

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

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

Comments of Global Crossing North America, Inc.

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Global Crossing North America, Inc., on behalf of its U.S. operating subsidiaries (collectively, “Global Crossing”), submits its initial Comments in the above-captioned proceeding. Global Crossing provides telecommunications solutions over the world’s first integrated global Internet Protocol-based network to business customers. Its core network connects more than 300 cities in 30 countries worldwide, and delivers services to more than 500 major cities, 50 countries and 6 continents around the globe. Global Crossing offers a full range of managed data and voice products to enterprise customers, governments, system integrators, carriers and Internet service providers.

AT&T Inc. and BellSouth Corporation (together, the “Applicants”) have failed to show that approval of the proposed transaction would serve the public interest. To the contrary, the proposed merger of AT&T and BellSouth

– especially viewed in close succession with the recently concluded merger of SBC and AT&T – would reverse nearly three decades of pro-competitive U.S. telecommunications policy codified in the Telecommunications Act of 1996 (“1996 Act”) and raise substantial competitive issues, particularly in the access services market. For the reasons set forth below, the proposed merger is anti-competitive. Therefore, the Communications Act of 1934, as amended (the “Communications Act”) precludes the Commission from approving the proposed merger unless the Commission imposes meaningful conditions to mitigate the proposed merger’s clear anti-competitive effects.

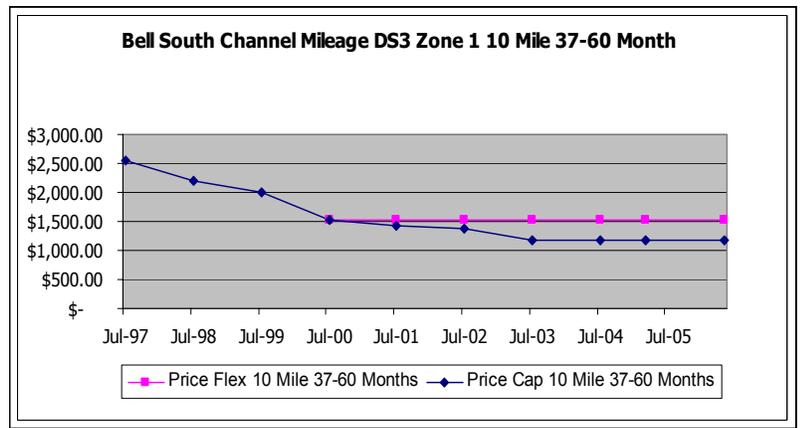
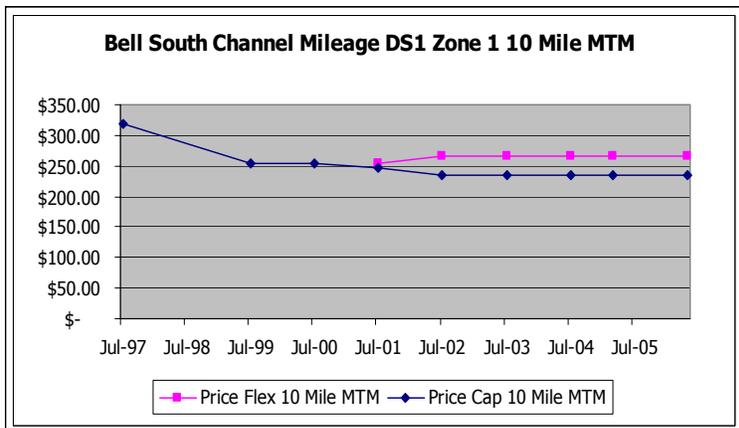
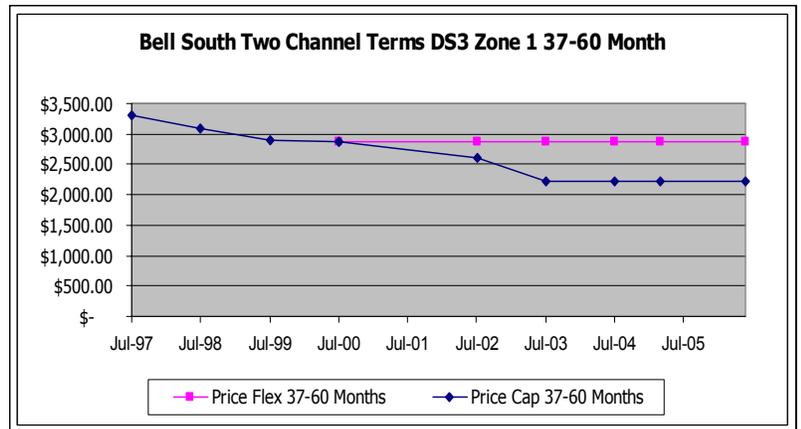
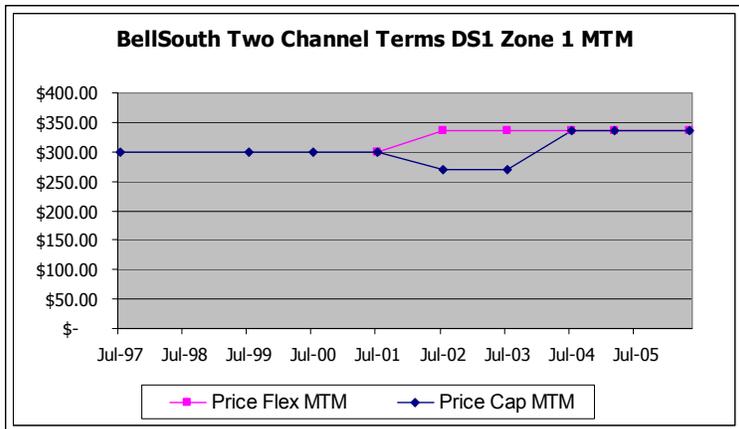
I. AT&T and BellSouth Dominate the Special Access Market

Global Crossing has a strong interest in this proceeding because it relies heavily on AT&T and BellSouth’s “last mile” special access facilities to reach end-user customers. Because the proposed merger will substantially increase the Applicants’ market power in the access services market, the transaction could cause significant competitive harm to competitive carriers, such as Global Crossing, as well as their end-user customers.

Global Crossing estimates that 38% of its national annual special access purchases would be directed to a combined AT&T/BellSouth. Naturally, such levels of concentration are worrisome especially considering that Global Crossing has implemented numerous optimization measures over the years in an attempt to reduce its reliance on AT&T and BellSouth’s special access services. This concentration, combined with increasing pricing

flexibility, raise serious concerns regarding AT&T/BellSouth's pricing power and willingness to deal. The below charts illustrate Global Crossing's concerns.

Bell South Special Access Circuits – Sample Annual Price Points
Trended Individual Rate Elements
(Final price point reflects June 06 rate)



Source: FCC #1 CT DS1: 7.5.9.A, page 7-144.1(Price Cap); 23.5.2.9.A, page 23-80(Price Flex); CM DS1: 7.5.9.B.2, page 7-146(Price Cap); 23.5.2.9.B.2, page 23-163(Price Flex) FCC #1 CT DS3: 7.5.9.A.3.v, page 7-145.0.7.1(Price Cap); 23.5.2.9.A.3.v, page 23-117(Price Flex); CM DS3: 7.5.9.B.5.h, page 7-147.0.3.4(Price Cap); 23.5.2.9.B.5.h, page 23-227(Price Flex)

As the above charts demonstrate, BellSouth has used its pricing flexibility to maintain its rates for special access services at artificially high levels, and in any event above their price capped services. Like many other commenters in this proceeding, Global Crossing North America, Inc., put forth ample evidence demonstrating the substantial competitive harm to the special access services market that would result from the mergers of SBC Communications Inc. (“SBC”) and AT&T Corp. (“AT&T”)¹, and Verizon Communications Inc. (“Verizon”) and MCI, Inc. (“MCI”).² Rather than duplicate that evidence here, Global Crossing requests the Commission to take administrative notice of the record in those proceedings.

II. AT&T Has Failed to Demonstrate Compliance with the Conditions of its Previous Merger

In approving those mergers, the Commission imposed nominal conditions in an attempt to mitigate these harms including -

1. SBC/AT&T affiliates that meet the definition of a Bell operating company in section 3(4)(A) of the Act (“SBC BOCs”) will implement, in

¹ *In re Applications of SBC Commc’ns Inc. & AT&T Corp.*, Memorandum Opinion and Order, WC Dkt. No. 05-65, FCC 05-183, (Nov. 17, 2005) (“*SBC/AT&T Merger Order*”).

² *In re Applications of Verizon Commc’ns Inc. & MCI, Inc.*, Memorandum Opinion and Order, WC Dkt. No. 05-75, FCC 05-184, (Nov. 17, 2005) (“*Verizon/MCI Merger Order*”).

the SBC Service Area, the Service Quality Measurement Plan for Interstate Special Access Services (“the Plan”), as described herein and in Attachment A. The SBC BOCs shall provide the Commission with performance measurement results on a quarterly basis, which shall consist of data collected according to the performance measurements listed in Attachment A. Such reports shall be provided in an Excel spreadsheet format and shall be designed to demonstrate the SBC BOCs’ monthly performance in delivering interstate special access services within each of the states in the SBC Service Area. These data shall be reported on an aggregated basis for interstate special access services delivered to (i) SBC/AT&T’s section 272 affiliates, (ii) its BOC and other affiliates, and (iii) non-affiliates. The SBC BOCs shall provide performance measurement results (broken down on a monthly basis) for each quarter to the Commission by the 45th day after the end of the quarter. The SBC BOCs shall implement the Plan for the first full quarter following the Merger Closing Date. This condition shall terminate on the earlier of (i) thirty months and 45 days after the beginning of the first full quarter following the Merger Closing Date (that is, when SBC/AT&T file their 10th quarterly report); or (ii) the effective date of a Commission order adopting performance measurement requirements for interstate special access services.

2. For a period of thirty months after the Merger Closing Date, SBC/AT&T shall not increase the rates paid by existing customers (as of the Merger Closing Date) of the DS1 and DS3 local private line services that AT&T provides in SBC’s in-region territory pursuant, or referenced, to its TCG FCC Tariff No. 2 above their level as of the Merger Closing Date.

3. For a period of thirty months after the Merger Closing Date, SBC/AT&T will not provide special access offerings to its wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions.

4. To ensure that SBC/AT&T may not provide special access offerings to its affiliates that are not available to other special access customers, for a period of thirty months after the Merger Closing Date, before SBC/AT&T provides a new or modified contract tariffed service under section 69.727(a) of the Commission’s rules to its own section 272(a) affiliate(s), it will certify to the Commission that it provides service pursuant to that contract tariff to an unaffiliated customer other than Verizon Communications Inc., or its wireline affiliates. SBC/AT&T also will not unreasonably discriminate in favor of its affiliates in

establishing the terms and conditions for grooming special access facilities.

5. SBC/AT&T shall not increase the rates in SBC's interstate tariffs, including contract tariffs, for special access services that SBC provides in its in-region territory and that are set forth in tariffs on file at the Commission on the Merger Closing Date. This condition shall terminate thirty months from the Merger Closing Date.³

Coming so soon on the heels of the SBC/AT&T Merger, it is impossible to determine AT&T's compliance with the conditions of the *SBC/AT&T Merger Order*. The deadline for AT&T to file its first Service Quality Measurement Plan was May 15, 2006. The Plan was not filed publicly so Global Crossing cannot say whether the Plan satisfies the Commission's condition. Additionally, AT&T has not put forth any evidence demonstrating its compliance with any of the other conditions of the *SBC/AT&T Merger Order* for at least the first six months of their operation under the conditions.

III. The Commission Must Ensure that AT&T/BellSouth do not Utilize Their Dominance in the Special Access Market to Harm Competition

If the Commission approves the proposed transactions and permits AT&T to complete its acquisition of BellSouth, it is critically important that the Commission place conditions on the merged companies to ensure that they do not engage in discriminatory practices in the provision of special

³*SBC/AT&T Merger Order*, Appendix F (footnotes omitted).

access services or otherwise exercise pricing power in the special access services market. As set forth in detail below, Global Crossing urges the Commission to adopt “final offer,” or “baseball style,” arbitration of special access agreements as one remedy to address the anticompetitive effects of the proposed transaction. This proposal is non-exclusive and is intended to complement other proposals made by other commenters in the proceedings.

The Communications Act requires that all carriers, including a post-merger AT&T, negotiate contracts for special access services containing terms that are “just and reasonable.”⁴ In a competitive market, carriers would be able to negotiate reasonable access arrangements with AT&T. However, because of the limited nature of competition in the access market in the AT&T service territory, limited all the more so by the SBC/AT&T merger and the Verizon/MCI mergers, and the enormous scale and scope of AT&T’s service footprint, AT&T has a decisive advantage in negotiating rates, terms and conditions for access. A framework under which requesting carriers can compel final offer arbitration will facilitate reasonable arrangements even in the face of AT&T’s increased market power.

The Commission has adopted a final offer arbitration remedy in the past to guard against the anticompetitive effects of increased market power on commercial negotiations. For example, in its order consenting to News

⁴ See, e.g., 47 U.S.C. §§ 201-202.

Corp.'s acquisition of an interest in Hughes Electronics Corp.,⁵ the Commission found that the combination of News Corp.'s regional sports network ("RSN") programming with DirecTV's national distribution platform could result in price increases because News Corp. would be able to extract higher prices or other concessions from unaffiliated multichannel video programming distributors ("MVPDs").⁶ The Commission therefore established "a neutral dispute resolution forum" to "provide a useful backstop to prevent News Corp. from exercising its increased market power to force rival MVPDs to either accept inordinate affiliate fee increases for access to RSN programming and/or other unwanted programming concessions or potentially to cede critical content to their most powerful DBS competitor, DirecTV."⁷ This remedy would "allow MVPDs to demand commercial arbitration when they are unable to come to a negotiated 'fair' price for the programming."⁸ As the Commission further explained, the arbitration condition is "intended to push the parties towards agreement prior to a complete breakdown in negotiations,"⁹ because "[f]inal offer arbitration has the attractive 'ability to induce two sides to reach their own agreement, lest

⁵ *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473 (2004) ("*Hughes/News*").

⁶ *Id.* ¶ 173.

⁷ *Id.*

⁸ *Id.* ¶ 175.

⁹ *Id.* ¶ 174.

they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.”¹⁰

The Commission’s rules also prescribe the use of final offer arbitration to settle certain interconnection disputes.¹¹ As the Commission explained in its *First Local Competition Order* implementing the Telecommunications Act of 1996, “[a]dopting a ‘final offer’ method of arbitration and encouraging negotiations to continue allows us to maintain the benefits of final offer arbitration, giving parties an incentive to submit realistic ‘final offers,’ while providing additional flexibility for the parties to agree to a resolution that best serves their interests.”¹²

Final offer arbitration has other important benefits for both carriers and the Commission. For carriers, such arbitration replicates, to the extent possible, conditions that would exist if there indeed were a competitive market. For the Commission, this approach avoids the difficult ratemaking and regulatory oversight that would otherwise be required to ensure that carriers achieve reasonable special access rates, terms and conditions.

In the *Hughes/News* transaction, the Commission defined the procedures that should apply in final offer arbitration, in the event that

¹⁰ *Id.* (quoting Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003, at 264).

¹¹ 47 C.F.R. § 51.807(d)-(f).

¹² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499, at ¶ 1294 (1996).

initial attempts to negotiate a commercially reasonable agreement fail.¹³

Substantially the same procedures can apply here. Global Crossing proposes that the procedure be as follows:

1. Commercial Arbitration Remedy
 - The commercial arbitration remedy is available to:
 - Any carrier seeking special access services (“Requesting Carrier”) from AT&T that, 90 calendar days following the closing of the AT&T/BellSouth acquisition has more than 180 calendar days remaining on its existing special access agreement with AT&T.
 - Any Requesting Carrier following the expiration of its existing special access agreements with AT&T.
 - Any Requesting Carrier that makes a request for a special access agreement with AT&T and that does not currently have such an agreement.
 - References to AT&T include any subsidiary or majority owned or controlled enterprise.
 - Thirty days after requesting the negotiation of a special access services agreement from AT&T, a Requesting Carrier may notify AT&T within five business days that it intends to request arbitration over the rates, terms and/or conditions of access. Such terms and/or conditions may be price or non-price based.
 - Upon receiving timely notice of the Requesting Carrier’s intent to arbitrate, AT&T must immediately allow continued access under the same terms and conditions of the expired or expiring agreement, as long as the Requesting Carrier continues to meet the other obligations of the agreement. AT&T shall provide to Requesting Carriers making first-time requests access pursuant to tariff, although if different rates are subsequently determined as a result of the arbitration, such rates will apply retroactively to the access services provided during the period prior to final agreement.

¹³ See, e.g., *Hughes/News* at ¶ 222.

- Following the Requesting Carrier’s notice of intent to submit the dispute to arbitration, but prior to filing for formal arbitration with the American Arbitration Association (“AAA”), or a mutually agreed upon neutral third-party arbitrator (who along with the AAA are hereinafter referred to as the “Arbitrator”), the Requesting Carrier and AT&T will enter a “cooling off” period during which negotiations will continue.
- The Requesting Carrier’s formal demand for arbitration, which shall include the Requesting Carrier’s “final offer,” and any supporting arguments and evidence, may be filed with the Arbitrator, no earlier than the fifteenth business day after the Requesting Carrier serves its intent to arbitrate on AT&T. AT&T must participate in the arbitration proceeding.
- The Arbitrator, will notify AT&T and the Requesting Carrier upon receiving the Requesting Carrier’s formal filing.
- AT&T must file a “final offer” with the Arbitrator within two business days of being notified by the Arbitrator that the Requesting Carrier has filed a formal demand for arbitration.
- The Requesting Carrier’s final offer may not be disclosed until the Arbitrator has received the final offer from AT&T. Upon receipt of both offers, the Arbitrator shall simultaneously provide a copy of the Requesting Carrier’s final offer to AT&T, and a copy of AT&T’s final offer to the Requesting Carrier.
- The final offers shall be in the form of a contract for access services for a minimum period of 1 year and a maximum period of 3 years, with automatic renewals.

2. Rules of Arbitration

- The arbitration will be decided by a single arbitrator mutually agreed to by the parties or selected by the AAA from members of its Telecommunications Panel and shall be conducted under the expedited procedures of the AAA Commercial Arbitration Rules, excluding the rules relating to large, complex cases. The location of the arbitration shall be Atlanta, Chicago, Los Angeles, or New York.
- The Arbitrator shall choose the “final offer” of the party which most closely approximates the prevailing commercially reasonable rates, terms and/or conditions in the industry with

respect to the access services at issue. In the absence of current data, the Arbitrator will consider evidence of pre-merger conditions, and contracts with competitive carriers other than AT&T shall carry a presumption of commercial reasonableness.

- To determine commercial reasonableness, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession) including, but not limited to:
 - Current contracts between the Requesting Carrier and AT&T or other access services providers without regard to confidentiality, non-disclosure, or other restrictive clauses contained in such contracts;
 - Current contracts between other access customers and AT&T or other access services providers in the applicable AT&T operating company's territory without regard to confidentiality, non-disclosure, or other restrictive clauses contained in such contracts;
 - Evidence of the relative value of the requested AT&T services compared to the services of other access services providers (*i.e.*, price, scope of service, quality of service, etc.);
 - Changes in the value of non-AT&T access agreements;
 - Changes in the value or costs of the provision of access services;
 - Evidence of rates, terms and/or conditions for comparable services;
 - Evidence of rates, terms and/or conditions for retail services;
 - Evidence of relevant practices in other industries;
 - Pre-merger contracts for access services between AT&T and third parties; and
 - Contracts between AT&T and its affiliates.

- The Arbitrator may not consider offers prior to the arbitration made by the Requesting Carrier and AT&T for the access at issue in determining commercial reasonableness.
- If the Arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the Arbitrator may assess all or a portion of the other party's costs and expenses (including attorney fees) against the offending party and may consider such behavior in assessing the reasonableness of the offers.
- Following the decision of the Arbitrator, the terms of the new access agreement, including payment terms, if any, will become retroactive to the expiration date of the previous agreement. The Requesting Carrier will make an additional payment to AT&T in an amount representing the difference, if any, between the amount that is required to be paid under the Arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration. Similarly, AT&T shall issue a cash refund in an amount representing the difference, if any, between the amount that is required to be paid under the Arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration.
- The result of the arbitration shall be binding on the parties, and judgment on the Arbitrator's award may be entered in any court having jurisdiction.
- Each party shall pay its own fees and costs, and the parties shall split the Arbitrator's fees and costs equally.
- The Arbitrator's decision shall be reviewable by the Commission.

* * * * *

It is critical that the Commission place conditions on the proposed acquisition of BellSouth by AT&T to ensure that the merged companies do not engage in discriminatory practices in the provision of special access services. As outlined above, the Commission should establish a framework to facilitate final offer arbitration to help remedy the anticompetitive effects of the proposed transactions on the special access services market.

Respectfully submitted,

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June 5, 2006

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Comments of Global Crossing North America, Inc. was served via electronic mail this 25th day of April, 2005, upon the following:

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