

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Comptel and TWTC Petitions for)	WC Docket No. 06-125
Declaratory Ruling)	
)	
_____)	

Comments of BT Americas Inc. on Behalf of Itself and other BT Entities

Pursuant to the Commission’s Public Notices,¹ BT Americas Inc., a wholly owned indirect subsidiary of BT Group plc (“BT plc”), submits these Comments on behalf of itself and other BT operating entities in the US (collectively referred to herein as “BT”)² in support of both Comptel’s³ and Time Warner Telecom’s (TWTC’s)⁴ Petitions for Declaratory Rulings. Those Petitions seek a ruling from the Commission confirming that, as Commissioner McDowell stated at the time the *AT&T Forbearance Order*⁵ was issued, AT&T would *not* be relieved of its existing tariffing, price freeze, pricing flexibility, and facilities discontinuance requirements for non-TDM based business broadband services until the AT&T/BellSouth merger conditions expire on December 29,

¹ Public Notice DA 07-4686 (rel. Nov. 20, 2007) and Public Notice 4908 (rel. Dec. 6, 2007).

² BT holds section 214 licenses and employs approximately 4000 people in the United States. BT’s relationship with BT plc, the incumbent carrier in the UK, and through the Global Services group which serves the global information and communications technology needs of large business (“enterprise”) customers worldwide.

³ Comptel’s Petition for Declaratory Ruling, WC Docket No. 06-125 (filed Nov. 13, 2007).

⁴ Emergency Petition for a Declaratory Ruling of Time Warner Telecom Inc., WC Docket No. 06-125 (filed Nov. 21, 2007) (“TWTC’s Declaratory Ruling Petition”).

⁵ Petition of AT&T Inc. for Forbearance and Petition of BellSouth Corporation for Forbearance, WC Docket No. 06-125, Memorandum Opinion & Order, 22 FCC Rcd 18705 (2007) (*AT&T Forbearance Order*). See Commissioner McDowell’s Statement at 1.

2010.⁶ This would include, as noted in TWTC's Petition, Ethernet and OCn special access services.⁷

Both petitioners sought this relief because of AT&T's announced intention not to maintain its special access tariffs.⁸ The requested Declaratory Ruling relief must be granted expeditiously because the Commission: (1) in the *AT&T/BLS Merger Order* found that the AT&T special access merger conditions, which included continuing tariffing and price flexibility requirements for special access services, were in the "public interest" designed to remedy harms that arose from the specific transaction under consideration; and (2) reiterated in the *AT&T Forbearance Order* that these conditions accordingly survived that Order.

I. THE AT&T/BLS SPECIAL ACCESS MERGER CONDITIONS WERE ADOPTED TO PROTECT THE PUBLIC INTEREST

A. The *AT&T/BLS Merger Order* Special Access Conditions Were "Narrowly Tailored" to Prevent "Transaction-Specific Harms"

The AT&T/BellSouth Merger proceeding record showed that this last in a series of AT&T mergers would increase AT&T's already enormous power over special access essential to large business customers and to those supplying those customers.⁹ The record showed the increased likelihood of price and non-price anticompetitive conduct in

⁶ In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) ("*AT&T/BLS Merger Order*").

⁷ For the reasons set forth in the *Ex Parte* Letter from Colleen Boothby, Levin and Blaszak on behalf of Ad Hoc Telecommunications Users Committee to Marlene Dortch, WC Dockets 06-125 & 06-147 (October 10, 2007), special access includes packet services such as Ethernet, SONET and OCn.

⁸ See Letter from Jack Zinman, AT&T to Marlene Dortch, WC Docket Nos. 06-125, 06-74 (Oct. 10, 2007); see also, AT&T's November 15, 2007 Letter attached as an Exhibit to Time Warner Telecom's Petition.

⁹ See, e.g., Susan M. Gately Declaration on behalf of Ad Hoc Telecom. Users Comm. FCC WC Docket No. 06-74 (AT&T/BellSouth Merger) (June 20, 2006).

special access by the merged entity against downstream competitors.¹⁰ While the Commission approved the AT&T/BellSouth merger, it did so only after the imposition of conditions which, as the Commission itself stated in the *AT&T/BLS Merger Order*, were “narrowly tailored, transaction-specific ... that ensure that the public interest is served by the transaction.”¹¹ As the Commission noted it “*will impose conditions only to remedy harms that arise from the transaction (i.e. transaction-specific harms)*” (emphasis added).¹² That is, the conditions here were – indeed could only be – imposed on the basis of specific harms identified as resulting from the merger.

B. The *AT&T/BLS Merger Order* Special Access Conditions Sought to Remedy These Harms Through Tariffing Requirements

The *AT&T/BLS Merger Order* Special Access conditions sought to address the concerns about price and non-price anticompetitive conduct through the use of tariffing requirements.¹³

The special access conditions designed to avoid price-related anticompetitive conduct such as price squeezes and rate discrimination included rate freezes and rate reductions, all tied to tariff filings. Special Access Condition 2 imposes a rate freeze for existing customers of DS1 and DS3 local private line services “*pursuant to, or referenced in, TCG FCC Tariff No. 2*; no AT&T/BellSouth ILEC may increase the rates in its *interstate tariffs, including contract tariffs*, above their levels as of the Merger Closing

¹⁰ See, e.g., TWTC Petition to Deny, In the Matter of AT&T, Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, WC Docket No. 06-74, filed June 15, 2006 (TWTC claimed that they began negotiations with AT&T over Ethernet access over a year earlier and that AT&T has, to date, refused to sell them Ethernet at reasonable rates; supported by an affidavit of TWTC's Senior VP of Marketing).

¹¹ *AT&T/BLS Merger Order* ¶22.

¹² *Id.*

¹³ And for the reasons set forth in TWTC's Declaratory Ruling Petition at 6-7, such tariffs must be dominant carrier tariffs.

Date” (emphasis added).¹⁴ Special Access Condition 6 provides that in areas “where an AT&T/BellSouth ILEC has obtained Phase II pricing flexibility for price cap services, ... such ILEC will offer DS1 and DS3 channel termination services, DS1 and DS3 mileage services, and Ethernet services, *that currently are offered pursuant to the Phase II Pricing Flexibility Provisions of its specified special access tariffs*, at rates that are no higher than, and on the same terms and conditions *as, its tariffed rates, terms and conditions* as of the Merger Closing Date for such services in areas within its in-region territory where it has not obtained Phase II pricing flexibility” (emphasis added).¹⁵ Special Access Condition 6 further provides for a *rate reduction* in Phase II areas of 15% from “the rates in *its interstate tariffs* as of the Merger Closing Date for Ethernet services that are not at that time subject to price cap regulation” (emphasis added).¹⁶ All of these conditions were designed to limit the ability of AT&T/BellSouth to further increase the wholesale price so as to exacerbate the price squeeze on downstream competitors or to engage in rate discrimination in favor of its own affiliate.

The special access conditions also included conditions tied to tariff filings designed to avoid non-price discrimination. Special Access Condition 4 for example, provides that “to ensure AT&T/BellSouth may not provide special access offerings to its affiliates that are not available to other special access customers, before AT&T/BellSouth provides a new or modified *contract tariffed service* ... to its own ... affiliates ... it will certify to the Commission that it provides service pursuant to that contract tariff to an

¹⁴ *AT&T/BLS Merger Order* at Appendix F, Special Access Condition 2.

¹⁵ *Id.*, Special Access Condition 6.

¹⁶ *Id.*

unaffiliated customer” (emphasis added).¹⁷ AT&T/BellSouth also agreed to conditions designed to ensure customer choice as to providers without being tied to “lock in” revenue commitments.¹⁸

The tariffing requirements were imposed to provide the transparency necessary for downstream competitors to determine and demonstrate to the Commission that they in fact were the victims of such unlawful price squeezes, rate or non-price discrimination. Efficacious enforcement of the conditions was a critical component of AT&T’s conditions. Thus Special Access Condition 7 provides that AT&T/BellSouth will not oppose any request by a purchaser of interstate special access service for mediation by Commission staff of disputes relating to AT&T/BellSouth’s compliance with rates, terms, and conditions *set forth in its interstate special access tariffs and pricing flexibility contracts or to the lawfulness of the rates, terms and conditions in such tariffs and contracts*, nor shall AT&T/BellSouth oppose any request that such disputes be accepted by the Commission onto the Accelerated Docket” (emphasis added).¹⁹ The ability of injured competitors to use the accelerated docket is effectively negated if the tariff and pricing flexibility requirements are now eliminated so that discrimination cannot be proven.

¹⁷ *Id.*, Special Access Condition 4.

¹⁸ *Id.*, Special Access Condition 8 (which provides that AT&T/BellSouth will not include in any pricing flexibility contract or tariff filed with the Commission after the Merger Closing Date access service ratio terms which limit the extent to which customers may obtain transmission services as UNEs, rather than special access services) and Special Access Condition 9 (which provides that AT&T/BellSouth ILECs will file one or more interstate tariffs that make available to customers of DS1, DS3 and Ethernet service reasonable volume and term discounts without minimum annual revenue conditions (“MARC”) or growth discounts.; if the AT&T/BellSouth ILECs file a tariff with a varying MARC they will file one with a fixed MARC as well). Under Special Access Commitment 10 if AT&T/BellSouth offers a proposal that includes a MARC, it must offer an alternative that gives the customer the option of obtaining a volume and/or discount without a MARC; if the proposal includes a MARC that will vary over the life of the contract must also offer a fixed MARC.

¹⁹ *Id.*, Special Access Condition 7.

II. AT&T'S THREAT TO DETARIFF SPECIAL ACCESS SERVICES VIOLATES ITS MERGER SPECIAL ACCESS CONDITIONS AND THE COMMISSION'S FORBEARANCE ORDER

- A. Both the *AT&T/BLS Merger Order* and the *AT&T Forbearance Order* Provide That AT&T's Special Access Merger Conditions Survive the Forbearance Order.

It is clear from the language of both the *AT&T/BLS Merger Order* and the *AT&T Forbearance Order* that the AT&T/BLS merger conditions survive the *AT&T Forbearance Order*. In the *AT&T/BLS Merger Order* AT&T expressly agreed, as part of its merger conditions that it "will not seek or give effect to any future grant of forbearance that diminishes or supersedes the merged entity's obligations or responsibilities under these merger conditions during the period in which those obligations are in effect."²⁰ And in the *AT&T Forbearance Order*, the Commission, accordingly held that "[t]he limited forbearance relief granted herein does not affect in any way the full force and effect of the merger conditions adopted in the AT&T/BellSouth Order."²¹ Thus it is indisputable that AT&T's merger conditions supersede any conflicting relief granted in the *AT&T Forbearance Order*.

As explained above and in the two Petitions, if AT&T carries through with its threat not to maintain its special access tariffs, the viability and enforceability of the AT&T/BellSouth merger conditions will be materially undercut.²² Simply put, even the most egregious forms of price and non-price discrimination will not be transparent,

²⁰ *Id.*, Forbearance Condition 2. In light of the use of the work "seek" it is arguable that AT&T's decision to pursue ("seek") the forbearance order as to special access and Ethernet services was itself a violation of AT&T's merger conditions.

²¹ *AT&T Forbearance Order* ¶2.

²² See also, TWTC's Declaratory Ruling Petition at 8-9 regarding the impact of detariffing on the enforceability of the imputation requirements in In the Matter of Section 271(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket No. 02-112, Report & Order and Memorandum Opinion & Order, 22 FCC Rcd 16440 ¶¶ 99-105 (2007).

rendering the conditions, and the access to the Accelerated Docket to enforce those conditions, illusory. The merger conditions repeatedly reference back to tariffing requirements because they are so dependent upon the continued tariffing of special access services.

B. The Merger Conditions' Tariffing Requirement Extends to non-TDM Services.

As BT has demonstrated,²³ excluding non-TDM services removes the most efficient way for competitors to provide innovative new access services such as Ethernet that the incumbents will not provide in order to retain the revenue and high margins of their legacy services.

As BT has explained, it is not cost-efficient to run Ethernet over TDM loops for at least three reasons. First, the purchaser is required to purchase unused bandwidth. For example, if a customer wants a 10Mbps Ethernet service, the BOCs will only provide a DS-3 (45 Mbps) special access loop. With a DS3 the customer will be paying substantially more than what the customer would expect to pay for a 10Mbps circuit (which is all it needs). Second, the customer then has to add equipment on top of the equipment already on the DS3 (and which is not needed) to deliver the Ethernet service. Third, it is more costly and inefficient in terms of the equipment used at both ends. The customer, at its end, will need a much bigger router and card to terminate a DS3 than to terminate a 10 Mbps solution. The carrier, at its end, rather than having a single card handle 100 10Mbps lines via an aggregated Gigabit Ethernet connection, will only be able to handle 8 DS3s.

²³ Letter from Aryeh Friedman, Senior Regulatory Counsel, BT, to Marlene Dortch, Secretary, Federal Communications Commission, Petitions of AT&T Inc., BellSouth Corporation, the Embarq Local Operating Companies, and Qwest Pursuant to 47 U.S.C. 160(c) for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Docket Nos. 06-125 & 06-147 (Oct. 5, 2007).

Nor is Ethernet over TDM efficient from a quality perspective. Introducing additional equipment introduces additional points of failure. And if there is a failure it is more difficult to determine whether the problem is in the BOC circuits/equipment or in the wholesale provider's Ethernet equipment. Technological solutions to compensate for these issues are costly and further raise the cost differential between Ethernet over TDM and other forms of Ethernet access service, making Ethernet over TDM not competitive.

CONCLUSION

For the foregoing reasons, both the Comptel and TWTC Petitions should be granted expeditiously.

Respectfully submitted.

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