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VIA ECFS

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

**Re: *Ex Parte* - WC Docket No. 06-74, In the Matter of AT&T Inc. and
Bell South Corporation Applications for Transfer of Control**

Dear Ms. Dortch:

Access Point, Inc., ACN Communications Services, Inc., Cavalier Telephone, LLC, DeltaCom, Inc., Florida Digital Network, Inc. d/b/a FDN Communications, Inc., Globalcom Communications, Inc., Lightyear Network Solutions, Inc., McLeodUSA Telecommunications Services, Inc., and Pac-West Telecomm, Inc. (collectively "CLECs"), by their undersigned counsel, urge the Commission to adopt the condition proposed by COMPTTEL that would prohibit AT&T and BellSouth from retiring copper loops.¹ CLECs support all of the conditions proposed by COMPTTEL, but in this letter focus on this proposed condition.

It is not costly or burdensome for ILECs to maintain copper plant. The Commission's rules specifically provide that ILECs "need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals" prior to receiving a request from a CLEC for unbundled access.² In fact, it is more expensive for BOCs to take affirmative steps to retire copper than to leave it in place. And, BOCs will be fully compensated for their unused copper if they provide unbundled access to it because prices are cost-based and include a reasonable profit.³ Therefore, the proposed condition would not burden or inconvenience ILECs.

¹ Comments of COMPTTEL, WC Docket No. 06-74, filed October 25, 2006, pp 23-25.

² 47 C.F.R. § 51.319(a)(iii)(B).

³ 47 U.S.C. § 252(d)(1).

On the other hand, while not imposing any burdens on BOCs, copper loop retirement is harmful to the public interest. First, legacy copper plant can be a platform for a “third wire” into the home. The Commission has sought to promote facilities-based, robust competition in provision of broadband.⁴ A third provider of wired broadband would meet the Commission’s goals by breaking the wired duopoly otherwise possessed by ILECs and cable operators. Ripping out legacy copper would thwart this very beneficial potential competitive development. Second, consumers have already paid for the legacy copper plant. The legacy network is immensely valuable not only in terms of billions of dollars of investment but because it can be used to provide numerous beneficial new services. It would be very harmful and pointless to permit ILECs to destroy this plant for any reason, but in particular just to thwart competition to their own fiber-based network.

Unfortunately, as pointed out by competitive carriers in this proceeding, AT&T and BellSouth have incentives to harm competition by retiring copper loops:

The record demonstrates that the proposed merger [between AT&T and Bell South] poses a substantial risk to competition because ... the Applicants will have an enhanced incentive and ability to discriminate against competitors. This discrimination could take the form of decommissioning the critical 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, the Applicants may decommission or even remove the copper plant. Competition requires that last mile copper be available so that competitors can reach customers and ensure that

⁴ See e.g. *Review of § 251 Unbundling Obligations of Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (“TRO”), paras. 22, 70, 242; *Unbundled Access to Network Elements, Review of the § 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 F.C.C.R. 2533 (2005), *aff’d*, *Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (“TRRO”) ¶¶ 2, 52, 65.

consumers have a selection of competitive wireline providers and services.⁵

There is a very serious risk that ILECs will act on their incentive and ability to harm competition by stepping up the pace of copper retirement. Technical developments are continually improving the utility of copper for provision of advanced services.⁶ Far from becoming obsolete, copper loops are a practical and economical way of providing voice, Internet access, and video programming to consumers comparable to what ILECs can provide over fiber.

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In fact, CLECs are beginning to use legacy copper to provide advanced broadband services, including video.⁷ CLECs using copper loops are able to provide advanced and video services on an economical basis without significant and unnecessary expenditures in FTTH. Even some ILECs are providing the “triple play” over copper.⁸

These developments increase BOC incentives to retire copper. BOCs heavy expenditures on fiber loops enhances their incentives to assure that CLECs cannot provide competing services using legacy copper. Retirement of copper is an effective way for BOCs to thwart intramodal competition.

The Commission’s rules, however, do not currently provide adequate protection against discriminatory retirement of copper loops by ILECs. When an ILEC overbuilds with fiber it is required to maintain the existing copper loop connected to the customer premises and provide nondiscriminatory access to it on an unbundled basis, unless the ILEC retires the copper loop pursuant to the

⁵ Comments of Access Point, Inc., ACN Communications Services, Inc., DeltaCom, Inc., Florida Digital Network, Inc. d/b/a FDN Communications, Inc., Globalcom Communications, Inc., Lightyear Network Solutions, Inc., McLeodUSA Telecommunications Services, Inc., and Pac-West Telecomm, Inc., WC Docket No. 06-74, filed October 25, 2006, p. 6.

⁶ *The Story of 10 Gigabit Over Copper*, Network World, <http://www.networkworld.com/newsletters/lans/2006/08211an1.html>

⁷ *Richmond, Virginia To Be the First in the Nation to Receive Revolutionary Broadband Technology*, Cavalier Telephone Press Release, May 22, 2006, http://www.cavtel.com/company/press/2006_5_22.shtml

⁸ *SureWest Launches IP-Video Over Copper*, Telephony Online, http://telephonyonline.com/broadband/web/telecom_surewest_launches_ipvideo/

Commission's network disclosure rules.⁹ Network disclosure, however, does not necessarily by itself preclude copper loop retirement. The Commission contemplates that "[u]nless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules..." oppositions to the network disclosure will be denied unless the Commission within 90 days determines otherwise.¹⁰ The ILEC must additionally comply with any applicable state requirements,¹¹ but no state to CLECs' knowledge has adequate or any rules in place addressing copper loop retirement. In fact, BellSouth files retirement notices on a regular and increasingly frequent basis, particularly concerning the feeder portion of the loop.¹²

At the present time, therefore, AT&T and BellSouth have insufficient constraints on their ability to act on their anticompetitive motivations to engage in the senseless and wasteful retirement of billions of dollars of investment in legacy plant in order to prevent this from becoming a third broadband wired platform into the home. The merger will increase their incentives to do so in particular by permitting BellSouth's aggressive loop retirement policies to become the norm in the merged company.

A condition that prevents retirement of copper is also fully consistent with the extensive broadband unbundling relief that the Commission has granted to BOCs. The Commission has limited or foreclosed unbundling obligations under both Sections 251 and 271 for broadband network elements.¹³ The Commission has already provided BOCs all the broadband relief possibly required in order to provide incentives for them to invest in broadband networks. The Commission

⁹ 47 C.F.R. § 51.319(a)(3)(iii)(A).

¹⁰ *TRO* para 282. The revised network disclosure rules adopted in the *TRO* do not apply to retirement of copper feeder plant. *Id.* n. 829.

¹¹ 47 C.F.R. § 51.319(a)(3)(iv)(A) and (B).

¹² See e.g., Revised Notice of Network Change - Vero Beach, Florida Replacing Copper Facilities with Fiber and Digital Loop Carrier Systems, Notification No. ND20060057, November 6, 2006; Notice of Network Change --Oakdale, LA, Replacing Copper Facilities with Fiber and Digital Loop Carrier Systems, Notification No. ND20060162, November 2, 2006.

¹³ See *TRO*; *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.'s Petition for forbearance Under 47 U.S.C. § 160(c)*; *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21, 496 (2004).

has even gone so far as to determine that CLECs and ILECs have comparable incentives and face similar barriers in deploying fiber.¹⁴ Thus, under the “new investment, new rules” mantra of the BOCs, there is no basis for permitting ILECs to foreclose unbundled access to legacy plant through unnecessary copper loop retirement.¹⁵

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Accordingly, CLECs strongly reiterate that as a condition on any approval of the merger, the Commission should prohibit the merged entity from decommissioning, retiring, or otherwise making copper loops and subloops as defined in the Commission’s rules,¹⁶ including copper feeder plant, unavailable for unbundled access pursuant to Section 251(c)(3) of the Act. Any such

¹⁴ *TRO*, para. 275.

¹⁵ BOCs reneged on their pledge to permit unbundled access to legacy copper if granted broadband relief. See *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the New York Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Pittsburgh Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Providence Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006); *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006).

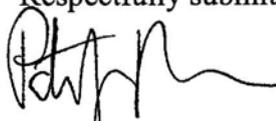
¹⁶ 47 C.F.R. § 51.319(a), 51.319(b)(1).

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condition must be enforceable. CLECs strongly support the COMPTTEL proposal on this issue.¹⁷ This is an uncomplicated and relatively costless safeguard that would preserve this vital source of competition in the marketplace.

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Respectfully submitted,



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¹⁷ Comments of COMPTTEL, WC Docket No. 06-74, filed October 25, 2006, p. 25.