high capacity loops and transport.)

capacity loops results in an annual economic loss to American business of nearly $13 billion. The overall impact on the economy is even larger because higher infrastructure costs for business enterprises translate into fewer jobs, slower economic growth, and higher retail prices for finished goods and services."[15]

The pending merger will significantly increase the combined entities ("Merged Firm's") incentive and opportunity to exploit this market power to harm consumer welfare. This is because, as discussed in detail below, this merger will result in an expanded ILEC footprint and the loss of an independent benchmark, a situation not present in the SBC/AT&T merger last year. Indeed, the Merged Firm will be the dominant provider of local telephone service in most of the metropolitan areas in 22 states, serving 68.8 million access lines.[16] Post merger, AT&T will control 45.7 percent of total annual special access revenues reported by ILECs.[17] In addition, the proposed merger will eliminate AT&T as a significant actual competitor in the BellSouth region and eliminate BellSouth as a potential competitor in the AT&T ILEC region.

Consequently, the Commission cannot conclude that the identical special access conditions adopted in last year's ILEC/IXC mergers, as proposed by AT&T and BellSouth in their letter dated October 13, 2006,[18] are sufficient to address the harms

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[15] *Id.*

[16] *Comments of Sprint Nextel Corp.* at 1.

[17] *Id.* at 2.

[18] Letter of Robert W. Quinn, Jr., Sr. Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Oct. 13, 2006).

posed to the special access service market by this far different merger. Accordingly, the Commission must adopt the conditions proposed by the Coalition.

II. THE RECORD IN THIS PROCEEDING DEMONSTRATES THAT THE PROPOSED MERGER POSES SERIOUS HARMS TO CONSUMER WELFARE ABSENT APPROPRIATE CONDITIONS

In previous proceedings considering BOC-to-BOC/ILEC mergers, the Commission has consistently recognized that such combinations threaten to harm both competition in telecommunications markets and consumers of telecommunications services. The Applicants independently have substantial market power today in the special access market. And, as discussed above, the proposed merger will make a bad situation much worse by:

(1) eliminating AT&T as an actual and potential competitor in the BellSouth region in the provision of special access services and by eliminating BellSouth as a potential special access service competitor in the AT&T ILEC territory;

(2) substantially increasing the size of the Merged Firm's footprint, and equally substantially increasing the Merged Firm's incentive and ability to raise rivals' costs; and

(3) reducing regulators' ability to detect and punish anticompetitive conduct by the Merged Firm (as well as by Verizon and Qwest) by eliminating BellSouth as an independent benchmark against which to judge the practices of other large ILECs.

The Commission found that precisely these three types of harm required the imposition of extensive conditions designed to constrain the abuse of market power in previous BOC-to-BOC/ILEC mergers.[19] Because the proposed merger results in a far larger ILEC footprint and an even smaller number of large ILEC benchmarks, it will result in even greater harms to competition than was the case with the last BOC-to-BOC/ILEC mergers absent appropriate conditions. Moreover, the harms to competition

[19] *GTE-Bell Atlantic Order*, 5 FCC Rcd 14032, ¶¶ 96 *et seq.*; *SBC-Ameritech Order*, 4 FCC Rcd 14712 ¶¶ 5, 56-60.

are likely to be particularly severe where competitors seek to provide advanced services in the Merged Firm's territory because, as the Commission has recognized, those services offer ILECs the greatest opportunities to "slow roll" the delivery of service and raise rivals' costs.[20] As in prior BOC mergers, the policies of Section 706 of the Telecommunications Act mandate that the Merged Firm be prevented from acting on its increased incentives to harm competition for critically important next-generation services.[21]

a. The Proposed Merger Expands AT&T's Footprint.

The Commission approved last year's SBC/AT&T and Verizon/MCI mergers with conditions on the pricing and provisioning of special access service because those mergers created virtually irresistible opportunities for the merged company to engage in anti-competitive behavior (by impeding competitive entry into telecommunications markets) and exploit customers of special access services (by charging unjust and unreasonable rates). Yet both of these effects will be magnified by the instant merger request – to the detriment of the public interest, convenience, and necessity – because this merger would not only eliminate another special access competitor but would greatly expand the geographic footprint of the merging parties' virtual monopoly over special access products and services. By expanding the geographic footprint of AT&T's monopoly, the merger increases the combined companies' incentives and opportunities for anti-competitive behavior in the special access market. The need for conditions is therefore even greater in the proposed combination of behemoth BOCs.

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[20] *GTE-Bell Atlantic Order* ¶ 174; *SBC-Ameritech Order* ¶ 187.

[21] *See id.*

The Applicants go to considerable lengths to portray the proposed transaction as merely another merger, not unlike last year's ILEC/IXC mergers. But this merger differs fundamentally from those transactions thanks to its unprecedented scope and scale. It will create a vertically integrated interexchange and ILEC footprint spanning 22 states and encompassing about half of all wireline access lines in the United States. As a result, the potential harm that would result if this merger were approved without adequate conditions is fundamentally greater, for several reasons.

First, the merger of BellSouth and AT&T will produce an ILEC far larger than that produced by any previous BOC-to-BOC/ILEC merger or either of last year's ILEC/IXC mergers and will result in the country's largest interexchange carrier – one that is considerably larger than the former AT&T Corp. was at the time that it was acquired by SBC. The consolidation that swallowed up SBC's then-largest special access competitor within its 13-state operating area will similarly eliminate BellSouth's single largest special access competitor across its 9-state region. Competitive activity and entry in both the local and long distance markets will now be reduced not only in the 13-state SBC footprint but also in the nine additional states dominated by BellSouth.

Vertical integration on this scale threatens to undo the progress made towards economically efficient and pro-competitive market conditions since the 1984 break-up of AT&T. This is in part because the proposed merger would eliminate, for a far greater segment of the market than was previously the case, AT&T's and BellSouth's prior indifference as to how they treat purchasers of their access services or which IXC their local service customers select.[22] As a long distance or wireless *competitor* to its access service *customers*, a merged AT&T/BellSouth can use its control over special (and switched) access charges as a formidable competitive weapon in downstream markets. In areas where IXCs and wireless carriers are affiliated with the local exchange carrier, payments for such services constitute intracorporate accounting transfers, *i.e.*, the movement of money from one corporate pocket to another. When access charges become mere intracorporate accounting transfers, access price increases become attractive competitive weapons, *i.e.*, they raise a competitor's cost of doing business and increase the access provider's overall revenues. The same problem exists where providers of competitive local service seek to purchase special access from the Merged Firm.

This problem is magnified by the geographic scope of the proposed merger. Competitive IXCs and wireless carriers will be dependent upon the merged company for an even greater portion of the access services they must buy. In other words, a single competitor will control an even greater portion of their costs of doing business. As the geographic area expands over which AT&T and BellSouth control access prices, the opportunities greatly increase for the merged company's successful use of that control as a competitive weapon.

The pro-competitive "indifference" of AT&T and BellSouth regarding their access customers will thus be turned on its head – the Merged Firm will confront

[22] The FCC's special access regulation was designed to ensure reasonable and non-discriminatory access for IXCs and other non-ILEC entities to the ILEC network services that were essential inputs to their operations. When the BOCs could not offer competing long distance services, they were entirely indifferent as to how they treated IXCs – and, for that matter, fully-separated wireless carriers – purchasing access services from them. Even though access rates were generally set well in excess of cost during this period, the same prices confronted all of the then-competing IXCs and wireless carriers, affording no one of them a competitive advantage vis-à-vis the others.

enormous business, financial, and competitive incentives to set its special (and switched) access prices as high as possible in order to obtain a competitive advantage in the interexchange and wireless markets. And so long as the Commission's "pricing flexibility" rules for special access remain in place, the Merged Firm will have every opportunity to do so without any meaningful regulatory oversight or constraint.

In the post-merger environment contemplated by the AT&T/BellSouth application, AT&T will control some 46 percent of all wireline access lines in the U.S. and some 27.7 percent of nationally-based CMRS carrier wireless phones.[23] Verizon, at that point, will control roughly 36.7 percent of all wireline access lines and some 27.2 percent of all wireless phones. These indicators do not bode well for special access customers insofar as serious competitive activity is concerned. Assuming that the Merged Firm and Verizon compete in each other's region, Verizon (including its wireless affiliate) will be AT&T's single largest special access customer. Similarly, AT&T and its then-integrated wireless operations will be Verizon's single largest special access customer. In both regions, there will not be even a close second when it comes to special access customers.

Meanwhile, the new, geographically-expanded Merged Firm will have powerful incentives to maintain – and even increase - its currently excessive special access rate levels in order to impose excessive costs of doing business upon its would-be rivals and constrain those rivals' activities within the newly-expanded AT&T footprint. As long as AT&T continues to be allowed to set special access prices without limit or constraint, it

[23] *See Ad Hoc Committee Reply Comments* at 12, n. 18.

will be able to block or seriously retard entry by other companies into its local service region.

b. The Proposed Merger Eliminates the Commission's Ability to Benchmark

The proposed merger would also eliminate BellSouth as a benchmark against which to judge the pricing and practices of other large ILECs, including AT&T. The loss of BellSouth as a benchmark, in turn, substantially reduces the FCC's ability to evaluate ILEC prices and practices regarding the inputs required by competitors to provide competing interexchange, wireless, and IP-based services. Indeed, as Drs. Besen and Mitchell explained in a Declaration accompanying Time Warner Telecom's Response to the Applicants' joint opposition to petitions to deny in this proceeding, the merger will likely eliminate the utility of benchmarking completely.[24]

The impact of losing a benchmarking point of reference cannot be overstated and should not be overlooked by the Commission in its evaluation of the merger proposal. Both state regulators and the FCC have continued to rely on BOC-to-BOC benchmarking since the last BOC mergers in order to evaluate pricing and marketplace behavior. In addition, the deployment of advanced services with which regulators have little or no data or regulatory experience will significantly increase, not decrease, the need for benchmarking data in the future. Yet, to the extent that the Merged Firms adopts common practices across the merged company's footprint (a likely outcome), regulators will lose a source of independent BOC behavior to use in evaluating price levels and behavior. Moreover, even if the Merged Firm continues to retain somewhat different

[24] *See* Response of Time Warner Telecom to Applicants' Joint Opposition to Petitions to Deny, *Applications for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corporation*, WC Docket No. 06-74 (August 8, 2006), Attachment B at ¶ 102 ("Besen/Mitchell Declaration").

practices among its legacy companies, it may only report its practices at the firm level, thus providing even less information to regulators. Even assuming separate reporting among the legacy companies, it is likely that all new initiatives and practices will be implemented company-wide, eroding the "differences" between the legacy companies over time.

This loss of information as a result of the proposed merger diminishes the ability of regulators to perform both "best-practice" and "average practice benchmarking."[25] As the Besen/Mitchell Declaration points out, the loss of one of today's four BOCs as a result of this merger would reduce the likelihood of a firm adopting a "best practice" (different from the remaining firms) by half.[26] The utility of relying upon "best practice" benchmarks would be reduced correspondingly. Any attempt by regulators to engage in "average practice benchmarking" would also be hampered. Fewer firms and therefore fewer data points make it more difficult to calculate an "average," making regulators less likely to employ average practice benchmarking at all.

In the absence of reliable benchmarking, the conditions advocated by this Coalition become essential mechanisms for protecting competitors and end users from the merged entity's exploitation of its market power. Substantial public interest harms will therefore result from the loss of BellSouth as a benchmarking firm unless the merger takes effect subject to long-term conditions like those advocated by this group to protect special access customers and those consumers relying on the customers' services.

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[25] These outcomes are described in greater detail in the Besen/Mitchell Declaration.

[26] *Id.* at ¶ 71.

III. THE APPLICANTS' PROPOSED CONDITIONS DO NOT ADDRESS THE HARMS POSED BY THE PROPOSED MERGER

The imposition of appropriate conditions is necessary when the Commission finds that the public interest benefits have not offset the public interest harms of a merger.[27] Conditions can mitigate the harms or perhaps amplify the benefits of such a transaction.[28] Notwithstanding the obvious, substantial, and well-documented harms posed by the proposed merger to the special access market, the Applicants have proposed conditions in this case that do not attempt to address those harms in a serious fashion. Instead, the Applicants have proposed conditions that consist of little more than an attempt to distract attention from the harms to consumer welfare posed by the proposed merger. In fact, the only condition proposed by the Applicants that addresses special access would do nothing more than extend to BellSouth the conditions imposed on the IXC/ILEC mergers. The Coalition supports the adoption of this condition (subject to an appropriate duration), but it is clearly insufficient by itself. The Commission must therefore require that the Applicants commit to conditions that actually address the harms to the special access market posed by this merger. Moreover, the Commission must establish clear,

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[27] *SBC-AT&T Merger Order* at ¶ 16 ("The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against the potential public interest benefits.")

[28] *Id.* at ¶19. ("Our public interest authority also enables us to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction. Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions not inconsistent with law that may be necessary to carry out the provisions of the Act. Similarly, section 214(c) of the Act authorizes the Commission to attach to the certificate 'such terms and conditions as in its judgment the public convenience and necessity may require.' Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to impose and enforce conditions based upon our extensive regulatory and enforcement experience to ensure that the merger will, overall, serve the public interest."(footnotes omitted))

enforceable penalties for failure to meet the conditions that adequately deter the Merged Firm from making non-compliance a cost of doing business that they are willing to incur.

For purposes of these comments, the Coalition focuses only on the substantial deficiencies in the proposed conditions related to special access services. Members of the Coalition will raise issues with the other conditions separately.

a. Applicants' Proposal on Duration of the Conditions.

> "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."

The thirty-month duration proposed for the merger conditions by the Applicants is clearly insufficient. The main source of the public interest harms posed by the merger is the Applicants' control over local transmission facilities needed to serve business customers. Given that the Applicants have controlled such bottleneck facilities for the better part of a century, it is unreasonable to assume that they will not continue to do so for a long time to come. It is therefore appropriate to require compliance with applicable conditions for an extended period of time. In a somewhat analogous context, the Commission has required merging parties to comply with conditions of six years in duration.[29] Given that the level of market power at issue in this merger is greater than was the case with either the Adelphia or DirecTV-Hughes mergers, and that the size of

[29] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses of Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶¶ 109, 157, 164, 190, and App. B (2006) ("*Adelphia Order*"); *See General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶¶ 128,179, and App. F (2004) ("*News Corp.-Hughes Order*").

the affected market as well as the importance of that market to the economy are far greater here than was the case with either the Adelphia or DirecTV-Hughes mergers, it makes sense for the conditions here to extend for a longer period than was the case in Adelphia or DirecTV-Hughes. Accordingly, the conditions should last for a minimum of seven years and the Commission should be able to extend that period if the harms still persist.

b. Applicants' Proposal on Special Access Services.

> 1. AT&T/BellSouth affiliates that meet the definition of a Bell operating company in section 3(4)(A) of the Act ("AT&T/BellSouth BOCs") will implement, in the AT&T and BellSouth Service Areas, the Service Quality Measurement Plan for Interstate Special Access Services ("the Plan"), similar to that set forth in the SBC/AT&T Merger Conditions. The AT&T/BellSouth BOCs shall provide the Commission with performance measurement results on a quarterly basis, which shall consist of data collected according to the performance measurements listed therein. Such reports shall be provided in an Excel spreadsheet format and shall be designed to demonstrate the AT&T/BellSouth BOCs' monthly performance in delivering interstate special access services within each of the states in the AT&T and BellSouth Service Areas. These data shall be reported on an aggregated basis for interstate special access services delivered to (i) AT&T and BellSouth section 272(a) affiliates, (ii) their BOC and other affiliates, and (iii) non-affiliates. The AT&T/BellSouth BOCs shall provide performance measurement results (broken down on a monthly basis) for each quarter to the Commission by the 45th day after the end of the quarter. The AT&T/BellSouth BOCs shall implement the Plan for the first full quarter following the Merger Closing Date. This condition shall terminate on the earlier of (i) thirty months and 45 days after the beginning of the first full quarter following the Merger Closing Date (that is, when AT&T/BellSouth files its 10th quarterly report); or (ii) the effective date of a Commission order adopting performance measurement requirements for interstate special access services.
> 2. AT&T/BellSouth shall not increase the rates paid by existing customers (as of the Merger Closing Date) of DS1 and DS3 local private line services that it provides in the AT&T/BellSouth in-region territory pursuant to, or referenced in, TCG FCC Tariff No. 2 above their level as of the Merger Closing Date.
> 3. AT&T/BellSouth will not provide special access offerings to its wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions.
> 4. To ensure that AT&T/BellSouth may not provide special access offerings to its affiliates that are not available to other special access customers, before AT&T/BellSouth provides a new or modified contract tariffed service under

section 69.727(a) of the Commission's rules to its own section 272(a) affiliate(s), it will certify to the Commission that it provides service pursuant to that contract tariff to an unaffiliated customer other than Verizon Communications Inc., or its wireline affiliates. AT&T/BellSouth also will not unreasonably discriminate in favor of its affiliates in establishing the terms and conditions for grooming special access facilities.

5. AT&T/BellSouth shall not increase the rates in its interstate tariffs, including contract tariffs, for special access services that it provides in the AT&T/BellSouth in-region territory and that are set forth in tariffs on file at the Commission on the Merger Closing Date.

As demonstrated above, the proposed merger poses serious harms to consumer welfare in the special access market. In the conditions they have proposed for the instant merger, however, the Applicants simply committed to extending to BellSouth the conditions imposed in connection with the SBC-AT&T merger. This is obviously not a serious attempt to address the additional harms posed by the instant merger. The Applicants' proposed conditions would, if adopted, leave special access purchasers and providers at the mercy of the Merged Firm's increased incentive and ability to engage in anticompetitive conduct.

For example, the proposed commitment to cap special access DS1 and DS3 rates allows the Merged Firm to continue to charge rates for those services that are set today at monopoly rent levels in areas in which the Applicants have received pricing flexibility. The merger will make this problem worse because the Merged Firm will have an increased incentive to exploit its high special access prices by placing its competitors in price squeezes. Nor is it even true that capping special access rates at existing levels actually forecloses future price increases in real terms. The Merged Firm's special access costs are likely declining as a result of economies of scale and scope.[30] The failure to

[30] *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶¶ 26-29 (2005) ("These accounting data

pass through cost decreases is tantamount to prices increases when compared to the prices a competitive market would produce. This is so because, in a competitive market, prices would be forced down as costs decline. Again, the Merged Firm will have an increased incentive to take advantage of the opportunity to increase prices in this manner than would either AT&T or BellSouth on its own.

In addition, the Applicants' proposed conditions do not even mention newly developing services such as Ethernet. The Commission has held that a merger of large ILECs poses the greatest threat to novel advanced services such as these, since the Merged Firm can exploit the absence of established modalities for providing wholesale inputs.[31] As Time Warner Telecom has demonstrated in this proceeding, AT&T has already engaged in this conduct extensively by refusing to provide Time Warner Telecom with Ethernet facilities on reasonable terms and conditions.[32] The Merged Firm will have a significantly increased incentive and ability to continue to engage in exactly this kind of conduct. The Applicants' proposed conditions unsurprisingly (and inappropriately) leave the Merged Firm free to do so. In so doing, the Applicants will be able to slow down and restrict the geographic scope of the deployment of Ethernet and

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suggest that the BOCs have realized special access scale economies throughout the entire period of price cap regulation, including before and after the CALLS plan and pricing flexibility were implemented. That is, special access line demand increased at a significantly higher rate than did operating expenses and investment throughout these periods, suggesting that the BOCs realized scale economies in both periods.")

[31] *SBC-Ameritech Merger Order* at ¶ 190.

[32] *See* Reply Declaration of Graham Taylor ¶¶ 5-15, ¶¶ 26-37, attached to Letter of Thomas Jones, Counsel, Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Aug. 8, 2006); Declaration of Graham Taylor ¶¶ 31-42, attached to Petition to Deny of Time Warner Telecom, WC Docket No. 06-74, (filed June 5, 2006).

other new advanced service offerings while the Merged Firm develops its own offerings. This will obviously deprive businesses and the U.S. economy more generally of the efficiencies yielded by Ethernet and other new advanced services. In the end, these inefficiencies will be passed along to consumers in the form of lower quality services and higher prices.

Furthermore, by also failing to address the problem of the numerous anti-competitive contract provisions that the Applicants now impose on special access purchasers, the Applicants' proposed conditions leave the Merged Firm free to exploit its market power in other ways. The Merged Firm would have an unfettered ability to require purchasers of special access services to comply with anti-competitive conditions that bear no reasonable relationship to any efficiencies yielded by volume and term commitments. The Merged Firm would therefore be free to act on its increased incentive to require that purchasers submit to onerous tying arrangements, agreements not to purchase special access services from competitors, agreements not to purchase UNEs, and other similarly anti-competitive conditions.

Nor do the Applicants' commitments to address discrimination between affiliates and other purchasers of special access services have any substance. The conditions do not even mention the Merged Firm's wireless affiliate, Cingular, which is the affiliate likely to be the beneficiary of the Merged Firm's discrimination. The discrimination provisions concerning wireline "affiliates" are largely meaningless because the Merged Firm's obligation to provide in-region interLATA services through a Section 272 affiliate has already "sunset" as a matter of law in every one of the 22 Merged Firm states. The Merged Firm can therefore eliminate its wireline affiliates at its discretion.

For all of these reasons the Applicants' proposed conditions for special access services are simply not a serious proposal. The Commission should therefore reject this proposal as insufficient and insist that the Applicants commit to meeting the conditions proposed by the Special Access Coalition as discussed below.

c. Applicants' Proposal on Net Neutrality.

The Coalition has no comment on the proposed net neutrality condition. Nonetheless, it is noteworthy that the special access conditions that we have proposed, if accepted in their entirety, also could well have salutary effects in the net neutrality debate. The reason is simple. No competitor seeking to operate a third or fourth (or even a second) broadband pipe to homes or businesses can afford to replicate an incumbent's network. Thus, special access services will be among the largest expenses for almost any new broadband network, whether it is a wireless or wireline network. The more that special access services are available on commercially reasonable terms, the more likely it is that additional competing broadband networks can obtain financing and compete in the broadband market. The more competitors in that market, the more likely that open network business models acceptable to net neutrality proponents will prevail. Thus, implementation of these conditions has the potential for benefits far beyond the special access market.

d. Applicants' Forbearance Commitment.

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

It is of course absurd that the Applicants have excluded special access services from their forbearance commitment. This is especially true because the Applicants have three forbearance petitions pending before the Commission at this time, and two of them seek relief from special access regulation.[33] For all of the reasons discussed in these comments, the forbearance commitment must include special access services, including Ethernet and other advanced services.

IV. ONLY THE CONDITIONS PROPOSED BY THE SPECIAL ACCESS COALITION ADEQUATELY ADDRESS THE HARMS POSED BY THE MERGER TO THE SPECIAL ACCESS MARKET

In contrast to the gaping holes in the Applicants' proposed special access conditions, we have proposed a series of conditions related to special access services that ameliorate the merger's damage to competition in the special access markets.[34] Each condition at least partially offsets one or more of the merger-specific harms that will inevitably arise if the transaction is allowed to go forward.

a. Elimination of Phase II Pricing Flexibility

The special access service rate regulation and price cap condition eliminates Phase II pricing flexibility for special access services, including DS1, DS3, certain

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[33] *Pleading Cycle Established For Comments On Bellsouth Petition For Forbearance Under 47 U.S.C. Section 160(C) From Title II And Computer Inquiry Rules With Respect To Broadband Services*, Public Notice, 21 FCC Rcd 8022 (2006); *Pleading Cycle Established For Comments On Qwest and AT&T Petitions for Forbearance Under 47 U.S.C Section 160(c) from Title II and Computer Inquiry Rules with respect to Broadband Services*, Public Notice, 21 FCC Rcd 7942 (2006); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. Section 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services,* Public Notice, 21 FCC Rcd 6862 (2006).

[34] *See Special Access Coalition ex parte, Sept. 22, 2006*, WC Docket No. 06-74 at 4-8 and Exhibit B ("Sept. 22 Ex Parte").

Ethernet services and any other local transmission services that offer similar capabilities in all areas in the Merged Firm's ILEC territory and re-establishes a lower price cap for these services.[35] This regulation addresses the first two of the merger-specific harms: (i) the loss of BellSouth and AT&T as competitors in each other's territory, and (ii) the Merged Firm's larger geographic footprint that creates an increased incentive and ability to discriminate against competitors.

Most importantly, this condition would reduce the Merged Firm's ability to raise prices and engage in "price squeeze" tactics after the merger. Absent the imposition of this condition, it is likely that the Merged Firm would engage in this conduct even more than it has in the past. Moreover, the price cap condition addresses these concerns by relying on well-established incentive regulation mechanisms that the Commission has hailed as effective means of increasing the efficiency of regulated firms.[36] Finally, the price cap condition utilizes an X-Factor of 6.5 percent, which both AT&T and BellSouth supported as signatories to the CALLS plan.[37]

b. Best and Final Offer Arbitration

The second condition is a baseball-style, best and final offer arbitration procedure that may be invoked by those seeking to purchase special access service from the Merged Firm under volume-term contracts rather than under price caps.[38] This condition

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[35] *See id.* at 4 and Exhibit B.

[36] *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶¶ 65-70 (1990).

[37] *Access Charge Reform, et al.*, Sixth Report and Order, *et al.*, 15 FCC Rcd 12962 ¶ 161 (2000), subsequent history omitted; *see also id.* at n.1.

addresses all three of the merger-specific harms. It is modeled closely on remedies that the Commission has used in the past, particularly in similar situations involving horizontal or vertical foreclosure or pricing problems exacerbated by a merger.[39] Moreover, it is a crucially important provision because it can be implemented immediately, is self-executing, has relatively little cost, and requires little or no expenditure of Commission resources.

The arbitration provision is designed to replicate the outcome of commercial negotiations among parties of relatively equal bargaining power, as would be the case in a competitive market with numerous buyers and sellers. As an initial matter, it thus offsets, though not completely, the loss of BellSouth and AT&T as competitors in each other's territory. It also ameliorates somewhat the potentially disastrous effect of the Merged Firm's larger geographic footprint and its increased incentive and ability to discriminate against competitors. Unfortunately, it does not affect the Merged Firm's incentive to exploit every opportunity to raise rivals' costs, including opportunities created by the introduction of new advanced services for which the wholesale arrangements for purchasing inputs are new. However, it does reduce the likelihood that the Merged Firm can successfully exercise its greater ability to raise rivals' costs or to deny, delay and degrade transmission sold to competitors.

The commercial arbitration proposal would also lessen to some extent the third harm - that caused by the elimination of one of the few remaining independent BOC benchmarks - by making it less necessary for regulators to detect unreasonable conduct in

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[38] *See Sept. 22 Ex Parte* at 4 and Exhibit B.

[39] *See id. at* 6-7.

the negotiation and implementation of special access arrangements. Specifically, the arbitration proposal effectively lets the private commercial arbitration mechanism, not the Commission, benchmark the Merged Firm's conduct. What the Merged Firm proposes and what it agrees to will be measured not only against the practices of the other two remaining BOC competitors, but against those of other ILECs and a variety of smaller, non-ILEC special access providers, including CLECs, fiber wholesalers, and cable MSOs. Again, the use of these non-BOC benchmarks in the arbitration process will make it more difficult for the Merged Firm to impede the introduction of Ethernet and other new advanced services for which the conditions governing wholesale arrangements for purchasing inputs are new. As an added bonus, the condition has the virtue of minimizing the day-to-day involvement of the Commission in regulating the market.

c. Fast Track Arbitration For Breach of Special Access Arrangements

The proposed fast track (120 day) arbitration procedure for alleged breaches of special access arrangements and any other forms of unreasonable conduct by the Merged Firm in the provision of special access services would apply whether the service was provided under a commercial agreement or tariff offering.[40] This mechanism is necessary to offset the Merged Firm's increased ability and incentive to deny, delay and degrade special access services provided to competitors, an ability and an incentive that continue (and indeed are magnified) even after a special access arrangement is in place. As numerous commentors have pointed out, an agreement or tariff offering can be thoroughly undermined by strategic misconduct by the Merged Firm, and the delay

[40] *See id.* at 7 and Exhibit B.

inherent in judicial litigation could effectively drive the Applicants' competitors out of business before the matter is resolved.[41]

d. Prohibition On Unreasonable Contract or Tariff Terms

It is well documented in this and other proceedings that AT&T and BellSouth have required that customers receiving volume-term discounts comply with conditions that are harmful to competition in the wholesale market and that have no connection to the lower costs yielded by volume and term commitments.[42] These include provisions such as those prohibiting purchasing UNEs or purchasing services from competitors, or tying arrangements such as those included in SBC's MVP Discount Plan, HCTPP Discount Plan, and DS1 TPP Discount Plans.[43] To prevent the Merged Firm from requiring inclusion of these conditions in volume-term agreements after the merger, the "prohibited terms" condition makes it unlawful for the Merged Firm to require that special access purchasers comply with any requirement that does not have a reasonable nexus with the efficiencies yielded by volume and/or term commitments.[44]

The condition prohibiting unreasonable terms[45] addresses two of the three merger-specific harms. First, it addresses one of the most obvious means by which the Merged

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[41] *See id.* at 7.

[42] *See, e.g., Petition to Deny of Time Warner Telecom*, at 15 (filed June 5, 2006); Comments of Cbeyond Inc. at 85-86 and attached Declaration of Lisa R. Youngers ¶ 6 (filed June 5, 2006); Reply Declaration of Joseph Farrell, Reply Comments of COMPTEL, et al., at ¶¶ 5-11, WC Docket No. 05-25; RM 10593 (filed July 29, 2005).

[43] *See Petition to Deny of Time Warner Telecom* at 15.

[44] *Sept. 22 Ex Parte* at 7 and Exhibit B.

[45] *For details, see id.*

Firm could act on its increased incentives to raise rivals' costs or to foreclose the market to competitors after the merger. Second, it offsets some of the harm from the loss of BellSouth as a benchmark by applying an objective standard - a requirement that a proposed provision have a reasonable connection to the lower costs yielded by volume and term commitments - and thus narrowing the types of issues that have to be benchmarked.

e. Porting of Special Access Term and Volume Agreements

This condition imposes a requirement that the Merged Firm permit a customer to "port" the entirety of an existing special access service plan or commercial agreement (except for state-specific rates or unreasonable terms as discussed in the item above) from a state in the Merged Firm's territory in which it currently is effective to any other state in the Merged Firm's territory.[46] The contract portability condition help address all three merger-specific harms. In combination with the other proposed conditions, it prevents the otherwise likely spread of worst practices by the Merged Firm and helps minimizes the impact of the elimination of BellSouth as a competitor and as an independent benchmark.

In prior BOC to BOC mergers, the loss of the competitive benchmarking tool has been partially offset by enabling CLECs to "port" agreements of one of the merging parties to the region of the other merging party.[47] Competitors have found this to be a particularly useful mechanism for ensuring that each of the merging parties adopts the "best practices" previously offered by either of them, as opposed to turning the merger

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[46] *See id.* at 8 and Exhibit B.

[47] *See, e.g., SBC-Ameritech Merger Order Conditions XII and XIII.*

into an opportunity to "race to the bottom" in incorporating the merging parties' worst practices. The Commission can and should ameliorate the loss of benchmarking opportunities by expanding upon prior agreement portability conditions (which largely covered interconnection agreements ("ICAs")) by extending the concept to special access volume and term agreements throughout the entire 22-state AT&T/BellSouth operating territory.

Preservation of the best practices of BellSouth is equally important to ameliorate the harm stemming from its loss as a competitor. 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 agreements a significantly more viable wholesale option for competitive carriers than the arrangements offered by AT&T.

f. Fresh Look and Agreement Not to Seek Forbearance

Finally, in order to ensure that the each of the above conditions has a meaningful effect in the marketplace, two other procedural conditions are necessary: (i) a limited one year fresh look option for affected special access service customers and (ii) agreement by the Merged Firm that any grant of forbearance under Section 10 of the Act shall not diminish, alter or in any way affect the Merged Firm's obligations or responsibilities under these merger conditions.[48]

Both of these conditions address all three merger-specific harms, since without these two conditions the potential effectiveness of all of the other conditions will be minimized. In effect, these two conditions guarantee that the public interest is served and that the marketplace gets the benefit of what the Commission will have bargained for - a

[48] *See Sept 22 Ex Parte* at 8 and Exhibit B.

set of merger conditions that at least partly offsets the inevitable public interest harms from the merger, that can be implemented quickly, and that will provide those offsetting benefits for a defined (if less than optimal) period of time.

V. CONCLUSION

The Commission cannot conclude that the conditions proposed by the Applicants are sufficient to address the public interest harms this merger poses to the special access market. The Commission must ensure that a comprehensive set of conditions are in place to remedy these harms.

Respectfully Submitted,

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October 24, 2006