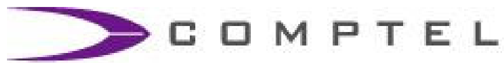

900 17th Street, NW. Suite 400. Washington, DC 20006. PH:202 296 6650. FX:202 296 7585.www.comptel

February 25, 2008

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: WC Docket No. 06-74; In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control

Dear Ms. Dortch:

Under the terms of the Federal Communication Commission's ("Commission" or "FCC") decision in the above-referenced docket approving AT&T's acquisition of BellSouth,[1] AT&T is required to file an annual certification attesting to whether it has "substantially complied" with the conditions set forth in Appendix F of the *Merger Order* "in all material respects."[2] On February 6, 2008, AT&T filed its first annual certification claiming that AT&T has substantially complied with all the conditions for the period beginning on December 29, 2006 and ending on December 29, 2007.[3] But, as COMPTEL explains below, AT&T's attestation lacks credibility unless the Commission accepts the notion that AT&T is allowed to erect roadblocks to prevent the conditions from being used by the intended beneficiaries and that AT&T can, in its discretion, re-write any condition upon realizing that compliance may be contrary to its interests.

A. Reducing Transaction Costs Associated with Interconnection Agreements

[1] *AT&T Inc. and BellSouth Corporation Application of Transfer of Control*, *Memorandum Opinion and Order*, 22 FCC Rcd 5662 (2006), ("*Merger Order*"); *Order on Reconsideration*, 22 FCC Rcd 6285 (2007), ("*Order On Reconsideration*").

[2] *Merger Order*, Appendix F.

[3] Letter of Jacquelyne Flemming, AT&T, to Marlene Dortch, Secretary, FCC, CC Docket No. 06-74, filed Feb. 6, 2008 ("Annual Compliance Certification").

AT&T agreed to a condition, which remains in effect until June 29, 2010, pursuant to which A&T is required to "permit a requesting telecommunications carrier to extend its current interconnection agreement, *regardless of whether its initial term has expired*, for a period of up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's "default" provisions."[4]

Even though this condition does not link the start date for the extension with the interconnection agreement's ("ICA") initial expiration term, AT&T tried to implement such a limitation on extension requests, even refusing to extend ICAs still in effect but where the initial expiration date was three years prior to the request. But they have been unsuccessful to date in convincing any state commission to accept this limitation.[5] AT&T has since modified its initial position, yet in a manner that is still not supported by the language of the condition and that makes it extremely difficult for interconnecting carriers to invoke this condition. Specifically, on November 16, 2007, AT&T issued what it called *Accessible Letters*, [6] in which it arbitrarily added the following time constraints to the terms of the condition:

- First, in spite of fact the condition *expressly* makes no distinction as to whether or not the initial term has expired and provides for a forty-two month effective period for the condition, AT&T's *Accessible Letters* state that for ICAs with initial expiration dates prior to January 15, 2008 an extension request had to be received prior to January 15, 2008.[7] There is absolutely no basis in the condition for this limitation.

- Second, for ICAs that have an initial expiration date on or after January 15, 2008, AT&T not only limits the extension to be from the initial expiration date, it is requiring that the extension request be received prior to the initial expiration date of the

---

[4] *Merger Order*, Appendix F.

[5] *See, e.g., Order of the Kentucky Public Service Commission*, Petition of Sprint Communications Company L.P. et al. For Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast, Case No. 2007-00180 (Sept. 18, 2007).

[6] *See* AT&T Accessible Letters, CLECLL07-086 and CLECSE07-055, dated Nov. 16, 2007 ("Accessible Letters").

[7] *Accessible Letters* at 2.

ICA.[8] Again, this is contrary to the specific language of the condition that extension requests may be made "…regardless of the whether [the ICA's] initial term has expired…"

- Third, AT&T will not accept extension requests for ICAs with expiration dates after June 29, 2010, even if the request is made prior to June 29, 2010.[9] In accordance with the merger condition, a request made prior to June 29, 2010 must be honored "…regardless of whether [the ICA's] initial term has expired…" Thus, AT&T's refusal to accept extension requests within this time period, regardless of whether the ICA's initial term has yet to expire, is at odds with the specific language of the condition.

Moreover, to the extent AT&T is willing to accept an ICA extension request, carriers continue to face problems with AT&T under this merger condition. The merger condition allows AT&T to require that the ICA be amended to reflect prior changes in law, but AT&T uses this provision to make the whole process more onerous. For instance, COMPTEL understands that when RCN recently requested an ICA extension in Illinois, AT&T provided its extensive 13-state Intercarrier Compensation Appendices to RCN,[10] supposedly to implement the FCC's *ISP Compensation Order,*[11] rather than propose an amendment that simply seeks to implement the relevant changes in law for RCN's Illinois operations. While this condition is designed to reduce transaction costs, AT&T's conduct increases transaction costs by imposing on carriers the burden of reviewing and negotiating extensive provisions that are not justified by the terms of the merger condition.

The Commission has also required AT&T to reduce the transaction costs associated with interconnection agreements by "… mak[ing] available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated, that an

---

[8] *Id.*

[9] *Id.*

[10] The Appendices AT&T provided RCN are posted on AT&T's website under its 13-State Generic Interconnection Agreement. *See https://clec.att.com/clec/shell.cfm?section=115.*

[11] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers --Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98,99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("ISP Compensation Order"),remanded, WorldCom, Inc. v. FCC, 288 F3d 429 (D.C. Cir. 2002).*

AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which request is made."[12]

Despite the clear language set forth in this merger condition, AT&T has been conducting a campaign designed to thwart, and even prevent, carriers' attempts to adopt and port an ICA from one state to another. For instance, when Sprint Nextel sought to adopt the BellSouth ICA and port it to Ohio, AT&T refused, forcing Sprint Nextel to file a complaint with the Ohio Public Utilities Commission. In a decision issued earlier this month, the Public Utilities Commission of Ohio rejected AT&T's spurious arguments as to why Sprint Nextel should not be allowed to avail itself of the porting condition in the *Merger Order* and concluded that AT&T had to allow Sprint Nextel to port to Ohio the BellSouth ICA, subject to state-specific modifications.[13] Still unwilling to comply, in yet a further attempt to evade its commitments, AT&T has filed a petition with the FCC to seek an interpretation that would eliminate the effectiveness of the condition.[14]

B. Special Access and Forbearance

Virtually all of the Special Access merger conditions reference AT&T tariff filings and/or pricing flexibility contracts.[15] Thus, AT&T cannot comply

---

[12] Merger Order, Appendix F.

[13] *In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp., and NPCR, Inc. v. The Ohio Bell Telephone*, Before The Public Utilities Commission of Ohio, Case No. 07-1136-TP-CSS, FINDING AND ORDER (Feb. 5, 2008). Currently Sprint Nextel has ongoing actions in 12 other former SBC states and in the 9 former BellSouth states challenging AT&T's refusal to follow the porting conditions in the *Merger Order*.

[14] Even if the FCC does not issue a decision on the petition, AT&T has used the fact that there is petition on file with the FCC to request that the state Commissions in its region defer taking any further action until the Commission rules on AT&T's Petition.

[15] The following are examples of the special access conditions to which AT&T agreed: "No AT&T/BellSouth ILEC may increase the rates in its *interstate tariffs*…AT&T/BellSouth will not oppose any request…for mediation…relating to AT&T/BellSouth's compliance with the rates, terms, and conditions set forth in *its interstate special access tariffs and pricing flexibility contracts*…The AT&T/ILECs will not include *in any pricing flexibility contract or*

with the conditions as written without the relevant tariffs. Furthermore, the Forbearance condition states: "AT&T/BellSouth 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 commitments during the period in which those obligations are in effect."[16] Detariffing clearly diminishes AT&T's obligation and responsibilities under the special access merger conditions.

Nevertheless, effective February 8, 2008, AT&T withdrew its tariffs for certain broadband transmissions that were subject to the Special Access merger conditions.[17] Instead of complying with the conditions to which it agreed – which undeniably contemplate tariffs - AT&T claims that it will now comply with the pricing, dispute resolution, and access service ratio aspects of the condition through non-tariff agreements.

AT&T agreed to these merger conditions knowing that it had a pending forbearance petition that had the potential of eliminating its tariff obligations for certain special access services. AT&T could have proposed, and the Commission could have adopted, language that would accommodate detariffing. That was not the case. AT&T should therefore be required abide by with the terms of the conditions as written and relied on by the public.

AT&T clearly is attempting to avoid its obligations under the conditions, whether through interpretations which ignore the letter of the conditions or through delay tactics. The Commission must ensure that AT&T does continue to brazenly violate its merger conditions. The Commission must not permit AT&T to re-write the merger commitments to which AT&T agreed and compliance with which the Commission conditioned its approval of the merger. Companies, Commissioners, other agencies, and the public in general, rely on conditions *as written* in developing business practices and making decisions in subsequent proceedings. If the Commission allows AT&T to disregard or re-write its merger commitment it jeopardizes the integrity of the merger approval process and subsequent Commission orders.

Respectfully,

---

tariff filed…access service ratio terms which limit the extent to which customers may obtain transmission services as UNEs…" *Merger Order,* Appendix F (emphasis added).

[16] *Id.*

[17] *See* Transmittal Nos. 1666, 1121, 176, 385, 965, and 3251.

/s/ Karen Reidy
Karen Reidy
Vice President, Regulatory Affairs