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VIA ECFS

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, file this *ex parte* letter to respectfully stress again that the Commission must impose appropriate and enforceable conditions on any approval of this merger. The Commission has broad authority to approve a merger subject to conditions under, *inter alia*, Section 214 of the Act which authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[1] CLECs support all of the conditions earlier proposed by COMPTEL in this proceeding.[2]

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[1] 47 U.S.C. § 214(c); *See, e.g., Application of GTE Corp. Transferor and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations*, CC Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, at ¶¶ 1-4, 248-259, 319 (June 16, 2000) ("*BellAtlantic/GTE Merger Order*"); *Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee*, CC Docket No. 98-24, FCC 98-169, 13 FCCR 15,243-15,244, Memorandum Opinion and Order, at ¶ 12 (Rel. July 23, 1998) ("*Teleport/AT&T Merger Order*"); *United States v. FCC*, 652 F.2d 72, 81-81, 88 (D.C. Cir. 1980); *Applications of NYNEX Corporation, Transferee, and Bell Atlantic Corporation, Transferor*, FCC 97-286, 12 FCCR 20,0002, Memorandum Opinion and Order, at ¶ 32 (Aug. 14, 1997) ("*BA/NYNEX Merger Order*").

[2] *See* Comments of COMPTEL, WC Docket No. 06-74, at 23-25 (filed Oct. 25, 2006) ("Comments of COMPTEL").

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Copper Loop Access.

The proposed merger poses a substantial risk to competition because, *inter alia*, 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 service providers rely upon to reach their customers..[3] It is neither costly nor burdensome for ILECs to maintain legacy copper loops. Far from becoming obsolete, the copper loop remains a cost-effective and efficient transmission medium for the provision of voice, Internet access, and video programming services to consumers, including residential consumers. At the same time, the Applicants' heavy expenditures on fiber loops similarly boost their incentive to deny CLECs and other competitive service providers access to legacy copper loops necessary to provide competing services.

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 unavailable for unbundled access copper loops and subloops as defined in the Commission's rules.[4] Any such condition must be readily enforceable to ensure uniform applicability across the Applicants' regions, and to ensure regulatory certainty. In this regard, CLECs strongly support the COMPTEL proposal on this issue.[5] This is an uncomplicated and cost-efficient safeguard that would preserve this vital source of competition in the marketplace.

Forbearance.

CLECs are encouraged by the concept of condition, similar to that proposed by the Applicants, that would bar forbearance petitions because petitions for forbearance seeking relief from section 251(c)(3) loop and transport unbundling relief could undermine the goal of regulatory stability. However, the language of Applicants' specific proposal the is too narrow, and may be read by them to exclude certain regulatory actions that would be functionally equivalent to forbearance. Further, the Applicants' proposed forbearance condition does not address forbearance from the Applicants' obligations to provide access to loop and transport facilities that may be suitable alternatives to, or that in some instances may be substitutes for, Section 251 facilities. The modifications proposed by COMPTEL would address these shortcomings, and the CLECs respectfully

[3] *See generally Review of Section 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, ¶ 249 (2003) ("*TRO*").

[4] *See* 47 C.F.R § 51.319(a), 51.319(b)(1).

[5] *See* Comments of COMPTEL, at 25.

request that the Commission clarify the proposed forbearance condition pursuant to COMPTEL's suggestions.[6] The forbearance commitment should also extend to withdrawal of pending AT&T and BellSouth petitions for forbearance.

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Section 271 Obligations.

CLECs urge the Commission to impose a condition on any approval of the merger that would set interim Section 271 network element prices at 115% of TELRIC prices pending establishment of permanent Section 271 element prices by state commissions. Further, any such requirement should be coupled with a condition that would require the Applicants, during the duration of the conditions, not to contest arbitration of Section 271 rates, terms, and conditions by state commissions pursuant to Section 252 of the Act. This proposal is reasonable given the Maine District Court decision that TELRIC rates could apply on an interim basis for 271 network elements. Further, setting interim rates for Section 271 loop and transport network elements at 115% of TELRIC rates is wholly appropriate because these are the same rates that the FCC ordered that ILECs apply for loop and transport UNEs out of non-impaired wire centers in the *TRRO*.[7] This same rate should apply for 271 elements until a state commission determines, based on a demonstration by the Applicants, that different rates for network elements under Section 271 should apply.

Continuation of Commercial Agreements.

The Commission should condition any approval of the Application with a requirement that the Applicants offer CLECs the opportunity of continuing commercial agreements currently in effect for the full duration of merger conditions, which should be seven years as discussed below.[8] Such a requirement will not be burdensome to the

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[6] *See* Comments of COMPTEL, at 18. COMPTEL's proposed forbearance condition includes language that, among other things, would require the Applicants to withdraw forbearance petitions currently pending before the FCC, as well as ensure that the Applicants file no other petitions, or otherwise seek any rulings or give force or effect to any forthcoming decisions of the FCC or a court that would alter the status of any facility being currently offered as a loop or transport UNE.

[7] *See, e.g., Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005)(*"TRRO")* ¶¶ 145, 198, *affirmed, Covad Communications Co. v. FCC*, Nos. 05-1095, *et al.* (June 16, 2006).

[8] Following the FCC's *TRO* and *TRRO* decisions, a number of CLECs operating in AT&T and BellSouth territory entered into commercial agreements for the provision of service to residential and business customers. Many of these agreements are set to expire in 2007. CLECs are concerned that Applicants, especially BellSouth, will raise prices as well as offer retail prices that are below their commercial wholesale offerings once the merger is consummated. Further, viable wholesale alternatives to the Applicants' (continued...)

Applicants since the negotiated prices in these agreements are presumptively acceptable to them. Providing CLECs and other competitive service providers the option of continuing these commercial agreements should not harm the Applicants at all. Moreover, such a condition would further promote regulatory certainty and competition.

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UNE, Interconnection, Collocation Rate Stability.

CLECs strongly support an effective constraint on the ability of the merged entity to raise prices for UNEs, interconnection, or collocation. Rate stability in these areas is essential to permit reasonable business planning and to assure that the merged entity will not be able to take advantage of the loss of advocacy by MCI and AT&T Corp. to initiate rate increases in numerous state jurisdictions. CLECs could be seriously harmed, not only by rate increases, but by the burdens of participating in numerous state proceedings. The Commission should adopt the condition proposed by COMTPEL.[9]

EEL Audits.

AT&T has proposed that it would terminate all pending audits of compliance with the Commission's EELs eligibility criteria and would not initiate any new audits. CLECs urge the Commission to adopt this condition with the clarifications proposed by COMPTEL that would assure that AT&T would terminate all threatened and pending EEL audits under either the initial EEL criteria or those adopted in the *Triennial Review Order*.[10]

Operation Support Systems.

Competitive carriers have spent substantial time and resources to conform to various AT&T and BellSouth OSS requirements. If the applicants are allowed to merge, CLECs could be harmed should the Applicants significantly alter their OSS practices and procedures because such changes in operating procedures can be extremely expensive and disruptive to CLECs. So far, the Applicants have failed to provide any detail on how the merger would affect OSS procedures, differences in OSS procedures between the companies, or how those differences will be reconciled. Further, the change management process, while providing for collaborative discussions, does not preclude the Applicants from imposing costly and anticompetitive changes on CLECs. The Commission has previously recognized the importance of nondiscriminatory access to OSS to the ability

offerings will not likely be sufficiently available throughout their regions for the foreseeable future. Thus, the availability of the current elements provided for in the existing commercial agreements are necessary for the preservation of competition in the Applicants' respective service territories.

[9] See COMPTEL Comments, at 11.

[10] *See* COMPTEL Comments, at 14-15.

of CLECs to compete on a commercially reasonable basis.[11] As such, CLECs urge the Commission to condition any approval of the Application on the requirement that the Applicants not modify OSS requirements without CLEC concurrence.

Resale Discounts.

Any approval of the merger should be conditioned on a requirement on the Applicants to provide appropriate resale discounts that would continue in effect for the proposed seven-year duration of the merger conditions. In the *SBC/Ameritech Merger Order*, the Commission required the merged companies for a specified Promotional Period to offer a resale discount of 32%.[12] In that case, the Commission found that resale discounts would reduce the risks and costs of entry into in-region markets and, therefore, would help mitigate the potential loss of competition that the merger would cause. As already explained on the record, the current proposed merger also entails the substantial risk of loss of competition through, among other reasons, an increased incentive and ability of AT&T and BellSouth to discriminate against CLECs. Such a discount could significantly encourage competition in the merged companies' region, and should therefore be required of the Applicants should the Commission approve the Application.

Broadband Service Access.

The Applicants have proposed to offer ADSL service to retail consumers who have not previously subscribed to AT&T's or BellSouth's ADSL service, for $10 per month as a condition of the merger. Although CLECs support reduced prices for consumers, the proposed $10 per month price is below the price for DSL capable loops in most AT&T and BellSouth UNE pricing zones, and is aimed at artificially pricing competitors out of the market. To address the anticompetitive effect of this proposal, the Commission should require that AT&T and BellSouth offer a UNE price for DSL capable loops that will permit CLECs to compete in all areas with the proposed $10 retail price. This could take the form of either a specific price or a sufficient discount off current prices for DSL capable UNE loops. Such a condition would ensure that consumers are afforded a $10 retail price, or better, in all areas of the country, by potentially numerous competitive providers.

IP Interconnection.

The Applicants have not proposed any conditions that would ensure reasonable

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[11] *See, e.g.*, *Application of BellSouth Corporation et al for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-191, FCC 98-271, ¶ 83.

[12] *SBC/Ameritech Merger Order*, Appendix C, ¶ 51.

terms and conditions of IP interconnection. As pointed out in initial comments,[13] both AT&T and BellSouth have in recent months expressed an intent to discriminate in their provision of IP interconnection,[14] and there are numerous ways in which the Applicants could discriminate once the merger is consummated.[15] In light of probable anticompetitive effects, the Commission should require the merged company to (1) allow any IP network to peer with the merged company if that network interconnects at a specified number of peering points, and (2) to provision interconnection to the IP backbone and transit service to non-peering ISPs and CLECs at LRIC rates. The Commission should also impose net neutrality requirements to preclude the Applicants from blocking or providing inferior quality access to non-ILEC IP-enabled services. Further, the Commission should prohibit the merged company from imposing any restrictions or limitations on use of Session Initiation Protocol ("SIP") by its customers or services obtained from third parties by the customer.[16] The Commission should include a condition that the merged company will not contest CLECs' ability to negotiate and arbitrate IP-based interconnection pursuant to Section 252 of the Act.

Special Access.

As the pre-merger AT&T Corp. recognized, the BOCs' special access rates, terms and conditions are not reflective of a competitive marketplace but rather are at "supracompetitive" levels.[17] The Applicants already have extraordinary market power and are achieving over 90% annual rates-of-return on special access services. Such levels far exceed the approximately 11-12% annual rates of return they were making in 1991.[18] The merged entity will have an even greater ability to exercise market power through further price gouging. In sum, the American public is being fleeced to provide the Applicants with supracompetitive returns. Special access prices are critical inputs to business costs, and therefore, are passed on to consumers in the form of increased prices

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[13] *See* Comments of Access Point, *et al.*, WC Docket No. 06-74, at 29 - 30 (filed June 5, 2006).

[14] *See Report: Bells to Push for Web Fees*, CNNMoney.com, Jan. 6, 2006; Marilyn Geewax, *Web "Neutrality" Proviso Sought*, BaltimoreSun.com, Dec. 13, 2005; *At SBC, It's All About "Scale and Scope"*, Business Week Online, Nov. 7, 2005.

[15] Comments of Access Point, *et al.*, WC Docket No. 06-74, at 30-31 (filed June 5, 2006).

[16] SIP is a signaling protocol used for establishing sessions in an IP network.

[17] *See AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (filed Oct. 15, 2002).

[18] The annual rates of return were calculated using ARMIS data reported for interstate special access services. Specifically, we divided the net return by average net investment to calculate the rates of return. *See* ARMIS 43-01, Table 1, Cost and Revenue, rows 1910, 1915, col. s.

for nearly all goods and services across the United States economy.

As such, CLECs urge the Commission to adopt those proposals forwarded by the Special Access Coalition in this proceeding.[19] Failure to do so would allow the Applicants to leverage their increased market power, post-merger, to further squeeze unconscionable rates-of-return out of American consumers.

Portability of Interconnection Agreements and Special Access Volume and Term Agreements.

Portability of interconnection agreements between states in the Applicants' respective regions could held ameliorate the harmful effect of the merger of limiting the ability of competitors to identify and compare BOC "best practices." An ability of CLECs to port interconnection agreements between any AT&T or BellSouth states would permit CLECs to preserve at least for the duration of the interconnection agreement the better respective practices of either of the merged companies in any state. This portability should also apply for the same reasons to special access and term agreements of AT&T and BellSouth. CLECs urge the Commission to adopt the proposal of COMPTEL on this issue.[20]

Stand-Alone ADSL Service.

The Applicant's have proposed a condition that would permit customers to purchase ADSL without also purchasing voice service, but the proposal does not include any pricing or specify that the service would be available for resale by ISPs or CLECs. The Commission should strengthen the Applicants' proposed condition by establishing assurances of reasonable pricing and by providing that the stand-alone ADSL will be available for purchase and resale by ISPs and CLECs.

Timeframes and Enforcement.

The record in this proceeding demonstrates that an unqualified approval of the Application would result in the loss of a critical existing and potential source of wholesale supply, thereby harming the public interest and competition. It is therefore vital that the above-referenced conditions be imposed on the proposed merger, and that they are not provided under such a narrow timeframe that render the benefits of conditions fleeting. Conditions should last for seven years to assure that reasonably priced unbundled facilities and special access services remain available from the Applicants long enough to alleviate the competitive and public interest harms the merger will present. Conditions should be applicable throughout the combined AT&T and

[19] *See generally* Comments of the Special Access Coalition, WC Docket No. 06-74 (filed Oct. 24, 2006).

[20] Comments of COMPTEL, at 25-27.

BellSouth region.

Finally, any merger conditions established by the Commission should be self-enforcing to the greatest extent possible. Given the limited timeframe that such merger conditions will have, streamlined enforcement of them is necessary to ensure that CLECs and other competitors are able to quickly realize any policy changes or competitive remedies established by the Commission. Further, to the greatest extent possible, the Commission should ensure that the its administrative resources are not burdened with enforcement. To avoid such burdens, the conditions should be crafted as clearly as possible to ensure compliance by the Applicants. Further, the Commission should authorize the state commissions to enforce these merger conditions in their particular state.

Respectfully submitted,

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