September 25, 2006

BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
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:

XO Communications ("XO") asks the Commission to use this merger proceeding to intercede in what XO characterizes as a Missouri "collocation" dispute with AT&T.[1] That request should be denied, not only because XO is not actually seeking collocation for the purposes for which it is authorized, but also because any dispute that may exist is entirely unrelated to the proposed merger and thus an improper basis for any merger condition.[2]

As Congress, the Commission, and the courts all have recognized, collocation is available to carriers only for the purpose of interconnection or access to unbundled network elements ("UNEs").[3] Indeed, the D.C. Circuit has held that the Commission lacks authority to require

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[1] *See Ex Parte* Letter from Kelley Drye & Warren LLP (Attorneys for XO) to Marlene H. Dortch (FCC), WC Docket No. 06-74 (filed Sep. 18, 2006) ("XO Sep. 18 Letter").

[2] *See, e.g.,* Memorandum Opinion and Order, *In re Applications of Time Warner, Inc., America Online, Inc, & AOL Time Warner Inc.,* 16 FCC Rcd. 6547, ¶ 6 (Jan. 22, 2001) ("It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies and objectives of the Communications Act that flow from the proposed transaction — *i.e.*, harms and benefits that are 'merger-specific.' The Commission recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act").

[3] "Section 251(c)(6) of the Communications Act requires incumbent LECs to permit collocation of equipment '*necessary for interconnection or access to unbundled network elements*.'" Fourth Report And Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd. 15435, ¶ 15 (2001) (quoting 47 U.S.C. § 251(c)(6)) (emphasis added), *aff'd Verizon Tel. Cos.* v. *FCC*, 292 F.3d 903 (D.C. Cir. 2002). "[E]quipment is [thus] eligible for collocation *only* if an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection or access to unbundled network elements." *Id.* ¶ 13 (emphasis added).

collocation for any other purpose.[4] XO, however, does not seek to collocate microwave facilities to obtain access to or interconnection with AT&T facilities. Rather, it appears to want some sort of real estate deal with AT&T for the lease of rooftop space for placement of facilities that XO would use to communicate with other XO microwave facilities on other rooftops. Contrary to XO's suggestion, AT&T has made clear its willingness to consider any concrete proposal XO may make for such an unregulated arrangement. But XO's suggestion (at 7) that "the promise of intermodal competition" will be "frustrated" if the Commission does not force AT&T to do a real estate deal with XO at regulated collocation prices is preposterous. AT&T obviously has no monopoly on commercial building rooftop space or other structures suitable for microwave equipment, and XO is no more entitled to demand regulated access to AT&T's rooftops for non-collocation purposes than it is to demand regulated access to the rooftop of any other building owner.

XO's recitation of the Missouri "facts" is remarkably misleading and incomplete. According to XO, "[i]n rejecting XO's requests, AT&T claimed . . . that microwave collocation is not an existing offering for which it has methods and procedures and insisted that XO pursue microwave collocation through AT&T's Bona Fide Request process."[5] The real facts are as follows. XO submitted a request to place microwave facilities on AT&T rooftops using the forms that AT&T's Missouri state tariff provides for legitimate requests seeking collocation for interconnection or access to UNEs.[6] But XO's communications with AT&T indicated that XO did not seek rooftop access for collocation purposes but merely viewed certain AT&T buildings as convenient locations for intermediate transmission facilities in XO's broadband wireless networks: "The request is for microwave between the two offices. Radio equipment and antennas will be placed on the roof of both offices and they will transmit between each other."[7] Because XO's request indicated that XO was not seeking interconnection or UNE access, AT&T promptly (later on the same day) sought to set up a conference call with XO personnel to obtain more details about XO's request.[8] XO agreed to the call, but then did not attend.[9] Because XO failed to provide the additional information, AT&T properly rejected XO's request. In an email to XO, AT&T explained that "[b]ecause the clock is ticking on [the interconnection agreement deadline to accept or reject] this application, at this time we will reject the application."[10] But AT&T made clear that it was still willing to discuss XO's request: "Please let us know when

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[4] *GTE Service Corp* v. *FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000); *see also Bell Atlantic* v. *FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994).

[5] XO Sep. 18 Letter at 3.

[6] XO Sep. 18 Letter at 2.

[7] Email from David Stauder (XO) to Grace Capitulo (AT&T) (sent July 20, 2006 12:58 PM) (attached hereto as Exhibit 1, at 2).

[8] *See* Email from Grace Capitulo (AT&T) to David Stauder (XO) (sent July 20, 2006 5:04 PM) (attached hereto as Exhibit 1, at 2).

[9] *Id.* at 1.

[10] *See* Email from Grace Capitulo (AT&T) to David Stauder (XO) (sent July 21, 2006 11:50 AM) (Exhibit 1, at 1).

you are available next week to discuss your request."[11] Moreover, AT&T separately informed XO that, to the extent XO was seeking an agreement to use AT&T's rooftop for purposes other than interconnection or access to UNEs, AT&T would consider it, like all non-standard requests, through the Bona Fide Request ("BFR") process.[12]

The very tariff and interconnection agreement excerpts XO attached to its letter refute its claim that AT&T violated its interconnection agreements and tariffs by rejecting an XO request that bore a collocation label but was not shown to be for either of the legitimate collocation purposes. As XO points out, its Missouri interconnection agreement with AT&T "provides for collocation pursuant to tariff,"[13] and, consistent with settled law, AT&T's Missouri state tariff expressly states that such collocation is available only for the purpose of "transmitting and routing telephone exchange service or exchange access pursuant to 47 U.S.C. § 251(c)(2) [*i.e.*, interconnection]" or "obtaining access to . . . unbundled network elements."[14] The California AT&T/Nextlink Interconnection Agreement and Texas AT&T tariff that XO attached to its submission are equally clear on this point,[15] as is AT&T's 13-state "template" microwave collocation interconnection agreement appendix.[16] Contrary to XO's suggestion, it is thus entirely appropriate for AT&T to insist that XO use the BFR process if it seeks *non-collocation* access to AT&T's rooftop space – a non-standard, unregulated arrangement.[17] And XO's proposal for a merger condition that requires AT&T to adopt BellSouth's microwave collocation

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[11] *See id.*

[12] XO Sep. 18 Letter, Attachment E, at 1-2 (emails from AT&T to XO seeking a "BFR" "outlining what you [XO] want" so that AT&T can "pursue your [XO's] request"); *id.* at 1 (inviting XO to provide more information because "[u]p to this point it has been a lot of discussion without really having official documentation outlining what you want").

[13] XO Sep. 18 Letter at 2, *citing id.*, Attachment A (AT&T-XO Missouri interconnection agreement).

[14] *See* XO Sep. 18 Letter, Attachment B, § 1.3 (AT&T Tariff setting out terms under which collocation is available).

[15] *See* XO Sep. 18 Letter, Attachment G (AT&T California Tariff), at 4 ("Where technically feasible, Pacific will provide for physical collocation of microwave equipment . . . necessary for *interconnection of CLEC's network facilities to Pacific's network or access to unbundled network facilities to Pacific's Network Elements*") (emphasis added); *id.*, Attachment F (AT&T Texas Tariff), § 6.9 ("This option allows Collocators, subject to the terms and conditions of this tariff, to place microwave equipment in the Eligible structure to obtain access to a collocation arrangement containing equipment *necessary for interconnection with SWBT or access to SWBT's unbundled network elements*") (emphasis added).

[16] *Id.* at 3 and Attachment D (quoting Appendix-Microwave-SBC-13STATE, § 2.1) (microwave collocation "is only available for the purpose of interconnection to SBC-13STATE's network or access to SBC-13STATE's unbundled network elements").

[17] XO Sep. 18 Letter at 4 (BFR process is appropriate for "Other Arrangements which do not currently exist in the CLEC's Interconnection Agreement") (emphasis omitted).

terms is truly puzzling given that XO's interconnection agreement with BellSouth appropriately contains the same express interconnection/UNE access collocation limitation.[18]

XO's submission also confirms that if XO truly were seeking microwave collocation from AT&T in Missouri – *i.e.*, to use rooftop-placed microwave facilities to obtain interconnection or access to UNEs – it already has in hand the tools it would need expeditiously to request and obtain that collocation. As XO explains, it already has an interconnection agreement with AT&T in Missouri that expressly provides for collocation in accordance with AT&T's Missouri tariff, which itself expressly provides for microwave collocation.[19] The parties' interconnection agreement also contains detailed dispute resolution provisions, and XO is, in any event, quite familiar with the full gamut of mediation, arbitration, state commission and court procedures for resolving true interconnection disputes. XO has not pursued any of these options – or even seriously pursued the matter with AT&T – because it knows full well that the arrangements it seeks are not available as regulated collocation services.

Finally, XO's suggestion that AT&T's entirely lawful response to XO's non-collocation request for rooftop access threatens intermodal competition is patently absurd. XO is apparently in the process of expanding its already robust broadband wireless networks by installing additional microwave facilities on rooftops or towers (or other high places), some of which will be used principally to relay traffic to and from other XO microwave facilities.[20] While the 1996 Act and the Commission's rules require incumbent LECs to provide collocation, including microwave collocation, on regulated terms to carriers that seek interconnection or access to UNEs, there is no requirement that incumbents provide those regulated services to wireless carriers, television broadcasters or anyone else that merely seeks convenient locations for their equipment. There are literally hundreds of thousands of commercial buildings in the AT&T incumbent LEC regions, the vast majority of which are not owned by AT&T (or any other telephone company). In addition to rooftops there are towers and "high ground" appropriate for placing microwave facilities. Indeed, companies have made entire businesses out of arranging

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[18] BellSouth Agreement, § 1.1, attached to XO Sep. 18 Letter as Attachment H (collocation of equipment, including "microwave equipment," is "limited to that which is necessary for [the customer] to interconnect with BellSouth's services/facilities or access to BellSouth's unbundled network elements").

[19] *See* XO Sep. 18 Letter at 2 ("In Missouri, the collocation provisions of XO's interconnection agreement with AT&T provides for collocation pursuant to tariff" and "AT&T's Missouri tariff recognizes microwave collocation as one of the available forms of collocation" and "AT&T provides a standard ordering form on its website for collocation that specifically provide for microwave collocation as one option"). XO suggests that AT&T has interfered with XO's efforts to amend its Missouri interconnection agreement to adopt AT&T's template Microwave Appendix. In fact, those negotiations, which proceeded quickly, have now concluded in a signed amendment – and could have proceeded even more quickly but for XO's desire to modify certain terms of the template agreement.

[20] *See, e.g.*, XO Press Release, *XO Communications Deploys Fixed Broadband Wireless in Nine Cities to Expand Metro Coverage and Reduce Network Costs* (rel. Aug. 28, 2006) ("Aug. 28 Press Release") *available at* http://www.xo.com/news/316.html.

locations for carriers seeking to place antenna or other equipment,[21] and XO and others have reached agreements with myriad commercial building owners to place equipment on their rooftops.[22] Thus, even if AT&T and XO ultimately do not enter a commercial real estate agreement, XO can turn to numerous alternative rooftop providers (and, in fact, has already done so). In short, XO's complaint has nothing to do with the merger, nothing to do with microwave collocation, nothing to do with intermodal competition, and is truly much ado about nothing.

Very truly yours,

/s/ Gary L. Phillips

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cc: Nicholas Alexander
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[21] *See, e.g.*, http://www.3gsolutions.net (company called "3g Solutions" providing lists of buildings with rooftop space available for antenna, including more than 50 such buildings in Missouri alone); Report and Order And Further Notice Of Proposed Rulemaking, *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, et seq.*, 19 FCC Rcd. 19078, ¶ 106 (2004) ("companies have made a business of constructing and maintaining towers on which multiple licensees can locate their transmitters and receivers").

[22] XO recently announced, for example, that it "has deployed fixed broadband wireless in nine metropolitan markets," including Chicago, Dallas, and Houston. Aug. 28 Press Release. XO notes in its press release that its antennas have at least a five mile range, which means that XO necessarily will always have numerous alternatives to any AT&T location it may find convenient. *See id*.