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December 13, 2006

VIA ECFS AND ELECTRONIC MAIL

Hon. Kevin J. Martin, Chairman
Michael J. Copps, Commissioner
Jonathan S. Adelstein, Commissioner
Deborah Taylor Tate, Commissioner
Robert M. McDowell, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Application Pursuant to Section 214 of the Communications Act of
1934 and Section 63.04 of the Commission's Rules for Consent to the
Transfer of Control of BellSouth Corporation to AT&T, Inc.; WC
Docket No. 06-74; DA 06-2035**

Dear Chairman Martin, Commissioner Copps, Commissioner Adelstein, Commissioner Tate, and
Commissioner McDowell:

The Resale Coalition¹ submits this response to BellSouth's December 4, 2006
letter submitted in Docket No. 06-74 regarding the Resale Coalition's proposed merger
conditions.² As the Resale Coalition has demonstrated repeatedly in comments, letters and *ex
parte* meetings and filings, ***urgent Commission action is required*** to end and prevent the spread

¹ Members of the Resale Coalition include: Image Access, Inc. d/b/a NewPhone, ABC Telecom d/b/a Home
Phone, Alternative Phone, Inc., AmeriMex Communications Corp., CGM, Inc., Connect Paging, Inc. d/b/a
Get A Phone, dPi Teleconnect, Express Phone Service, Inc., FLATEL, Inc., Ganoco, Inc. d/b/a American
Dialtone, Lost Key Telecom, Quality Telephone, Seven Bridges Communications, Smart Telecom
Concepts, LLC, and NALA/PCA - The National Alternative Local Exchange Carrier Association/ Prepaid
Communications Association.

² See Letter from Bennett Ross, General Counsel, BellSouth, to Marlene Dortch, Secretary, FCC (Dec. 4,
2006) ("BellSouth Letter").

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of BellSouth's campaign to eradicate resale competition through its refusal to comply with its resale obligations under the Act and the Commission's regulations. As demonstrated herein, nothing in BellSouth's December 4 *ex parte* demonstrates that the relief sought by the Resale Coalition is improper or otherwise not in the public interest. Indeed, BellSouth's *ex parte* letter underscores the need for swift Commission adoption of the Resale Coalition's proposed merger conditions, if the Commission declines to deny the merger applications altogether.

BellSouth's first defense is that the proposed resale conditions are completely unrelated to the merger.³ This now rote retort is no more effective here than it is with respect to unbundled network elements, special access, wireless spectrum, or net neutrality. A merger of this magnitude necessarily has an impact on all these areas – including resale. With respect to resale in particular, the Commission can and certainly should condition any approval of the Applicants' merger on compliance with the Commission's resale rules and policies. It is not too much for the Commission to demand compliance with its rules and policies as a condition to approving the proposed merger. No applications should be granted with a blind eye toward the anticompetitive and unlawful conduct BellSouth has been engaging in at the expense of its resale competitors and consumers. This is especially true in this instance where the proposed transaction will diminish wireline competition and the attendant benefits it provides for consumers.⁴ Commission action also is necessary to prevent the spread of BellSouth's aggressive anti-resale practices and policies to states within the legacy serving areas of the "new" AT&T.⁵

BellSouth's second defense is that cash-back, gift cards and other giveaways are "marketing incentives" rather than "promotions" and that cash-back and the like are not

³ BellSouth Letter at 1.

⁴ As the Resale Coalition has demonstrated previously, member customers tend to be underserved segments of the population, including single mothers, immigrants, minorities and the working-class poor. *See, e.g.*, Letter from John Heitmann, Counsel for the Resale Coalition, to Marlene Dortch, Secretary, FCC, at 2 (Nov. 27, 2006); *see also* Letter from John Heitmann, Counsel for NewPhone and Q-Tel, to Marlene Dortch, Secretary, FCC, Attachment at 3 (Sept. 28, 2006).

⁵ In the *SBC-Ameritech Merger Order*, the Commission found that the merger of SBC and Ameritech, and well as subsequent RBOC mergers, would result in the loss of potential competition, the loss of the ability to perform regulatory "benchmarking," and the would increase the opportunity for RBOC discrimination against competitors. *Applications of Ameritech Corp. and SBC Communications, Inc., For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 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 14,712 (1999).

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telecommunications services.⁶ The Commission's resale rules and policies adopted in the *Local Competition Order*,⁷ however, do not allow such wordplay to obviate the Act's resale requirements. Applicants are required to offer all retail telecommunications services for resale without unreasonable or discriminatory conditions or limitations.⁸ The Resale Coalition is not seeking a wholesale discount on gift cards or toaster ovens. BellSouth's suggestion to the contrary is misleading.⁹ Instead, as NewPhone explained in its Petition for Declaratory Ruling filed in WC Docket No. 06-129 and as the Resale Coalition and its members have explained in comments,¹⁰ letters and *ex partes* since, resellers simply want to resell the telecommunications service offered in those promotions (BellSouth is not promoting cash-back or gift cards, but rather, telecommunications services) and they want the wholesale avoided cost discount applied to the retail rate paid by consumers – and not to some fictitious *tariffed rate*.¹¹ The Act and the Commission's regulations are clear: the discount gets applied to the *retail rate*,¹² which increasingly, is not the tariffed rate that BellSouth refers to in its letter.¹³ In the *Local Competition Order*, the Commission was quite cognizant of the danger of incumbent LEC efforts to “avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act” and quite clearly pronounced that it would not tolerate incumbent LEC uses of promotional offerings to “evade the wholesale obligation”.¹⁴ BellSouth's offering of price discounts on standard telecommunications service offerings through the use of cash-back and similar promotional offerings is not subject to any lawful exception to the rule. Adoption of the Resale Coalition's proposed resale conditions

⁶ BellSouth Letter at 1

⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15954, ¶¶ 863-984 (rel. Aug. 8, 1996) (“*Local Competition Order*”); 47 C.F.R. §§ 51.601-617.

⁸ 47 U.S.C. § 251(c)(4).

⁹ See BellSouth Letter at 1.

¹⁰ Copies of the NewPhone Petition for Declaratory Ruling, as well as comments and reply comments filed by the Resale Coalition in support of the Petition are appended hereto for inclusion in the record of this docket.

¹¹ See, e.g., Letter from John Heitmann, Counsel for the Resale Coalition, to Marlene Dortch, Secretary, FCC, at 2 (Nov. 27, 2006).

¹² 47 U.S.C. § 251(c)(4)(A); *Local Competition Order* ¶¶ 948-51 (“[w]e conclude that the ‘retail rate’ should be interpreted in light of the pro-competitive policies underlying the 1996 Act”); 47 C.F.R. §§ 51.605(a) and 51.607.

¹³ BellSouth Letter at 2.

¹⁴ *Local Competition Order* ¶¶ 948 and 950.

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would eradicate BellSouth's self-serving and unilaterally imposed exception to the Commission's resale regulations.

BellSouth's third defense is a deliberate mischaracterization of the Resale Coalition's position with respect to mixed bundle promotions.¹⁵ A mischaracterization of a position is not an effective defense. The Resale Coalition is not asking to resell information services offered by BellSouth as part of its mixed bundle promotions. Instead, as NewPhone explained in its Petition for Declaratory Ruling filed in WC Docket No. 06-129 and as the Resale Coalition and its members have explained in comments, letters and *ex partes* since, resellers simply want to resell the telecommunications service offered as part of mixed service bundles. Here, too, and resellers want the wholesale avoided cost discount applied to the retail rate paid by consumers – and not to some fictitious tariffed rate. By bundling a telecommunications service together with an information service, BellSouth attempts to disguise the real or effective retail rate for the telecommunications service. With regard to these mixed service bundles, BellSouth discriminates against its resale competitors and violates the Commission's resale requirements by insisting that the wholesale avoided cost discount be applied only to the tariffed retail rate for equivalent stand-alone telecommunications service offerings rather than to the actual retail rate at which BellSouth offers the bundled telecommunications service to its own subscribers. Here, too, however, the Commission's rules do not allow BellSouth to imply only a tariffed rate or some other false rate (in some cases, that necessarily would unlawfully result in the telecommunications services subsidizing the sale of information services) to the telecommunications services included in the bundled promotional offering.¹⁶ Thus, adoption of the Resale Coalition's proposed resale conditions would eradicate BellSouth's self-proclaimed and unlawful exemption of telecommunications services that are part of bundled service offerings from the Commission's resale discount requirements.

BellSouth's fourth defense is that marketing expenses associated with gift cards are avoided costs and already are included in the state commission set avoided-cost wholesale discount rates.¹⁷ BellSouth offers no support for that assertion – because it has none. Indeed, as the Resale Coalition explained in Reply Comments filed in WC Docket No. 06-129 on August 10, 2006, BellSouth's claim that the costs of cash-back and similar promotions are already included in state commission approved avoided cost discount cases is belied by the following facts: (1) BellSouth did not cite a single state commission cost decision to support its position

¹⁵ BellSouth Letter at 2.

¹⁶ See Resale Coalition Reply Comments, WC Docket No. 06-129, at 14-19 (a copy of which is appended hereto).

¹⁷ BellSouth Letter at 3.

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and the Resale Coalition's research did not reveal that any such decisions exist;¹⁸ and (2) BellSouth recognizes in its 10-K report filed with the Securities Exchange Commission the costs of these so-called marketing incentives as *revenue reductions* which are accrued in the period the service is provided.¹⁹ Thus, when faced with SEC reporting requirements and potential enforcement (but, evidently, not for an FCC filing), BellSouth readily admits that these costs are not marketing expenses, but rather that they are revenue reductions that result from discounted retail rates. Adoption of the Resale Coalition's proposed merger conditions would ensure that BellSouth applies the wholesale discount to the discounted retail rates and not to tariffed rates which do not apply in such instances.

Finally, BellSouth offers no defense for its practice of discriminating against resellers by refusing to allow competitive carriers to resell its long-term promotions until BellSouth has already marketed them for 90 days.²⁰ BellSouth's efforts to hamstring competitors by making them wait 91 days to resell its long term promotions is directly contrary to the Commission's rules and policies which require resale at the wholesale avoided cost discount as of the first day of any long term promotion.²¹ Under the Commission's rules, the "retail rate" that the discount gets applied to is the discounted retail rate that is available to subscribers as of the first day of the promotion.²² Here, too, adoption of the Resale Coalition's proposed merger condition would ensure that BellSouth complies with the Commission's resale rules and policies and that its practices do not spread to the "new" AT&T's legacy serving area.

As has been demonstrated herein and in previous filings (some of which are attached hereto), through the use of cash-back promotions and mixed service bundle promotions, BellSouth discriminates against and attempts to eliminate its resale competition by unlawfully limiting its resale obligations and application of the wholesale avoided cost discount to *tariffed* products and the *tariffed* rates associated with them that consumers increasingly do not pay. The Commission, however, has from the very beginning recognized that the section 251(c)(4) resale obligations are tied to "retail" service offerings and the "retail rate" – rather than to "tariffed"

¹⁸ See Resale Coalition Reply Comments, WC Docket No. 06-129, at 9-10 (a copy of which is appended hereto).

¹⁹ *Id.*

²⁰ See, e.g., Resale Coalition Joint Comments, WC Docket No. 06-74, at 5-6 (October 24, 2006).

²¹ See *Local Competition Order*, ¶¶ 948-51 (allowing a restriction on application of the wholesale avoided cost discount on promotions of 90 days or less); see also 47 C.F.R. § 51.613(a)(2) (same).

²² See *Local Competition Order*, ¶ 950 ("Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A)"); see also 47 C.F.R. § 51.607.

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offerings or a “tariffed rate.”²³ Contrary to Commission requirements, BellSouth also brazenly refuses to offer the wholesale discount on long term promotions until day 91. These anticompetitive practices must be curbed before they spread further – and before resale competition disappears altogether. To protect resale competitors and the consumers they serve and to correct this anti-competitive conduct, the Resale Coalition proposed the following conditions:

- (1) for all promotions greater than 90 days in duration, at the option of the requesting telecommunications carrier, AT&T and BellSouth shall *either* (i) in addition to offering the telecommunications service that is the subject of the promotion at the wholesale avoided cost service discount, offer to telecommunications carriers throughout the entire local exchange footprint of the combined company the value of all cash-back, gift card, coupon, or other similar giveaways or incentives that AT&T and BellSouth provide to retail end-users; *or* (ii) apply the wholesale avoided cost service discount to the “effective retail rate” of the telecommunications service that is the subject of the AT&T or BellSouth promotion,²⁴

²³ *Local Competition Order*, ¶¶ 948-51 (“[W]e conclude that the ‘retail rate’ should be interpreted in light of the pro-competitive policies underlying the 1996 Act”).

²⁴ The “effective retail rate” should be determined by subtracting the face value of the promotional incentive from the tariffed rate, and the value of such discount should be distributed evenly across any minimum monthly commitment up to a maximum of three months.

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- (2) for all promotions greater than 90 days in duration, AT&T and BellSouth shall make available for resale the telecommunications services contained within mixed bundle promotions, *i.e.*, bundles consisting of both telecommunications service and information service, and apply the wholesale avoided cost discount to the “effective retail rate” of the telecommunications services contained within the mixed bundle;²⁵ and
- (3) telecommunications carriers shall be entitled to resell Applicants’ promotions of greater than 90 days in duration at the wholesale avoided cost discount as of the first day AT&T/BellSouth offers the promotion to retail subscribers.

With these conditions, the Resale Coalition simply asks that the Commission exact a commitment from the Applicants that they will comply with *existing federal law* by providing resale competitors with their long-term cash-back, non-cash-back and mixed bundle promotions at the effective retail rate minus the wholesale avoided cost discount, as of the first day those promotions are offered to retail end users.

Among the list of conditions currently under consideration, the Resale Coalition’s conditions should be easy ones for the Applicants to accept, as they simply require the Applicants to abide by the letter and spirit of the Act’s and the Commission’s local resale requirements.

²⁵ The “effective retail rate” of the telecommunications component of a mixed service bundle shall be determined by prorating the telecommunications service component based on the percentage that each unbundled component is to the total of the mixed service bundle if added together at their retail unbundled component prices (for example, if the individual components comprising a mixed service bundle have a combined retail price of \$150 if purchased on a stand-alone basis, and the telecommunication service component has an stand-alone retail price of \$30, the telecommunications service component would have an “effective retail rate” of 20% of the total mixed service bundled price).

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Please do not hesitate to contact me, if you have any questions about this filing.

Respectfully submitted,



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Attachments