

October 11, 2007

VIA E-MAIL

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

RE: WC Docket Nos. 06-125, 06-74

Dear Ms. Dortch:

This letter responds to the letter filed yesterday by AT&T in which AT&T argues that its request for forbearance from common carrier regulation of Ethernet and OCn business broadband special access services does not violate the AT&T-BellSouth Merger Condition that prohibits AT&T from seeking forbearance that “diminishes” or “supersedes” its “obligations or responsibilities under the merger commitments.”¹ In its letter, AT&T does not dispute, nor could it, that it “seeks” forbearance from regulation of business broadband services. Nor does it attempt to show that the services for which it seeks forbearance are anything other than special access. Rather, it argues that the elimination of bedrock common carrier regulations with which it purportedly did not expressly commit to comply in the Merger Conditions cannot “diminish” AT&T’s commitments under the conditions and cannot cause such conditions to be “superseded” by a different regime for enforcing the Merger Commitments. This argument has no merit.

To begin with, the plain language of the commitments does include the obligation to comply with certain common carrier regulations. For example, Special Access Merger Condition No. 2 states that AT&T shall not increase rates for services offered “pursuant to, or referenced in TCG FCC Tariff No. 2.” If there is no TCG FCC Tariff No. 2, however, there are no services offered “pursuant to” or “referenced in” that tariff and the obligation disappears. Similarly, Special Access Merger Condition No. 5 prohibits AT&T from increasing “the rates in its interstate tariffs, including contract tariffs, for special access services . . . as set forth in tariffs on file at the Commission on the Merger Closing Date,

¹ See Letter from Jack Zinman, AT&T, to Marlene Dortch, WC Docket Nos. 06-125, 06-74 (Oct. 10, 2007) (“AT&T Letter”).

and as set forth in tariffs amended subsequently in order to comply with the provisions of these commitments.” If AT&T no longer has “interstate tariffs” and “contract tariffs” on file with the FCC, it can increase its special access rates without violating the rate regulation governing rates set forth in such tariffs. Such an outcome would obviously diminish AT&T’s obligations under the conditions.

More fundamentally, the Merger Conditions were adopted in a context in which AT&T was subject to regulation as a dominant common carrier. Virtually all of the regulations explicitly rely on the requirements applicable to a firm subject to such regulation. For example, Special Access Merger Condition No. 6, as modified by the March 26, 2007 Order on Reconsideration, requires that AT&T reduce rates for DS1, DS3 and Ethernet by filing “all tariff revisions necessary to effectuate” this requirement and by maintaining reduced rates “until 39 months after the day the AT&T/BellSouth incumbent LECs file with the Commission the final tariff revisions necessary to effectuate this commitment.” The rates set forth in the tariff described in this passage, like the other offerings AT&T must include in tariffs in order to comply with the Merger Conditions, is subject well-established and extensive legal requirements, such as the filed rate doctrine, designed to protect purchasers of tariffed services against discrimination. There was no need to include in the Merger Conditions the requirement that AT&T make the required rates and conditions available in tariffs, because that requirement already applied to AT&T. But that does not mean that eliminating tariffs, and the associated legal protections for purchasers, leaves the Merger Conditions unchanged. On the contrary, if these requirements are not offered in tariffs by a common carrier subject to dominant carrier regulation, they are far less meaningful because, among other things, (1) in the absence of a common carrier duty to deal, AT&T can simply refuse to offer the service, thus rendering the rate and other regulations completely meaningless, (2) in the absence of a tariff offering, AT&T is free to discriminate by selectively dropping prices to favor one purchaser over another of the same service, and (3) in the absence tariffs, purchasers are not placed on public notice of the prices, terms and conditions of AT&T’s service offerings. It is for these very reasons, among others, that dominant firms are subject to common carrier regulation and are required to offer their services pursuant to publicly filed tariffs.

This principle applies to other aspects of dominant common carrier regulation as well. For example, Special Access Merger Condition No. 8 states that AT&T “will not include in any pricing flexibility contract . . . filed with the Commission after the Merger Closing Date” a limitation on the availability of UNEs. Again, because AT&T was subject to the obligation to file carrier contracts under Section 211 at the time of the merger, there was no need to include that duty in this condition. But if this duty were eliminated (as it would be if AT&T were deemed non-dominant), AT&T would be free to include limitations on the availability of UNEs in contracts since they would not be “filed with the Commission.” Special Access Merger Condition No. 8 would thereby be rendered a nullity and AT&T’s obligations would obviously be “diminished.”

Similarly, if AT&T were able to discontinue or diminish its offer of services such as Ethernet or OCn special access without obtaining prior FCC approval, it would be able to diminish its obligations to comply with the rate and other requirements of the Merger Conditions. Again, there was no need to prohibit AT&T from discontinuing or diminishing its offer of services in the Merger Conditions because, at the time of the merger, it was subject to the dominant carrier obligation that it

