Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of BellSouth Telecommunications, Inc. Revisions to Tariff FCC No. 1	Transmittal No. 1114

OPPOSITION TO COMPTEL'S MOTION TO ACCEPT LATE-FILED PETITION AND REPLY TO COMPTEL'S PETITION TO REJECT AT&T'S TRANSMITTAL NO. 1114

Pursuant to 47 C.F.R. § 1.773(b), AT&T Inc. ("AT&T") respectfully submits this Opposition to COMPTEL's Motion to Accept Late-Filed Petition and Reply to COMPTEL's Petition to Reject AT&T's Transmittal No. 1114.

INTRODUCTION AND SUMMARY

On October 31, 2007, AT&T filed Transmittal No. 1114 seeking to withdraw the BellSouth Transport Advantage Plan ("TAP") – an overlay special access discount plan originally filed by BellSouth Telecommunications, Inc. ("BellSouth") – on 15 days notice.[1] Under the Commission's rules, any petitions opposing or seeking to suspend and investigate AT&T's transmittal were due seven days later – i.e., by November 7, 2007. No such petitions were filed by that date, meaning that AT&T's transmittal should be deemed lawful by operation of law on November 15, 2007.

Nevertheless, on the afternoon of November 13, 2007 – close to a week after petitions were due, and just two days before the transmittal takes effect – COMPTEL and CompSouth

[1] *See* Letter from Patrick Doherty, Director – Access Regulatory Affairs, AT&T, Inc. to Marlene H. Dortch, Transmittal No. 1114 (Oct. 31, 2007) ("*Transmittal Letter*").

(collectively, "COMPTEL") filed a petition seeking to reject (or suspend and investigate) AT&T's transmittal, along with a motion to accept the late-filed petition. Remarkably, however, COMPTEL's cursory motion offers no justification whatsoever for its untimely filing, other than its assertion that it recently "discover[ed]" AT&T's transmittal. That bare assertion does not come close to establishing good cause sufficient to excuse COMPTEL's noncompliance with the Commission's rules. Indeed, acceptance of COMPTEL's untimely petition would be particularly unwarranted here, where COMPTEL not only filed two days prior to the effective date of the transmittal, but also failed to serve the contact identified on AT&T's transmittal and then failed to notify AT&T's D.C. office until approximately 3:20 p.m. on the day it filed – about 20 minutes before notifying the press. Those facts evidence either an extreme lack of diligence or a deliberate effort to prejudice AT&T's ability to respond – or, more likely, both. Either way, the Commission should reject COMPTEL's motion to accept its late-filed petition.

Even were the Commission to reach the merits of COMPTEL's petition, COMPTEL's objection to AT&T's transmittal is unavailing. COMPTEL's only claim is that the transmittal violates AT&T's merger commitment to not increase rates in existing special access tariffs. But AT&T's transmittal does not increase rates; rather, it *withdraws* (subject to substantial grandfathering protections) a tariff. Nothing in the text or history of the AT&T/BellSouth merger conditions (or the Commission's order approving the merger) suggests that the Commission intended to bar AT&T from *withdrawing* any tariff for the duration of the merger conditions. Furthermore, the premise of COMPTEL's objection – that withdrawing TAP would necessarily result in an increase in customers' rates – is unsupported. AT&T has numerous pricing flexibility contract tariffs for special access services in the BellSouth region, and it stands ready, willing, and able to negotiate new arrangements with its customers. Indeed, AT&T

believes pricing flexibility contracts can better meet both customers' and providers' needs than can generic discount tariffs, such as TAP. Contrary to COMPTEL's baseless speculation, AT&T's withdrawal of the TAP special access tariff thus in no way means that AT&T's customers will necessarily pay higher rates.

ARGUMENT

I. COMPTEL HAS FAILED TO ESTABLISH GOOD CAUSE FOR ACCEPTING ITS LATE-FILED PETITION

COMPTEL's petition should be dismissed first and foremost because it is untimely. As explained above, AT&T filed its transmittal on October 31, 2007, on 15-days' notice as authorized by 47 U.S.C. § 204(a)(3) and 47 C.F.R. § 61.58. Under the Commission's rules governing streamlined tariff transmittals, any petition opposing AT&T's transmittal was due within 7 days of AT&T's filing – i.e., by November 7, 2007. *See* 47 C.F.R. § 1.773(a)(2)(iii). COMPTEL did not file its petition until November 13, nearly one week late and only 2 calendar days prior to the effective date of AT&T's transmittal. Under a straightforward application of the Commission's rules, COMPTEL's petition should be dismissed as untimely.

That is especially so, moreover, because COMPTEL has pointed to no good cause for its delay in opposing AT&T's transmittal. COMPTEL asserts (Mot. at 1) that it "did not discover" AT&T's transmittal until November 9. But that assertion begs the question: *why* did COMPTEL fail to discover the transmittal on a timely basis? COMPTEL's utter failure to address that question supports the inference that the obvious answer – COMPTEL's own lack of diligence – is the accurate one.[2] In any case, COMPTEL'S failure to provide any cause, much

[2] *See United States v. Johnson*, 288 F.2d 40, 45 (5th Cir. 1961) ("The failure of a part[y] to produce relevant and important evidence within its peculiar control raises the presumption that if produced the evidence would be unfavorable to its cause."); *United States v. Wilson*, 322 F.3d 353, 363 (5th Cir. 2003) ("a party's failure to . . . produce evidence that would clarify or explain

less good cause, for its alleged lack of awareness of AT&T's transmittal renders its effort to excuse its lack of timeliness insufficient on its face.[3] Consistent with uniform precedent on this issue, the Bureau should thus reject COMPTEL's petition as untimely.[4]

Indeed, adherence to the Commission's time limits is particularly important here, in the context of streamlined tariff revisions, as noncompliance with those limits undermines Congress's objectives in streamlining the tariff process. As the Bureau has stressed, "[i]n light of the foreshortened comment periods required under the tariff streamlining provisions of the Telecommunications Act of 1996, it is important for parties to file timely petitions in order for the Commission to consider effectively all relevant issues."[5] COMPTEL's 11th hour filing – again, a mere two days before AT&T's transmittal takes effect – plainly deprives the

---

disputed factual issues can give rise to a presumption that the evidence, if produced, would be unfavorable to that party").

[3] *Cf. United States v. Long*, 905 F.2d 1572, 1575, 284 n.4 (D.C. Cir. 1990) (where party "proffered no excuse for her delay," court could not begin to decide if failure to comply with time limits of Federal Rules of Appellate Procedure constituted "excusable neglect").

[4] *See* Order, *Alascom, Inc., Interstate Transport and Switching Services*, 13 FCC Rcd 187, ¶ 14 (CCB 1997) ("*Alascom Tariff Order*") (rejecting motion to file petition opposing transmittal late because the "petition was late" and the party did not point to "good cause to accept [the] late-filed petition"); Order, *Investigation of Alascom, Inc.*, 16 FCC Rcd 19, ¶ 2 n.3 (CCB 2000) (rejecting petitions opposing transmittal as untimely where petitioners failed to "explain satisfactorily their inability to file their petitions in a timely manner"); Order, *NYNEX Telephone Cos., Revisions to Tariff F.C.C. No. 1*, 9 FCC Rcd 7832, ¶ 3 n.1 (CCB 1994) (good cause for late-filed petition opposing tariff transmittal was not established by the fact that an "intervening Thanksgiving Holiday" prevented the party's personnel from "complet[ing] review of the transmittal"); *see also National Science & Technology Network, Inc. v. FCC*, 397 F.3d 1013, 1014-15 (D.C. Cir. 2005) (affirming Commission refusal to consider untimely request where party did not "offer[] [a] valid excuse" for noncompliance with time limit; "[a]s the saying goes, 'rules is rules'").

[5] Memorandum Opinion and Order, *Petition of Southwestern Bell Telephone Co. under Section 69.4(G)(1)(II) of the Commission's Rules for Establishment of New Service Rate Elements*, 13 FCC Rcd 5274, ¶ 10 (CCB 1998); *see id.* (rejecting late filed petition despite arguments that carrier had "adequate to time to respond to [the] late petition," "that good cause exists . . . in light of the particular significance of the transmittal in question," "that a clerical error" caused the late filing, and that a "crunch" of related matters before the Commission contributed to the late filing).

Commission of the opportunity to "consider effectively" the issues at stake and thus compromises the streamlined tariff provisions established by Congress for the express purpose of "[s]peed[ing] up FCC action" on tariff transmittals.[6] The filing should be rejected out of hand.

Beyond all of that, COMPTEL's delay in filing and serving its motion and petition, even *after* its belated "discovery" of AT&T's transmittal, independently undermines its request to be excused from the Commission's time limits. By its own admission (Mot. at 1), COMPTEL learned of AT&T's transmittal on Friday, November 9. Yet COMPTEL not only waited until the following week to file its motion and petition, but did not serve copies of those filings on AT&T until approximately 2:30 PM, when it faxed copies of them to AT&T's Dallas office. COMPTEL waited to notify AT&T's Washington, D.C. office of its filing until 3:20 p.m., apparently only minutes before COMPTEL notified the press.[7] COMPTEL's conduct – which at best represents a lack of diligence, and at worst an effort to prejudice AT&T's ability to respond to COMPTEL's petition – undermines any equitable basis for excusing COMPTEL from the rules.[8]

Finally, COMPTEL claims (Mot. at 2) that AT&T will suffer no harm if COMPTEL's petition is accepted late. This claim is both irrelevant and incorrect. The question here is not whether AT&T is prejudiced, but rather is whether COMPTEL has carried its burden of establishing good cause for its noncompliance with the Commission's rules. For the reasons set

[6] 141 Cong. Rec. S7898 (daily ed. June 7, 1995) (summary of "deregulation" measures by Sen. Dole, who sponsored the 7- and 15-day notice provisions).

[7] *See* Ted Gotsch, *CLEC Groups Ask Commission To Deny AT&T Tariff Filing*, TR Daily (Nov. 14, 2007).

[8] *Cf., e.g., McDaniel v. United States Dist. Court*, 127 F.3d 886, 889 (9th Cir. 1997) ("[u]nreasonable delay" weighs against entitlement to emergency relief).

out above, it has not. As the Bureau has previously recognized, the question of prejudice is therefore beside the point.[9]

In any case, COMPTEL's lack of diligence plainly prejudices AT&T, insofar as it forced AT&T to respond to COMPTEL's petition in a highly compressed time period. Indeed, in this very context, the Commission rejected a proposal that would have required replies in support of streamlined tariff transmittals to be due "on the calendar day following service of the petition," reasoning that such a compressed timeline would "unreasonably abbreviate the amount of time within which to submit filings."[10] So too here. By filing close to a week after petitions were due and only two days prior to the effective date of the transmittal, COMPTEL has "unreasonably abbreviate[d]" AT&T's ability to reply. The suggestion that AT&T is not prejudiced by that conduct is simply incorrect.

II. COMPTEL'S PETITION SHOULD BE REJECTED ON THE MERITS

Apart from COMPTEL's failure to comply with the Commission's rules, its petition to deny (or suspend and investigate) AT&T's transmittal fails on the merits. COMPTEL's only claim as to the lawfulness of AT&T's tariff transmittal is that it is in conflict with AT&T's commitment, made in connection with the AT&T/BellSouth merger, not to increase interstate tariffed special access rates for the duration of the merger commitments. The text, purpose, and history of that commitment belies COMPTEL's claim.

---

[9] *See, e.g.*, *Alascom Tariff Order* ¶¶ 11, 14 (rejecting argument that "acceptance of [a] petition would not impose any additional burdens or otherwise prejudice" party filing transmittal where there was no good cause shown for a late-filed petition).

[10] *See* Report and Order, *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, ¶ 78 (1997).

First, nothing in the text of the merger commitment suggests that AT&T agreed to maintain all existing interstate special access tariffs for the duration of the merger commitments. The commitment in question provides:

> No AT&T/BellSouth ILEC may *increase the rates* in its interstate tariffs, including contract tariffs, for special access services that it provides in the AT&T/BellSouth in-region territory, as set forth in tariffs on file at the Commission on the Merger Closing Date, and as set forth in tariffs amended subsequently in order to comply with the provisions of these commitments.[11]

By its terms, that commitment provides that AT&T will not *increase any rates* that are set forth "in [a] tariff[]"; the commitment does *not* say that AT&T will *maintain all* existing tariffs on file for the duration of the merger conditions. By withdrawing TAP, subject to the grandfathering provisions, AT&T is not "increas[ing] the rates in [an] interstate tariff[]." After AT&T withdraws TAP, all of the rates in AT&T's special access tariffs will remain the same.[12]

---

[11] *See* Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, FCC 06-189, WC Docket No. 06-74, appendix F, at 151 (FCC rel. 2007) ("*AT&T/BellSouth Merger Order*").

[12] Furthermore, nothing in *AT&T/BellSouth Merger Order* itself or in the history leading to the adoption of the merger commitments supports COMPTEL's reading. On the contrary, in commenting on the proposed merger commitments, COMPTEL and its allies, far from insisting upon a right to sign up for new volume and term commitments (such as those contained in TAP), asked the Commission to provide customers the right to *walk away* from existing volume and term commitments. *See*, *e.g.*, Letter from Jonathan Lee, General Counsel for COMPTEL, to Marlene H. Dortch, Secretary, FCC, Ex Parte, WC Docket No. 06-74, at 2 (Dec. 26, 2006) (calling upon the Commission to "eliminat[e] anticompetitive term and volume 'bundled discount' contracts," which, according to COMPTEL, raised costs for customers that use competitive access providers); Letter from Karen Reidy, COMPTEL, *et al.*, to Marlene H. Dortch, FCC, Ex Parte, WC Docket No. 06-74, at 4, 8 (Sept. 22, 2006) (proposing "fresh look" condition – under which "any special access service customer of the Merged Firm that is bound by an existing contract or tariff" can "terminate such arrangement without the application of early termination penalties of any kind" – in order to avoid "special access service customers" being "locked into the existing agreements after the merger"). The Commission rejected that request. Having failed to secure a right for customers to abrogate existing term and volume discount provisions in the combined company's special access tariffs, COMPTEL should not now be heard to suggest that it fought for (and won) an opposite condition under which AT&T is

AT&T's reading of the commitment is confirmed by the fact that, where the Commission intended through the merger conditions to require the merged company to maintain the availability of existing offerings, it said so expressly. In UNE commitment one, for example, the Commission required that AT&T would not "seek any increase in state-approved rates for UNEs" *and* that AT&T would "*continue to offer*" such rates "that are in effect as of the Merger Closing date."[13] Similarly, in interconnection agreement commitment five, the Commission ordered that AT&T "shall 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."[14] The absence of any comparable language in the special access commitment at issue here confirms that no comparable obligation – i.e., an obligation to continue to offer all existing interstate special access tariffs for the duration of the merger commitments – was intended.[15]

Indeed, the fact of the matter is that AT&T has *already* withdrawn a comparable tariff in the wake of the AT&T/BellSouth merger, without any suggestion from COMPTEL or anyone else that doing so violated its merger commitments. On July 27, 2007, AT&T submitted Transmittal No. 1636, pursuant to which AT&T proposed withdrawing the Managed Value Plan ("MVP"), which was a discount special access tariff in the legacy SBC region similar in all

---

bound to continue offering all existing term and volume discount tariffs for the duration of the merger commitments.

[13] *Id.*, appendix F, at 149 (emphasis added).

[14] *Id.* appendix F, at 150 (emphasis added).

[15] *Cf. Keene Corp. v. United States*, 508 U.S. 200 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

important respects to TAP. That transmittal met no objection and by operation of law was deemed lawful 15 days later.

Finally, even if it were relevant to the Bureau's analysis (and it is not), COMPTEL is wrong to assert (Pet. at 3) that "[t]here is no question that [AT&T's transmittal] will result in customers paying increased rates for special access services." Pursuant to AT&T's transmittal, existing TAP customers will be grandfathered for the duration of their existing term.[16] And virtually all of AT&T's term customers that are not existing TAP subscribers either could not qualify for TAP or have elected to pursue one of AT&T's other special access pricing options. Of course, even if that were not the case, AT&T stands ready, willing, and able to negotiate pricing flexibility arrangements with its customers, and AT&T believes that such one-on-one business negotiations can result in arrangements that can better meet both customers' and providers' needs than can generic discount tariffs, such as TAP. Hence, the unavailability of TAP to new customers in the BellSouth region does not, as COMPTEL asserts without support, mean that customers will necessarily pay more for special access.

CONCLUSION

For the foregoing reasons, the Bureau should reject COMPTEL's Motion to Accept Late-Filed Petition. Alternatively, the Bureau should deny COMPTEL's Petition to Reject, or in the Alternative, Suspend and Investigate, AT&T's Transmittal No. 1114.

Respectfully submitted,

/s/ Davida Grant

Davida Grant
Gary Phillips
Paul K. Mancini

[16] *See Transmittal Letter* at 1.

AT&T Inc.
1120 20th Street NW
Suite 1000
Washington, D.C. 20036
(202) 457-3045 – phone
(202) 457-3073 – facsimile

November 14, 2007