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October 27, 2006

***Via ECFS***

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: AT&T and BellSouth Merger Application, WC Docket No. 06-74  
Written *ex parte* presentation  
Proposed Merger Condition Regarding Interconnection Agreement  
Portability**

Dear Ms. Dortch:

On October 25, 2006, representatives of Cbeyond Communications and XO Communications participated with other competitive carrier representatives in a meeting with Commission Jonathan S. Adelstein and his Legal Assistant Scott Bergmann in which certain questions were raised regarding CompTel's proposed merger condition requesting the portability of AT&T and BellSouth interconnection agreements ("ICAs") approved under Section 252(e) of the Communications Act of 1934, as amended, from one state to another and AT&T and BellSouth special access volume and term agreements from one carrier or state to another.<sup>1</sup> Specifically, the inquiry was made what was the precedent for such merger conditions.

This *ex parte* presentation is being submitted to respond to these questions and to offer Cbeyond's and XO's support for the portability-related merger conditions. In both the most

<sup>1</sup> Letter of Brad E. Mutschelknaus, Kelley Drye & Warren, LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in WC Docket No. 06-74 (dated Oct. 26, 2006). See also Comments of CompTel, WC Docket No. 06-74, at 27-29 (filed Oct. 24, 1996); Comments of the Special Access Coalition, WC Docket No. 06-74, at 25-26 (filed Oct. 24, 2006).

Marlene H. Dortch  
 October 27, 2006  
 Page Two

recent RBOC-to-RBOC merger involving SBC and Ameritech in 1999 and the major ILEC combination of Bell Atlantic and GTE in 2000, the Commission adopted conditions requiring portability of ICAs.<sup>2</sup> Excerpts from the appendices to the Commission's orders in these proceedings containing the ICA portability merger conditions are appended hereto for reference.

At the time the Commission imposed the ICA portability conditions on the SBC-Ameritech and Bell Atlantic-GTE mergers, the Commission was still three years away from taking the actions which significantly reduced the availability of incumbent local exchange carrier ("ILEC") unbundled network elements to requesting telecommunications carriers in its *Triennial Review Order* and *Triennial Review Remand Order*.<sup>3</sup> In those rulemaking decisions, the Commission eliminated the availability of OCn and higher transport and loop related unbundled network elements and limited the availability of DS3 and DS1 loops going forward. As such, the continued competitiveness of today's markets depends more heavily on the availability of reasonable and non-discriminatory ILEC special access rates terms and conditions, a concern made all the more acute in light of the rapid consolidation among major ILECs, culminating in the instant proposed merger, which would be the largest in United States history. There is not an all-fours precedent for CompTel's request to extend portability to volume and term special access agreements.<sup>4</sup> However, in light of the changed market and regulatory conditions existing since the last round of RBOC-to-RBOC mergers, the rationale that justified (and continues to warrant) imposing a duty, following an RBOC-to-RBOC merger, to make the ICAs portable warrants the contemporary adoption of a merger condition allowing requesting carriers to opt into the rates, terms, and conditions of volume and term special access arrangements entered into by the merged entity. Thus, Cbeyond and XO submit that CompTel's

<sup>2</sup> *In re 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's Rules*, Memorandum opinion and Order, 14 FCC Rcd 14712, Appendix C, § XII, ¶¶ 42-43 (1999); *In re Application of GTE Corporation and Bell Atlantic Corporation For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, Appendix D, § IX, ¶¶ 30-32 (2000).

<sup>3</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) *vacated and remanded in part, affirmed in part, sub nom. United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004); *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2005), *aff'd sub nom., Covad Communications Co. v. Federal Communications Commission*, 450 F3d 528 (DC Cir 2006).

<sup>4</sup> See Comments of the Special Access Coalition, *supra*, at 25-26.

Marlene H. Dortch  
October 27, 2006  
Page Three

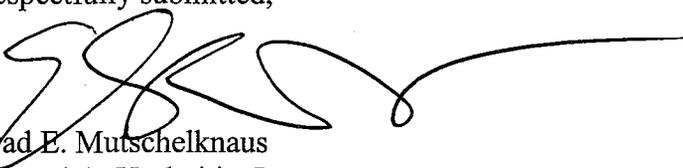
proposed condition regarding portability of special access volume and term agreements should be adopted.

Cbeyond and XO wish to emphasize that the portability conditions imposed on merged RBOC entities in the past proved to be extremely useful to competitive carriers. Portability conditions helped ensure that the merged entity, as a whole, continued to make more available favorable terms and conditions offered by one of the pre-merger partners and did not resort to the adoption of the worse practices of one or the other. As a consequence, competition and consumers benefited, partially offsetting the substantial consolidation created by the merger and the concomitant reduction in benchmarking opportunities for regulators.

This *ex parte* written presentation is being filed pursuant to the Commission's Rules.

Do not hesitate to contact the undersigned if there are any questions or if the Commission desires any further information on the subjects discussed in this letter.

Respectfully submitted,



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Attachment

cc: Jonathan S. Adelstein  
Scott Bergmann

## BA/GTE ICA PORTABILITY MERGER CONDITION

Appendix D from BA/GTE Merger Order, 15 FCC Rcd 14032 (2000)

### **IX. Most-Favored-Nation Provisions for Out-of-Region and In-Region Arrangements**

30. Out-of-Region Agreements. Bell Atlantic/GTE shall make available to telecommunications carriers in the Bell Atlantic/GTE Service Area any service arrangements that an incumbent LEC (not a Bell Atlantic/GTE incumbent LEC) develops for a Bell Atlantic/GTE affiliate, at the request of the Bell Atlantic/GTE affiliate, where the Bell Atlantic/GTE affiliate operates as a new local telecommunications carrier. Specifically, if such a Bell Atlantic/GTE affiliate makes a specific request for and obtains any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions from an incumbent LEC that had not previously been made available to any other telecommunications carrier by that incumbent LEC after the Merger Closing Date, then Bell Atlantic/GTE's incumbent LECs shall make available to requesting telecommunications carriers in the Bell Atlantic/GTE Service Area, through good-faith negotiation, the same interconnection arrangement or UNE on the same terms (exclusive of price and state-specific performance measures).<sup>5</sup> Bell Atlantic/GTE shall not be obligated to provide pursuant to this condition any interconnection arrangement or UNE unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made and with applicable collective bargaining agreements. Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable. The price(s) for such interconnection arrangement or UNE shall be negotiated on a state-specific basis and, if such negotiations do not result in agreement, Bell Atlantic/GTE's incumbent LEC or the requesting telecommunications carrier shall submit the pricing dispute(s), exclusive of the related terms and conditions required to be provided under this Paragraph, to the applicable state commission for resolution under 47 U.S.C. § 252 to the extent applicable. To assist telecommunications carriers in exercising the options made available by this Paragraph, each Bell Atlantic/GTE out-of-region local exchange affiliate shall post on its Internet website all of its interconnection agreements entered into with unaffiliated incumbent LECs.<sup>6</sup>

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<sup>5</sup> The performance measures applicable to the state where the agreement will be performed will apply.

<sup>6</sup> Links to the agreements must be displayed prominently on the initial page of each Bell Atlantic/GTE out-of-region local exchange affiliate's website or on the initial page of Bell Atlantic/GTE's corporate website for CLECs, or as otherwise directed by the Chief of the Common Carrier Bureau, to ensure easy accessibility.

31. In-Region Post-Merger Agreements.

a. Subject to the Conditions specified in this Paragraph, Bell Atlantic/GTE shall make available to any requesting telecommunications carrier in the Bell Atlantic/GTE Service Area within any Bell Atlantic/GTE State any interconnection arrangement, UNE, or provisions of an interconnection agreement (including the entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions in the Bell Atlantic/GTE Service Area within any other Bell Atlantic/GTE State that (1) was voluntarily negotiated with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), by a Bell Atlantic/GTE incumbent LEC after the Merger Closing Date and (2) has been made available under an agreement to which Bell Atlantic/GTE is a party after the Merger Closing Date. Terms, conditions, and prices contained in tariffs cited in Bell Atlantic/GTE's interconnection agreements shall not be considered negotiated provisions. Exclusive of price and state-specific performance measures<sup>7</sup> and subject to the Conditions specified in this Paragraph, qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i), provided that (1) the interconnection arrangements or UNEs shall not be available beyond the last date that they are available in the underlying agreement and that the requesting telecommunications carrier accepts all reasonably related terms and conditions<sup>8</sup> as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreement and (2) interconnection arrangements or UNEs voluntarily negotiated or agreed to by a Bell Atlantic or GTE incumbent LEC prior to the Merger Closing Date cannot be extended throughout the Bell Atlantic/GTE Service Areas unless voluntarily agreed to by Bell Atlantic/GTE. The price(s) for such interconnection arrangement or UNE shall be established on a state-specific basis pursuant to 47 U.S.C. § 252 to the extent applicable. Provided, however, that pending the resolution of any negotiations, arbitrations, or cost proceedings regarding state-specific pricing, where a specific price or prices for the interconnection arrangement or UNE is not available in that state, Bell Atlantic/GTE shall offer to enter into an agreement with the requesting telecommunications carrier whereby the requesting telecommunications carrier will pay, on an interim basis and subject to true-up, the same prices established for the interconnection arrangement or UNE in the negotiated agreement. This subparagraph shall not impose any obligation on Bell Atlantic/GTE to make available to a requesting telecommunications carrier any terms for interconnection arrangements or UNEs that incorporate a determination reached in an arbitration conducted in the relevant state under 47 U.S.C. § 252, or the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. § 252(a)(1). Bell Atlantic/GTE shall not be obligated to provide pursuant to this Paragraph any interconnection arrangement or UNE unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made and with applicable collective bargaining agreements. Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between

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<sup>7</sup> The performance measures applicable to the state where the agreement will be performed will apply.

<sup>8</sup> See *Local Competition Order*, 11 FCC Rcd 15499 (1996), ¶¶ 1309-1323.

the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable.

b. In the event that any requesting telecommunications carrier seeks to adopt any interconnection arrangement, UNE, or interconnection agreement provisions that are subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions in the Bell Atlantic/GTE Service Area within any Bell Atlantic/GTE State in the Bell Atlantic/GTE Service Area within any other Bell Atlantic/GTE State that (1) is covered by subparagraph a above (except for the requirement that such agreement be voluntarily negotiated), and (2) was the result of an arbitration conducted and decided in the former state under 47 U.S.C. § 252 after the Merger Closing Date, then either party may submit the arbitrated provisions to immediate arbitration in the latter state with the consent of the affected state (without waiting for the statutory negotiation period set out in 47 U.S.C. § 252 to expire).<sup>9</sup>

32. In-Region Pre-Merger Agreements. Subject to the Conditions specified in this Paragraph, Bell Atlantic/GTE shall make available: (1) in the Bell Atlantic Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions that was voluntarily negotiated by a Bell Atlantic incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date and (2) in the GTE Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement subject to 47 U.S.C. § 251(c) that was voluntarily negotiated by a GTE incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date, provided that no interconnection arrangement or UNE from an agreement negotiated prior the Merger Closing Date in the Bell Atlantic Area can be extended into the GTE Service Area and vice versa. Terms, conditions, and prices contained in tariffs cited in Bell Atlantic/GTE's interconnection agreements shall not be considered negotiated provisions. Exclusive of price and state-specific performance measures<sup>10</sup> and subject to the Conditions specified in this Paragraph, qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i), provided that the interconnection arrangements or UNEs shall not be available beyond the last date that they are available in the underlying agreement and that the

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<sup>9</sup> Bell Atlantic/GTE will act in good faith in determining whether to agree voluntarily to such arbitrated provisions in the latter state(s) and in determining whether to submit such arbitrated provisions to immediate arbitration in the latter state(s). For example, Bell Atlantic/GTE generally would not require a requesting telecommunications carrier to arbitrate in the latter state(s) a provision that previously was arbitrated and decided in that state(s), except to the extent necessary to preserve its appellate rights or to ask the state to reconsider based on changed or new facts or circumstances. Bad faith attempts by Bell Atlantic/GTE to block or delay adoption in a Bell Atlantic/GTE State of any UNE, whole interconnection agreement, or interconnection agreement provisions arbitrated in any other Bell Atlantic/GTE State after the Merger Closing Date would be considered a violation of this Order and could subject Bell Atlantic/GTE to penalties, fines or forfeitures pursuant to general Commission authority.

<sup>10</sup> The performance measures applicable to the state where the agreement will be performed will apply.

requesting telecommunications carrier accepts all reasonably related<sup>11</sup> terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreement. The price(s) for such interconnection arrangement or UNE shall be established on a state-specific basis pursuant to 47 U.S.C. § 252 to the extent applicable. Provided, however, that pending the resolution of any negotiations, arbitrations, or cost proceedings regarding state-specific pricing, where a specific price or prices for the interconnection arrangement or UNE is not available in that state, Bell Atlantic/GTE shall offer to enter into an agreement with the requesting telecommunications carrier whereby the requesting telecommunications carrier will pay, on an interim basis and subject to true-up, the same prices established for the interconnection arrangement or UNE in the negotiated agreement. This Paragraph shall not impose any obligation on Bell Atlantic/GTE to make available to a requesting telecommunications carrier any terms for interconnection arrangements or UNEs that incorporate a determination reached in an arbitration conducted in the relevant state under 47 U.S.C. § 252, or the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. § 252(a)(1). Bell Atlantic/GTE shall not be obligated to provide pursuant to this Paragraph any interconnection arrangement or UNE unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made and with applicable collective bargaining agreements. Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable.

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<sup>11</sup> See *Local Competition Order*, 11 FCC Rcd 15499 (1996), ¶¶ 1309-1323.

## **SBC/AMERITECH ICA PORTABILITY MERGER CONDITION**

### **Appendix C from SBC/Ameritech Merger Order, 14 FCC Rcd 14712 (1999)**

#### **XII. Most-Favored-Nation Provisions for Out-of-Region and In-Region Arrangements**

42. Out-of-Region Agreements. SBC/Ameritech shall make available to telecommunications carriers in the SBC/Ameritech Service Area any service arrangements that an incumbent LEC (not an SBC/Ameritech incumbent LEC) develops for an SBC/Ameritech affiliate, at the request of the SBC/Ameritech affiliate, where the SBC/Ameritech affiliate operates as a new local telecommunications carrier. Specifically, if the SBC/Ameritech out-of-territory entity described in Paragraph 59 makes a specific request for and obtains any interconnection arrangement or UNE from an incumbent LEC that had not previously been made available to any other telecommunications carrier by that incumbent LEC, then SBC/Ameritech's incumbent LECs shall make available to requesting telecommunications carriers in the SBC/Ameritech Service Area, through good-faith negotiation, the same interconnection arrangement or UNE on the same terms (exclusive of price). SBC/Ameritech shall not be obligated to provide pursuant to this condition any interconnection arrangement or UNE unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made. Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable. The price(s) for such interconnection arrangement or UNE shall be negotiated on a state-specific basis and, if such negotiations do not result in agreement, SBC/Ameritech's incumbent LEC shall submit the pricing dispute(s), exclusive of the related terms and conditions required to be provided under this Paragraph, to the applicable state commission for resolution under 47 U.S.C. § 252 to the extent applicable. To assist telecommunications carriers in exercising the options made available by this Paragraph, SBC/Ameritech or the out-of-region entit(ies) described in Paragraph 59 shall post on its Internet website all interconnection agreements between the SBC/Ameritech out-of-territory entity and an unaffiliated incumbent LEC.

43. In-Region Agreements. Subject to the conditions specified in this Paragraph, SBC/Ameritech shall make available to any requesting telecommunications carrier in the SBC/Ameritech Service Area within any SBC/Ameritech State any interconnection arrangement or UNE in the SBC/Ameritech Service Area within any other SBC/Ameritech State that (1) was negotiated with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), by an SBC/Ameritech incumbent LEC that at all times during the interconnection agreement negotiations was an affiliate of SBC and (2) has been made available under an agreement to which SBC/Ameritech is a party. Terms, conditions, and prices contained in tariffs cited in SBC/Ameritech's interconnection agreements shall not be considered negotiated provisions. Exclusive of price and subject to the conditions specified in this Paragraph, qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i), provided that the interconnection arrangements or UNEs shall not be available beyond the last date that they are available in the underlying agreement and that the requesting telecommunications carrier accepts

all reasonably related terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreement. The price(s) for such interconnection arrangement or UNE shall be established on a state-specific basis pursuant to 47 U.S.C. § 252 to the extent applicable. Provided, however, that pending the resolution of any negotiations, arbitrations, or cost proceedings regarding state-specific pricing, SBC/Ameritech shall offer to enter into an agreement with the requesting telecommunications carrier whereby the requesting telecommunications carrier will pay, on an interim basis and subject to true-up, the same prices established for the interconnection arrangement or UNE in the negotiated agreement. This Paragraph shall not impose any obligation on SBC/Ameritech to make available to a requesting telecommunications carrier any terms for interconnection arrangements or UNEs that incorporate a determination reached in an arbitration conducted in the relevant state under 47 U.S.C. § 252, or the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. § 252(a)(1). For example, terms made available in Texas through SWBT's Proposed Interconnection Agreement ("PIA") (filed with the Texas PUC on May 13, 1999) would not be available under this Paragraph. SBC/Ameritech shall not be obligated to provide pursuant to this Paragraph any interconnection arrangement or UNE unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made. Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable.