

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

In the matter of)	
)	
Petition of AT&T for Forbearance Under)	
47 U.S.C. § 160 from Title II and Computer)	WC Docket No. 06-125
Inquiry Rules with Respect to its Broadband)	
Services)	
)	
BellSouth Petition for Forbearance Under)	
47 U.S.C. § 160 from Title II and Computer)	
Inquiry Rules with Respect To its Broadband)	
Services)	

**REPLY COMMENTS
OF
LEVEL 3 COMMUNICATIONS, LLC
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
TDS METROCOM, LLC
U.S. TELEPACIFIC CORP. D/B/A TELEPACIFIC COMMUNICATIONS**

Level 3 Communications, LLC, McLeodUSA Telecommunications Services, Inc., TDS Metrocom, LLC, and U.S. TelePacific Corp. d/b/a TelePacific Communications submit these Reply Comments in support of the Petitions filed by COMPTTEL¹ and Time Warner Telecom Inc.² in this proceeding. The Petitions request that the Commission determine that the incumbent local exchange carrier subsidiaries of AT&T, Inc. (collectively, “AT&T”) must, pursuant to the

¹ Pleading Cycle Established for COMPTTEL Petition for Declaratory Ruling, Public Notice, WC Docket No. 06-125, DA 07-4686, November 20, 2007.

² Pleading Cycle Established for Time Warner Telecom, Inc. Petition for Declaratory Ruling, DA 07-4908, Public Notice, WC Docket No. 06-125, December 6, 2007.

AT&T/BellSouth merger commitments,³ continue to tariff non-TDM special access services notwithstanding the *AT&T Broadband Forbearance Order*.⁴

I. AT&T'S INTERPRETATION OF THE MERGER COMMITMENTS IS TOO NARROW

In its Opposition, AT&T contends that it agreed in the special access merger commitments to various "substantive" requirements, such as not to raise prices, but that it did not commit to continue to tariff its special access offerings.⁵ As already explained in initial comments, nearly every one of the special access merger commitments provides explicitly that the special access commitments will be achieved via tariffed offerings.⁶ Although it is true that the commitments reflect "substantive" obligations on the part of AT&T, it is a figment of AT&T's imagination that *implementation, maintenance and enforcement* of those substantive obligations is envisioned in the commitments outside of tariffing.

The *272 Sunset Order* does not support AT&T's view.⁷ In that decision, the Commission stated that AT&T/BellSouth special access merger commitment 4 "continue[s] to apply as described in the merger orders, regardless of whether the in-region, interstate, long distance services are offered directly instead of through a wireline affiliate as described in the conditions."⁸ Thus, in the *272 Sunset Order* dealing with separate affiliate obligations, the

³ *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-BellSouth Order*").

⁴ *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Compute Inquiry Rules With Respect to its Broadband Services*, Memorandum Opinion and Order, WC Docket No. 06-125, released October 12, 2007.

⁵ AT&T Opposition 10.

⁶ Comments of Level 3 *et al.* 3-5.

⁷ *Section 271(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Report and Order and Memorandum Opinion and Order, FCC 07-159, released August 31, 2007 ("*272 Sunset Order*")

⁸ *272 Sunset Order* n. 292.

Commission chose not to give precedence to the special access merger commitments. Instead, it explained how the ruling in the *272 Sunset Order* would effectively interact with the pre-existing merger commitments. By stark contrast, in the *AT&T Broadband Forbearance Order*, the Commission specifically stated that "the limited ...relief granted herein does not affect in any way the full force and effect of the merger commitments adopted in the *AT&T/BellSouth Order*."⁹ In dealing with the detariffing under the *AT&T Broadband Forbearance Order*, then, the Commission explicitly noted that the relief granted would *not* modify the merger conditions, effectively deferring detariffing until the expiration of the merger commitments.

In addition, the *272 Sunset Order* concerned the sunset of the separate affiliate requirement specifically envisioned by Congress. The Commission was implementing the congressional presumption of lapse of the separate affiliate requirement. There is no comparable statutory provision concerning detariffing. Accordingly, the *272 Sunset Order* dealing with separate affiliate obligations does not provide any guidance concerning detariffing in this proceeding.

Accordingly, the Commission should reject AT&T's narrow interpretation of the special access merger commitments and its self-serving view that detariffing is permitted under them.

II. PROMISES OF DETARIFFED COMPLIANCE ARE INSUFFICIENT

AT&T proposes to detariff the services subject to the *AT&T Broadband Forbearance Order* and offer them pursuant to non-tariffed contracts in a manner that is consistent with the "substantive" obligations of the special access merger commitments.¹⁰ In case there is any doubt

⁹ *AT&T Forbearance Order* ¶ 2.

¹⁰ AT&T Opposition 2.

on this issue, it is emphatically the case that AT&T's proposed detariffed compliance is less reliable, and would substantially diminish, the original commitment to comply with the "substantive" special access obligations to which AT&T agreed. The undersigned competitive carriers have already explained that AT&T may violate the special access merger conditions by good faith errors or misinterpretations of them.¹¹ In fact, AT&T has already admitted to, and corrected, one such violation of the rate freeze.¹² Further, AT&T has a substantial record of willful and repeated violations of regulatory requirements designed to protect competition. AT&T in 2002 received the largest fine ever imposed by the Commission -- for violation of the SBC/Ameritech merger conditions¹³ -- which even so is small in comparison to the total of more than \$1 Billion in fines imposed on SBC for violation of competitively sensitive requirements.¹⁴ Therefore, there is a substantial question whether AT&T would comply with the "substantive" special access merger commitments in a detariffed environment. The safeguard of tariffing is required for the duration of the special access merger conditions.

III. AT&T WANTS TO REOPEN THE MERGER COMMITMENTS

Commitment 7 provides that AT&T will not oppose any request for mediation of the "rates, terms, and conditions *set forth in* interstate special access tariffs." (emphasis added). Under the explicit terms of this commitment, AT&T has pledged to mediate only *tariffed* rates,

¹¹ Comments of Level 3 *et al.* 6-9.

¹² Letter to Marlene H. Dortch from Jacquelyne Flemming, AT&T, WC Docket No. 05-65, filed January 2, 2008, Attachment A.

¹³ *SBC Communications, Inc.*, Apparent Liability for Forfeiture, File No. EB-01-IH-0030, Forfeiture Order, FCC 02-282, released October 9, 2002, *aff'd sub nom. SBC Communications, Inc. v. FCC*, 373 F. 3d 140 (D.C. Cir. 2004)(\$6 Million fine for violation of the shared transport condition of the SBC/Ameritech merger).

¹⁴ Joshua E. Barbach, AT&T Wireless - Cingular: Revealing a Lack of Regulatory Progress, Pipeline, May 2004 ("Across its 13-state territory, SBC has been fined more than \$1 billion by state and federal regulators for wholesale performance standards violations. The U.S. Treasury has received \$724,475 from SBC for a final total of \$85.3 million in federal fines for anti-competitive behavior since 2000."); Alex Goldman, Voices for Choices Wins Two vs. SBC, ISP-Planet, June 13, 2003 ("SBC is by far the most fined, and has managed to be fined in almost every month since January 2000").

terms, and conditions. AT&T states that detariffing will have no impact on its commitment to mediate because it will mediate rates, terms, and conditions even if not set forth in tariffs. But this is either a new proposed commitment or an unenforceable promise to comply outside of tariffing. AT&T is attempting to reopen the merger commitments and substitute a new compliance scheme that would directly undercut the earlier commitment to mediate *tariffed* terms and conditions. Similarly, with respect to the other "substantive" merger conditions, such as limits on rate increases, AT&T proposes a new compliance scheme outside of tariffing neither envisioned nor stated in the original merger commitments.¹⁵

AT&T accuses the Petitioners of filing, in effect, late filed petitions for reconsideration of the *AT&T Broadband Forbearance Order*.¹⁶ It is AT&T, however, that is seeking a new approach to mask the fact that detariffing would undercut the current legal obligation under the merger commitments to comply via tariffing. Although the Commission should promptly grant the COMPTEL and Time Warner Telecom Petitions, if the Commission were for any reason to consider AT&T's new proposed promises for detariffed compliance, the Commission should additionally offer competitive carriers the opportunity to suggest other new proposed special access commitments.

IV. THE *AT&T FORBEARANCE ORDER* TOOK EFFECT SUBJECT TO THE MERGER CONDITIONS

AT&T argues that the *AT&T Forbearance Order* unambiguously took effect on October 11, 2007 and, therefore, it cannot be the case that the Commission intended detariffing to occur

¹⁵ See, e.g., AT&T Opposition 10-11 ("Consistent with Condition 5, AT&T will not increase the rates for the covered services for the duration of the merger commitment regardless of whether the services are offered via tariffs *or through detariffed contracts*." (emphasis added))

¹⁶ AT&T Opposition 5.

at the expiration of the merger conditions in 2010.¹⁷ But that decision, as noted, provides that: "[t]he limited forbearance relief granted herein does not affect in any way the full force and effect of the merger commitments adopted in the *AT&T/BellSouth Order*."¹⁸ Therefore, the *AT&T Forbearance Order* became effective on October 11, 2007 subject to the merger conditions. The effective date of the *AT&T Forbearance Order* says nothing about when AT&T may detariff. As discussed, detariffing is governed by the AT&T/BellSouth merger commitments.

V. CONCLUSION

The Commission should promptly grant the Petitions.

Respectfully submitted,

/s/

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¹⁷ AT&T Opposition 2, 5.

¹⁸ *AT&T Forbearance Order* ¶ 2.