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December 13, 2006

VIA ECFS

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th St., SW  
Washington, D.C. 20554

Re: AT&T Inc. and BellSouth Corporation Applications for Approval of  
Transfer of Control, WC Docket No. 06-74

Dear Ms. Dortch:

Over the past several months, interested parties have focused the Commission's attention on the special access issue and have urged the Commission to adopt a series of conditions designed to address the pending merger's impact on competition in the special access market.<sup>1</sup> These efforts have met with substantial opposition by the Applicants.<sup>2</sup> Consequently, the special access issue remains unresolved, which threatens the Commission's ability to vote on the pending merger. Momentum Telecom, Inc. ("Momentum") suggests an alternative means to resolve the competitive issues surrounding special access. Momentum urges the Commission to adopt the proposed condition addressing access to Section 271 network elements suggested by COMPTTEL.<sup>3</sup> Adoption of the COMPTTEL Section 271 merger condition would provide a vehicle to address the competitive issues regarding special access rates, and terms and conditions identified by a broad spectrum of competitors and enterprise customers (hereinafter referred to jointly as the "Special Access Coalition") and, at the same time, would not subject AT&T to the

<sup>1</sup> See e.g. Comments of the Special Access Coalition, WC Docket No. 06-74 (filed Oct. 24, 2006) ("Special Access Coalition Comments").

<sup>2</sup> Letter from Robert J. Quinn, Jr., AT&T Services, Inc., and James G. Harralson, BellSouth Corp., to the Honorable Kevin Martin, Chairman, FCC, WC Docket No. 06-74, at 2 (filed Dec. 1, 2006) ("Dec. 1 AT&T Letter").

<sup>3</sup> Comments of COMPTTEL, WC Docket No. 06-74, at 21-23 (filed Oct. 25, 2006).

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commercial arbitration, fresh look, and rate re-initialization requirements it considers so objectionable.

The Special Access Coalition and others have demonstrated the substantial role of special access services in the provision of nearly all telecommunications and information services and their dependence on the Applicants to provide special access.<sup>4</sup> The individual Applicants' bottleneck control of the special access market has been well documented,<sup>5</sup> and the Coalition has explained how the pending merger will significantly increase the combined entity's incentive and opportunity to exploit this bottleneck to harm consumer welfare.<sup>6</sup> The Coalition has proposed a series of conditions that would ameliorate the merger's harm to competition in the special access market.<sup>7</sup> In response, the Applicants have informed the Commission that the Coalition's proposals are "unacceptable"<sup>8</sup> and the issue remains at an impasse.

At the same time, COMPTTEL and numerous other interested parties have suggested that the Commission adopt a merger condition addressing access to Section 271 network elements.<sup>9</sup> They have pointed out that the Applicants have a statutory obligation to provide Section 271 elements at just and reasonable rates and terms, but to date they have failed to comply with their obligations.<sup>10</sup> The proposed condition reads as follows:

*The merged entity shall offer section 271 network elements at just and reasonable rates and terms, which shall not exceed 115% of the UNE rates most recently approved by the applicable state commission, until such time as the state sets different rates for network elements under section 271. These rates, once approved, shall be incorporated*

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<sup>4</sup> See e.g. Special Access Coalition Comments at 3.

<sup>5</sup> See e.g. Comments of PAETEC Communications, Inc., WC Docket No. 06-74, at ii (filed Jun. 4, 2006); Comments of Sprint Nextel Corporation, WC Docket No. 06-74, at i (filed Jun. 5, 2006); Petition to Deny of COMPTTEL, WC Docket No. 06-74, at 9-10 (filed Jun. 5, 2006).

<sup>6</sup> See Special Access Coalition Comments, at 5-13.

<sup>7</sup> *Id.*, at 20-27.

<sup>8</sup> Dec. 1 AT&T Letter, at 2.

<sup>9</sup> Section 271 network elements are any elements that have been listed, or interpreted by the Commission to be part of the Competitive Checklist in 47 U.S.C. § 271(c)(2)(B), including, but not limited to, loops, dedicated transport, local switching, dark fiber, and line sharing.

<sup>10</sup> See e.g. Comments of COMPTTEL, WC Docket No. 06-74, at 21-23 (filed Oct. 25, 2006).

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*prospectively into section 252 interconnection agreements. The merged entity agrees, to the extent requested by a telecommunications carrier, to arbitrate rates, terms, and conditions for section 271 network elements before state commissions, in accordance with the section 252 arbitration process, and the merged entity further agrees not to oppose any petitions for such arbitrations on the grounds that state commissions have no authority to establish rates, terms, and conditions for section 271 network elements or are otherwise preempted from doing so.*<sup>11</sup>

Under CompTel's proposed condition, competitive local exchange carriers ("CLECs") could be assured of continued access to equivalent facilities to special access at rates and terms that are just and reasonable, as administered by the state commissions. CLECs would be permitted to convert circuits from special access, including special access volume and term plans, to Section 271 elements without penalty, and CLECs would also be permitted to combine Section 271 elements and to commingle Section 271 elements with alternative wholesale arrangements, including special access. The particular harms to consumer welfare threatened by the proposed merger of the Applicants as providers of special access could be fully addressed through adoption of this condition.

Adoption of the COMPTTEL Section 271 merger condition would have the added benefit of rendering unnecessary the increasing number of costly, resource-intensive lawsuits and proceedings before federal courts and state commissions in the AT&T and BellSouth regions in which the issue of state commission jurisdiction over Section 271 network element pricing and terms is at issue.<sup>12</sup> Currently, throughout the country, there are nearly a dozen separate suits pending in the federal courts on the Section 271 jurisdictional issue.<sup>13</sup> At least three different

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<sup>11</sup> *Id.*, at 23.

<sup>12</sup> Adoption of the condition would also render moot the separate petitions by the Georgia Public Service Commission and BellSouth Corp. which are pending before the Commission. *In the Matter of BellSouth Emergency Petition for the Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245 (filed Jun. 24, 2004); *In the Matter of Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, WC Docket No. 06-90 (filed Apr. 18, 2006).

<sup>13</sup> See Attachment to Letter from Genevieve Morelli, Counsel to Momentum Telecom, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Dec. 13, 2006).

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federal circuit courts of appeals are considering the matter. Unfortunately, all of this expensive, time-consuming litigation is not leading to any clarity on the Section 271 jurisdictional issue, as the commissions and courts are issuing inconsistent rulings.<sup>14</sup>

Further, adoption of the Section 271 merger condition would provide a mechanism for the administration of rates and terms for Section 271 network elements by the entities best suited for the job, *i.e.* the state commissions. State commissions have the tools, experience and expertise to efficiently arbitrate disputes among carriers regarding rates and terms for network elements and network element combinations. Their decade-long experience addressing rates and terms for Section 251 network elements makes them the best choice to administer the Applicants' Section 271 obligations in the first instance. Importantly, however, adoption of the proposed condition would not result in an abdication of responsibility or jurisdiction by the Commission. The Commission would remain the final arbiter of compliance with Section 271(c)(2)(B) through the Section 271(d)(6) complaint process.


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<sup>14</sup> See *e.g.* *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order Part II (Me. P.U.C. Sep. 3, 2004), *aff'd*, *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. 2006), *appeal pending*, *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, No. 06-2151, (1st Cir.) (filed Jul. 19, 2006); *Southwestern Bell Telephone L.P. d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement*, Case No. TO-2005-0336, *Arbitration Order*, 2005 Mo. PUC LEXIS 963 (Mo. P.S.C. Jul. 11, 2005), *rev'd in part*, *Southwestern Bell Tel. L.P. d/b/a SBC Missouri v. Missouri Pub. Serv. Comm'n et al.*, 2006 U.S. Dist. LEXIS 65536 (E.D. Mo. 2006), *appeal pending*, *Southwestern Bell Tel. d/b/a SBC Missouri v. Big River Tel. Co., LLC et al.*, Nos. 06-3701 and 06-3726 (consolidated) (8th Cir.) (filed Oct. 26, 2006).

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For all of the foregoing reasons, Momentum urges the Commission to adopt the COMPTel Section 271 merger condition.

Sincerely,

  
Genevieve Morelli

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cc: Michelle Carey  
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