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December 21, 2006

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, 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:

Cbeyond Communications LLC, NuVox Communications, and XO Communications, LLC, (“CLEC Parties”) hereby reiterate the critical need to ground approval of the pending transfer of control applications of AT&T Inc. and BellSouth Corp. (jointly, the “Applicants”) on conditions designed to ensure the meaningful availability of unbundled network elements (“UNEs”). The CLEC Parties urge the Commission to refuse to settle for the cursory UNE conditions proposed by the Applicants on October 13, 2006.<sup>1</sup> Not surprisingly, those conditions would not offset the competitive harms that would be caused by the combination of AT&T and BellSouth. The CLEC Parties instead urge the Commission to adopt the UNE conditions proposed by COMPTTEL on behalf of the competitive service provider community.<sup>2</sup> The COMPTTEL UNE conditions – which have not been rebutted by the Applicants in the two months since they were filed – are essential to regenerate the competition and

<sup>1</sup> See Letter from Robert W. Quinn, Jr., Senior Vice President, AT&T, to the Honorable Kevin Martin, Chairman, FCC, WC Docket No. 06-74 (filed Oct. 13, 2006) (“AT&T/BellSouth Conditions”).

<sup>2</sup> See Comments of COMPTTEL, WC Docket No. 06-74 (filed Oct. 25, 2006) (“COMPTTEL Conditions”).

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innovation that would be lost should the merger be consummated by ensuring that competitors have a solid foundation upon which to grow.<sup>3</sup>

Some of the merger conditions proposed by the Applicants on October 13<sup>th</sup> would help to partially offset the injuries to competition that would occur should the Applicants be permitted to merge. The Applicants' merger conditions fall woefully short, however, and must be redrafted and supplemented to accomplish any true constructive purpose.<sup>4</sup> The COMPTTEL conditions incorporate the elements needed to make the UNE conditions meaningful, and to ensure that they mitigate the material anti-competitive effects of the merger. Each of the UNE conditions proposed by COMPTTEL serves an important purpose and should be adopted. The conditions described below are particularly vital to the competitive industry, however, and represent the absolute minimum obligations that should be required of the Applicants.

1. **Duration Condition**

*For the avoidance of doubt, unless otherwise expressly stated to the contrary, the merged entity agrees that all conditions and commitments apply in the AT&T/BellSouth in-region territory for a minimum period of seven years from the Merger Closing Date, subject to extension by the Commission. In addition, the merged entity agrees that all conditions and commitments are automatically effective as of the Merger Closing Date, and that the merged entity agrees to give full force and effect to all of the conditions and commitments in this merger agreement and to waive any rights to exercise any conflicting provision of any existing interconnection*

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<sup>3</sup> Our understanding is that AT&T and BellSouth have agreed that all conditions should apply in each of the 22 states in their incumbent operating territories. See AT&T/BellSouth Conditions, at 2 (“For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments in this letter would apply in the AT&T/BellSouth in-region territory, as defined herein, . . .”), and n. 2 (“As used herein, the AT&T/BellSouth ‘in-region territory’ means the area in which an AT&T or BellSouth operating company is the incumbent local exchange carrier . . .”). We applaud that commitment. If the conditions are to have any real competitive impact, it is essential that they apply throughout the 22-state operating territory of the merged entity.

<sup>4</sup> Of course, it would be arbitrary and capricious for the Commission to fail to impose each of the conditions voluntarily agreed to by AT&T and BellSouth in their October 13<sup>th</sup> filing.

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*agreements. For the purposes of this merger agreement, the term "the merged entity" shall include AT&T, BellSouth, and all of their affiliates.*<sup>5</sup>

The Applicants propose that all conditions and commitments would apply for a period of thirty months from the merger closing date and would automatically sunset thereafter.<sup>6</sup> In light of the substantial competitive harms that would result from the combination of AT&T and BellSouth, the conditions must be of significantly greater duration. The thirty-month period proposed by the Applicants would cause the conditions to expire before they are fully implemented and before the pre-merger levels of competition could be expected to be replaced. Consequently, COMPTTEL's suggested modification should be adopted and the Commission should require that the conditions remain in effect for a minimum of seven years, with the Commission having the authority to extend the conditions if a competitive market has not developed or if the merged entity has delayed its full compliance with the conditions.<sup>7</sup>

2. **UNE/Collocation/Interconnection Rate Condition**

*The AT&T and BellSouth incumbent LECs, in all states where the merged entity operates as an incumbent LEC, shall continue to offer and shall not seek any increase in state-approved rates (including through the imposition of surcharges of any kind) for UNEs, interconnection, or collocation that are in effect as of the Merger Closing Date. This condition shall not limit the ability of the merged entity's incumbent LECs and any other telecommunications carrier to agree voluntarily to any different UNE, interconnection, or collocation rates.*<sup>8</sup>

UNE rate stability is an absolutely essential prerequisite for CLEC competition to develop, particularly in the current environment where AT&T and MCI have been absorbed by BOCs and the remaining competitive carriers lack the resources to conduct UNE rate cases simultaneously in the 22 states that would comprise the merged entity's incumbent operating territory. UNE rate stability also is essential to any efforts by CLECs to replicate the previously-available competitive wholesale facilities that would be eliminated through the merger. Although the Applicants have agreed to a cap on UNE and collocation rates,<sup>9</sup> several important refinements of the Applicants' proposed condition are necessary to ensure the purpose of the condition –

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<sup>5</sup> COMPTTEL Conditions, at 6-7.

<sup>6</sup> AT&T/BellSouth Conditions, at 2.

<sup>7</sup> COMPTTEL Conditions, at 5-7.

<sup>8</sup> COMPTTEL Conditions, at 11.

<sup>9</sup> AT&T/BellSouth Conditions, at 3.

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providing a period of price stability for competition to develop – is achievable.<sup>10</sup> First, the Commission should ensure that the condition applies to the rates for all key elements of interconnection agreements, including interconnection itself. In addition, the condition must prohibit surcharges of any kind, since surcharges easily could be used to circumvent the rate cap.<sup>11</sup> Finally, as discussed above, the condition should remain in effect for a minimum of seven years.

3. **Forbearance**

*The merged entity agrees that it will withdraw the AT&T and BellSouth forbearance petitions pending before the FCC (CC Docket Nos. 06-120 and 06-125) and shall not file any additional forbearance petitions dealing with the same or similar service offerings. The merged entity also agrees that it will not file a petition or otherwise to seek a ruling, including through a forbearance petition under Section 10 of the Communications Act (the "Act") 47 U.S.C. 160, altering the status of any facility being currently offered as a loop or transport UNE under section 251(c)(3) of the Act or under section 271 of the Act. In addition, the merged entity agrees that it will not give force or effect to any present or future grant of forbearance, or any other decision of the Commission or a court, in a manner that in any way reduces, alters, or otherwise affects their duties under the conditions and commitments of this merger.<sup>12</sup>*

As explained above, in order for carriers to replicate the competition that would be lost due to the proposed merger, a reasonable period of regulatory certainty must be established and enforced. UNE rate certainty is critical, but it alone is not sufficient. There must also be the assurance that essential network facilities will remain available, and will not simply be removed from the market through the regulatory forbearance process. The Applicants propose a condition to address this issue,<sup>13</sup> but their loosely-worded proposal falls short of providing the protection needed if competition is to develop. The COMPTTEL condition would close the loopholes in the

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<sup>10</sup> See COMPTTEL Conditions, at 9.

<sup>11</sup> For example, on December 20, 2006, the Florida Public Service Commission, in spite of a primary staff recommendation to the contrary, voted to permit BellSouth to impose a line-item surcharge on its UNE loop rates, ostensibly to recover costs incurred to repair damage caused by storm systems in 2005. *Petition by BellSouth Telecommunications, Inc. to Recover Tropical Storm Related Costs and Expenses*, Docket 060598-TL, Florida Public Service Commission.

<sup>12</sup> COMPTTEL Conditions, at 19.

<sup>13</sup> See AT&T/BellSouth Conditions, at 6.

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Applicants' proposal. The language suggested by COMPTTEL would address the possibility of the Commission being unable to enforce a requirement not to file a petition or otherwise seek a ruling by the Applicants, it would encompass the several petitions by the Applicants currently pending before the Commission, and it would include access to loop and transport facilities that are equivalent to section 251(c)(3) UNEs.<sup>14</sup> Only if the changes suggested by COMPTTEL are made would the condition become truly effective.

4. **EEL Audits**

*The merged entity shall cease all ongoing or threatened EEL audits and terminate all EEL audit related rights regarding compliance with the Commission's EELs eligibility criteria (e.g. the Supplemental Order Clarification's significant local use requirement and related safe harbors, and the Triennial Review Order's high capacity EEL eligibility criteria) and shall not initiate any new audits.*<sup>15</sup>

Misuse of EEL qualification criteria has been a substantial impediment to CLEC competition in the BellSouth territory. Termination of the EEL audit threat could significantly boost competition and the CLEC Parties therefore are encouraged by the Applicants' willingness to propose a condition to address this problem.<sup>16</sup> The specific language proposed by the Applicants is ambiguous, however, and should be clarified as suggested by COMPTTEL to ensure that the condition has its intended effect.<sup>17</sup> Specifically, the condition must explicitly direct the Applicants to cease and desist from all EEL audit related activity, regardless of its type or status. Further, there must be no potential for dispute over whether an audit is "pending," and the condition therefore must specify that all audit requests, threats, misuse of CPNI, and dispute resolution/litigation is prohibited.

5. **Portability of Agreements**

*The merged entity shall permit a requesting telecommunications carrier to port the entirety of an existing interconnection agreement (except for state-specific rates) from a state where it currently is effective to another state in the AT&T/BellSouth Region.*<sup>18</sup>

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<sup>14</sup> See COMPTTEL Conditions, at 18.

<sup>15</sup> COMPTTEL Conditions, at 15.

<sup>16</sup> See AT&T/BellSouth Conditions, at 3.

<sup>17</sup> COMPTTEL Conditions, at 14-15.

<sup>18</sup> COMPTTEL Conditions, at 27.

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One of the most significant deficiencies of the merger conditions proposed by the Applicants is the failure to propose a condition that would permit the porting of ICAs and special access agreements across state lines. In prior BOC-to-BOC mergers, the Commission has recognized the usefulness of an ICA portability condition to at least partially offset the loss of a competitive benchmark.<sup>19</sup> In fact, the ability to port ICAs from one state to another has proven to be a very useful mechanism for ensuring that each of the merging parties adopt the best practices previously employed by either party.<sup>20</sup> Although the Applicants have chosen not to offer a condition that would permit the portability of ICAs, COMPTTEL has proposed a portability condition. Indeed, COMPTTEL's suggested condition would expand upon the portability condition imposed by the Commission in past mergers to include the portability of volume and term special access agreements.<sup>21</sup> As COMPTTEL points out, "special access volume and term agreements have become an increasingly important supplement to and/or replacement for, standard interconnection agreements. It is equally important that the best practices of each of the merging parties with respect to such special access volume and term agreements be preserved."<sup>22</sup>

Cox Enterprises, Inc. and Charter Communications (jointly, "Cox/Charter") have recently suggested several refinements to the portability condition.<sup>23</sup> They propose that (1) a carrier be permitted to opt into any ICA even if it has not yet been updated to reflect changes of law, if the carrier agrees to negotiate an amendment, (2) carriers be permitted to use their existing ICAs as a starting point for re-negotiation, and (3) the term of existing agreements be extended for up to three years, subject to amendment for changes of law.<sup>24</sup> The Cox/Charter refinements represent useful and practical additions to the portability condition. Thus, the CLEC Parties urge the Commission to adopt COMPTTEL's proposal, as modified by Cox/Charter. This condition

<sup>19</sup> See e.g. *In re Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, CC Docket No. 98-184, ¶¶ 300-305 (rel. Jun. 16, 2000).

<sup>20</sup> See COMPTTEL Conditions, at 26.

<sup>21</sup> COMPTTEL Conditions, at 27.

<sup>22</sup> *Id.*

<sup>23</sup> See Attachment to Letter from Michael H. Pryor, Counsel to Cox Enterprises, Inc. and Charter Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Nov. 17, 2006). Although Cox/Charter specify that their proposed portability condition would apply to "cable telephony providers," all conditions adopted by the Commission, including any portability condition, should apply to all requesting telecommunications carriers.

<sup>24</sup> *Id.*

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provides a reasonable and useful means to ameliorate the loss of benchmarking opportunities in the UNE and special access markets.

In conclusion, it bears repeating that the Applicants have not responded to the UNE conditions proposed by COMPTTEL. In the two months since the COMPTTEL merger conditions were made part of the record in this proceeding, the Applicants have failed to offer any response to any of the substantive proposals offered by COMPTTEL. In the absence of any record evidence that the COMPTTEL conditions would not have their intended positive impact on competition, or would have other unintended consequences, and in light of the substantial record evidence that the COMPTTEL conditions are essential to mitigate the harms to competition and the public interest that would result from the merger of AT&T and BellSouth, the Commission should adopt the COMPTTEL conditions in their entirety.<sup>25</sup>

Sincerely,



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Thomas Cohen

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Communications, LLC*

cc: Michelle Carey  
Dan Gonzalez  
Scott Bergmann  
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<sup>25</sup> The CLEC Parties note that the Applicants likewise have not been responded to the suggestion by Momentum Telecom, Inc. in its December 13, 2006 ex parte letter that the Section 271 merger condition proposed by COMPTTEL (COMPTTEL Conditions, at 21-23) could serve as an alternative means to resolve the well-documented competitive issues surrounding special access. *See* Letter from Genevieve Morelli, Counsel to Momentum Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Dec. 13, 2006). The CLEC Parties agree with Momentum that the particular harms to consumer welfare threatened by the proposed merger of the Applicants as providers of special access could be addressed through adoption of the COMPTTEL Section 271 condition and the CLEC Parties urge the Commission to adopt that condition.