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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, SW, Room 204
Washington, DC 20554

Attn: David Krech, Esq.
International Bureau.

Re: Bell Canada Petition for Declaratory Ruling,
IB Docket No. 98-148, Public Notice DA 99-2981

Dear Ms. Salas:

AT&T Corp. ("AT&T") is pleased to comment as follows on the letter filed by Bell Canada in support of the above-referenced petition on September 1, 2000.[1]

As AT&T has shown, Bell Canada should remain subject to the dominant carrier and No Special Concessions rules because it controls virtually the entire local access market in six Canadian provinces -- covering more than two-thirds of the Canadian population -- and thus unquestionably possesses market power at the foreign end of the U.S.-Canada route. Bell Canada also has a substantial share of the Canadian international and long-distance market, including at least 65 percent of the international and long-distance calls originating in its local franchise areas (even before its pending acquisition of TeleGlobe, which would make it by far the largest international carrier in Canada).[2]

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[1] Letter dated Sept. 1, 2000 to Magalie Roman Salas, Secretary, Federal Communications Commission, from Gregory C. Staple ("*Bell Canada Letter*").

[2] Letter dated Mar. 3, 2000 to Magalie Roman Salas, Secretary, Federal Communications Commission, from James J.R. Talbot ("*AT&T Letter*").

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Bell Canada now concedes its dominance of the relevant local access markets in Canada, and instead attempts to deflect attention to U.S. market data, which are entirely irrelevant to this proceeding, and to dismiss the significance of the dominant carrier and No Special Concessions rules it wishes to have removed. As the Commission made clear last year in the *ISP Reform Order*, continued anticompetitive safeguards are necessary to prevent the abuse of foreign market power on routes like the U.S.-Canada route where the International Settlements Policy is removed. This is because carriers like Bell Canada with market power at the foreign end of these routes may still harm U.S. competition by discriminating among unaffiliated U.S. carriers or in favor of their own U.S. affiliates.

Equally unfounded is Bell Canada's claim that Canadian regulation will prevent anticompetitive abuse -- a claim shown to be false by the inadequate safeguards described in AT&T's prior filings and by the continuing USTR concerns about Canada's failure to reform its anticompetitive universal service contribution system, which requires competitive carriers to provide a huge and growing subsidy to Bell Canada and the other incumbent local providers. These problems further demonstrate that U.S. carriers should not be dependent on Canadian regulation to ensure nondiscriminatory treatment in their arrangements with Bell Canada, and that the Commission should continue to apply the No Special Concessions and dominant carrier rules.

For these reasons, Bell Canada's petition should be dismissed, and Bell Canada and its U.S. affiliates should continue to be treated as dominant under Commission rules.

1. Bell Canada's Local Access Bottleneck Requires Continued Safeguards on the U.S.-Canada Route.

While Bell Canada accuses AT&T of seeking to "cloud the legal standard by focusing on irrelevant issues regarding Bell Canada's share of the market for international and domestic long distance as well as local exchange services" (*Bell Canada Letter* at 1), its own prior filings in this proceeding are largely devoted to market share issues, including the claim that "its market share in the local markets it serves in Canada does not enable it to adversely affect competition in the United States." (Bell Canada Petition at 4.) That claim by Bell Canada was founded on the erroneous assertion that "the relevant market share to examine is Bell Canada's share of the national market in Canada, not just certain Canadian provinces." (Bell Canada Reply at 4.)

Tellingly, Bell Canada now offers no rebuttal to AT&T's showing (*AT&T Letter* at 3-4) that the relevant market for the assessment of market power over local access under Commission precedent is clearly Bell Canada's local franchise area covering more than two-thirds of the Canadian population -- where Bell Canada controls more than 95 percent of local access facilities. Bell Canada's dominant market share of local access facilities in these areas -- including two provinces, Ontario and Quebec, that alone generate more than 60 percent of Canada's international traffic -- precludes any finding here that it lacks market power in all relevant markets on the foreign end of the U.S.-Canada route.[3] Therefore, continued application of the dominant carrier and No Special Concessions rules is necessary to prevent Bell Canada from harming unaffiliated U.S. carriers by leveraging this extensive local bottleneck.

2. U.S. Market Data Fail to Show that Bell Canada Lacks Market Power.

While conceding that the relevant concern here is Bell Canada's potential ability through its control of local bottlenecks in Canada to "increase[e] its rivals' costs or restrict[] its rivals' output through the control of an input that is necessary for the provision of services" (*Bell Canada Letter* at 2), Bell Canada nonetheless contends that AT&T's U.S.-Canada market share and U.S. retail prices somehow demonstrate that Bell Canada cannot harm competition on the U.S.-Canada route. (*Id.* at 5-6.) However, the situation today, under which the No Special Concessions requirement applies to U.S. carrier arrangements with Bell Canada and U.S. affiliates of Bell Canada are subject to the dominant carrier rules, provides no evidence concerning how any removal of these Commission safeguards (or the failure to impose these safeguards on TeleGlobe following consummation of its pending acquisition by Bell Canada) would affect competition on this route.[4] Present U.S. market shares and prices have no bearing on the key issue here, which is Bell Canada's overwhelming market power at the foreign end of the U.S.-Canada route, which allows Bell Canada to engage in anticompetitive conduct by discriminating among U.S. carriers, and accordingly requires continued safeguards.

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3 Bell Canada also offers no rebuttal to AT&T's showing that Bell Canada's share of the domestic long-distance and international calls originating its franchise areas is in excess of 65 percent (65 percent in Ontario and Quebec and 86 percent in the four Atlantic provinces). *AT&T Letter* at 2.

4 Indeed, under Bell Canada's argument that "dominant" classification is somehow unnecessary where U.S. carriers have high market shares and market share of the relevant foreign carrier is "negligible," no new entrant foreign dominant carrier would ever be subject to dominant carrier rules -- which is clearly contrary to the Commission's decision that dominant carrier classification is required because of the foreign carrier's "market power on the foreign end of a U.S. international route" (*Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23,891, 23,988 (1997) ("*Foreign Participation Order*"), to prevent such carriers "from seeking to leverage their market power into the U.S. market." (*Id.* at 23,998.)

3. Bell Canada Should Remain Subject to Dominant Carrier and No Special Concessions Rules.

Equally misplaced is Bell Canada's attempt to dismiss the significance of the dominant carrier and No Special Concessions rules it wishes to have removed (and not imposed on TeleGlobe). Bell Canada now contends that dominant carrier rules have "limited regulatory purpose" on this route because "most competitors already self-correspond" and "may terminate traffic locally." (*Bell Canada Letter* at 2.) In fact, AT&T's affiliate, Concert Global Network Services Limited ("Concert"), and other U.S. carriers continue to have international traffic arrangements with Bell Canada.[5] This new argument by Bell Canada that U.S. carriers purportedly lack sufficient arrangements with Bell Canada to require continued safeguards is not only incorrect but is also at variance with the position taken in its petition (pp. 2-3) and reply comments (p. 3) that it should be removed from the dominant carrier list with the alleged "sole" purpose and effect of ensuring that U.S. carriers would not need to "file their contracts with Bell Canada." Further, even where U.S. carriers correspond with other Canadian carriers, virtually all traffic destined for Bell Canada's franchise areas must ultimately terminate on Bell Canada's local access bottleneck.[6]

In fact, the Commission has made clear that the removal of the International Settlements Policy on a route does not remove the need for continued anticompetitive safeguards to prevent the abuse of foreign market power. It found only last year that "there is still a risk of anticompetitive conduct for arrangements with foreign carriers that possess market power, even where we no longer apply the ISP." (*1998 Biennial Regulatory Review, Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket No. 98-148, Report and Order and Order on Reconsideration (rel. May 6, 1999), DA 99-73 ("*ISP Reform Order*"), ¶ 86.) This is because "[e]ven on routes where we remove the ISP, foreign carriers may retain significant market power that could enable them to discriminate among U.S. carriers."[7] That is indisputably the case here, because of Bell Canada's continuing ubiquitous control of the local access bottleneck in its franchise areas. Therefore, non-pricing matters like "interconnection terms, private line provisioning, quality of service and the like" remain subject to the No Special Concessions rule where the ISP

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5 Concert assumed responsibility for these arrangements from it parent, AT&T, upon formation of the Concert enterprise with British Telecom plc in Janauary 2000.

6 Further, no U.S. carrier may "self-correspond" on this route with a wholly-owned or even a majority-controlled Canadian affiliate, because continuing Canadian foreign ownership restrictions permit U.S. carriers to own only minority shares of Canadian facilities-based carriers.

7 *Id.*

is removed, because discriminatory conduct regarding these matters "can undermine competition significantly."[8]

Similarly mistaken is Bell Canada's claim that the dominant carrier rules were "largely designed" for settlements traffic (*Bell Canada Letter* at 2). In fact, these safeguards apply to all basic services termination arrangements with Bell Canada, including non-ISP arrangements, for the reasons described above. They require, among other things, disclosure of "the provisioning and maintenance of all basic network services and facilities" provided to Bell Canada's U.S. affiliates to prevent the "degrad[ing of] unaffiliated U.S. carriers' quality of service." (*Foreign Participation Order*, 12 FCC Rcd. at 24,016.)

Significantly, not only have the various Canadian regulatory provisions relied upon by Bell Canada (*see Bell Canada Letter* at 2) failed to reduce Bell Canada's market power at the foreign end of the U.S.-Canada route, but there has been no showing that that these Canadian provisions even address the discriminatory conduct that is the subject of the Commission's No Special Concessions and dominant carrier rules. In any event, as shown by the failure of Canadian regulation to ensure fair competition between Bell Canada and its domestic competitors, U.S. carriers should not be dependent on Canadian regulation alone to ensure nondiscriminatory treatment in their arrangements with Bell Canada.

4. Canada's Anticompetitive Universal Service Contribution System – the Subject of Continuing USTR Concern – Demonstrates That Canadian Regulation Fails to Prevent Anticompetitive Conduct.

As AT&T has described (*AT&T Letter* at 5-7), Canadian regulation has notably failed to provide a level playing field for competitive carriers in Canada, and there is no basis to Bell Canada's argument that it lacks market power merely by virtue of this regulation. (*Bell Canada Letter* at 3.) AT&T has shown, without rebuttal by Bell Canada, that Canada does not require that Bell Canada and other incumbent local carriers provide domestic long-distance and other competitive services through separate affiliates (*AT&T Letter* at 5), does not have effective accounting safeguards against cross-subsidization because it has no requirement for public disclosure of the allocation of costs (*id.* at n.8), and has no requirement for the filing or cost-justification of international and long-distance rates (*id.* at 6). Nor do local service price-caps remove cross-subsidization incentives, notwithstanding Bell Canada's assertions to the contrary (*Bell Canada Letter* at 5), because they do not cover all local services, such as optional services, on which Bell Canada earns large

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8 *Id.* Nor is it relevant that there may have been no prior allegations concerning such misconduct by Bell Canada, as Bell Canada contends (*Bell Canada Letter* at 9), since past compliance with existing Commission safeguards permits no inference concerning how Bell Canada might behave in the future following any removal of these safeguards and consummation of its pending acquisition of TeleGlobe.

margins, and do not prevent subsidization through, among other things, overly burdensome universal service contributions.

Significantly, while seeking to divert attention to irrelevant U.S. market share data, Bell Canada contests none of the facts put forward by AT&T (*AT&T Letter* at 6-7) showing that that competitive realities in Canada are quite unlike the pro-competitive environment Bell Canada has sought to portray in this proceeding, with Bell Canada and the other vertically integrated local carriers in Canada increasingly profitable, notwithstanding their low domestic long-distance prices and their competitors' losses, and increasing their long-distance market share, while AT&T Canada has exited the residential long-distance business altogether.

Canada's universal service contribution system, which is the subject of continuing review this year by the Office of the U.S. Trade Representative ("USTR") under Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 because of its "anticompetitive aspects,"[9] is a prime example of the absence of fair competition in Canada. Indeed, rather than demonstrating the existence of "a comprehensive and effective regulatory regime," as contended here by Bell Canada (*Bell Canada Letter* at 3), Canada's universal service contribution system shows the exact opposite. Not only does it provide a huge and increasing subsidy to Bell Canada and the other incumbent local carriers, but Canada has failed to remedy matters, despite the concerns expressed in April this year by USTR to the Canadian Government about the need for reform.

The CRTC stated in 1997 that the "level of contribution should be set to ensure that residence rates in high cost areas continue to permit universality of access, while minimizing distortion of the competitive market."[10] However, Canada's present contribution regime requires competitive carriers to make payments far in excess of this level. For Bell Canada and other incumbent local carriers, Canada's universal service system simply requires the transfer of funds from one part of their operations to the other without any bottom line impact. Competitive long-distance carriers, however, are required to pay an increasing subsidy to Bell Canada and other incumbent local carriers with insufficient safeguards to prevent its use for anticompetitive cross-subsidization. Also, because the subsidy is levied on long-distance calls on a per minute basis, is unlimited in total amount, and has a disproportionately adverse impact on competitive long-distance carriers, which receive virtually no subsidy payments, it encourages Bell Canada and other incumbent local carriers to engage in anticompetitive pricing to stimulate increased subsidy payments to themselves and to reduce their long-distance competitors' margins.

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9 USTR Press Release dated Oct. 2, 2000, *Canada and Peru: USTR Notes Progress on Telecommunications Issues, But Remains Concerned About Pace of Implementation.*

10 CRTC, *Local Competition*, Telecom Decision 97-8, May 1, 1997, ¶ 155.

As the result of the CRTC's 1997 decision to freeze per minute contribution rates for the period 1998-2001 without any adjustment for the subsequent growth in contribution eligible minutes since the introduction of flat-rate long-distance pricing plans in mid-1998,[11] AT&T Canada forecasts excess contribution revenues for the incumbent local carriers during the 1998-2001 rate freeze period of $CAN 730 million above the $2.6 billion contribution requirement. (The CRTC itself estimates excess contribution revenue of $CAN 540 million for the 1999-2001 period.) At the same time, the incumbent local carriers have not experienced reductions in the so-called "implicit" universal service subsidies they obtain from profits on optional local services like caller ID and call waiting as the result of competition in local services. Contrary to the expectation of the CRTC, reductions in these implicit subsidies have not materialized because there is relatively little local service competition in Canada.

The growth in contribution eligible minutes stimulated by lower long-distance prices has a much greater adverse impact on competitive carriers, for whom the growth in fixed amount per minute contribution payments generated by lower-priced long-distance minutes is not matched by growth in long-distance revenue and thus increases their costs. In contrast, Bell Canada and other incumbent local carriers experience no negative impact on their profitability, because virtually each new dollar of contribution payment incurred by their long-distance services is simply an additional dollar earned by their local services. Therefore, the structure of the contribution regime, together with Canada's ineffective regulation of anticompetitive practices by Bell Canada and other incumbent local carriers, creates an incentive for Bell Canada and other incumbent local carriers to price long-distance services below cost, thus stimulating additional traffic and further widening the profitability gap with their competitors.

Because of these problems, USTR found earlier this year in its annual Section 1377 review that Canada's contribution program presents "potential anticompetitive risks."[12] Ambassador Barshevsky accordingly urged Canada "to take steps to administer this program in a manner that is more transparent, non-discriminatory and competitively-neutral, and to ensure that integrated local/long distance providers do not benefit from unfair subsidies," and established an October 2 deadline for further review.[13] Following completion of that review, Ambassador Barshevsky stated: "We are disappointed that the Canadian Government has not

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[11] *Id.*, ¶ 183; CRTC, *Price Cap Regulation and Related Issues*, Telecom Decision 97-9, May 1, 1997, ¶ 268. Before Canada's adoption of price caps in 1997, the growth in contribution eligible minutes resulted in annual reductions in contribution rates.

[12] USTR Press Release dated Apr. 4, 2000, *Annual Review of Telecommunications Trade Agreements Highlights Concerns Regarding Mexico, South Africa, and Other Countries.*

[13] *Id.*

responded positively to calls for reform of its system for funding universal local telecommunications service – failure to address this issue will have an adverse long-term impact on the development of a competitive telecommunications market in Canada."[14] She emphasized that USTR expected "timely reform" of the contribution system and would continue to monitor the situation closely.[15] These continuing concerns further demonstrate the falsity of Bell Canada's claims that Canadian regulation removes concerns about the potential abuse of Bell Canada's local bottleneck.

In sum, there is no basis for any Commission finding that Bell Canada does not possess market power at the foreign end of the U.S.-Canada route. Bell Canada's petition should be dismissed and it should continue to be classified as a dominant carrier.

Respectfully submitted,

James J. R. Talbot / hr

James J. R. Talbot

cc: Rebecca Arbogast
Jeffrey Anspacher
Gregory Staple, Counsel to Bell Canada.

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14 USTR Press Release dated Oct. 2, 2000, *Canada and Peru: USTR Notes Progress on Telecommunications Issues, But Remains Concerned About Pace of Implementation.*

15 *Id.*