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September 8, 2005

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SEP - 8 2006

Federal Communications Commission
Office of Secretary

ORIGINAL

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Notice
Docket No.: In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, WC Docket No. 06-74

Dear Ms. Dortch:

On September 7, 2005, the undersigned Counsel for Global Crossing Limited, along with Paul Kouroupas, Vice President, Regulatory Affairs, Global Crossing Limited, and Steven W. Wall, Esq., Brownstein Hyatt & Farber, met with Scott Deutchman, Legal Advisor to Commissioner Michael J. Copps to discuss issues related to the aforementioned proceeding and certain substantive points reflected in the submissions already on file in this proceeding. In addition, Mr. Kouroupas provided Mr. Deutchman with an unredacted copy of the attached document.

Any question about this matter should be directed to the undersigned.

Respectfully submitted,

Alfred E. Mottur
Counsel for Global Crossing Limited

Attachment

cc: Commissioner Michael J. Copps (with attachment)
Scott Deutchman, Esq. (without attachment)
Paul Kouroupas, Esq. (without attachment)
Steven W. Wall, Esq. (without attachment)

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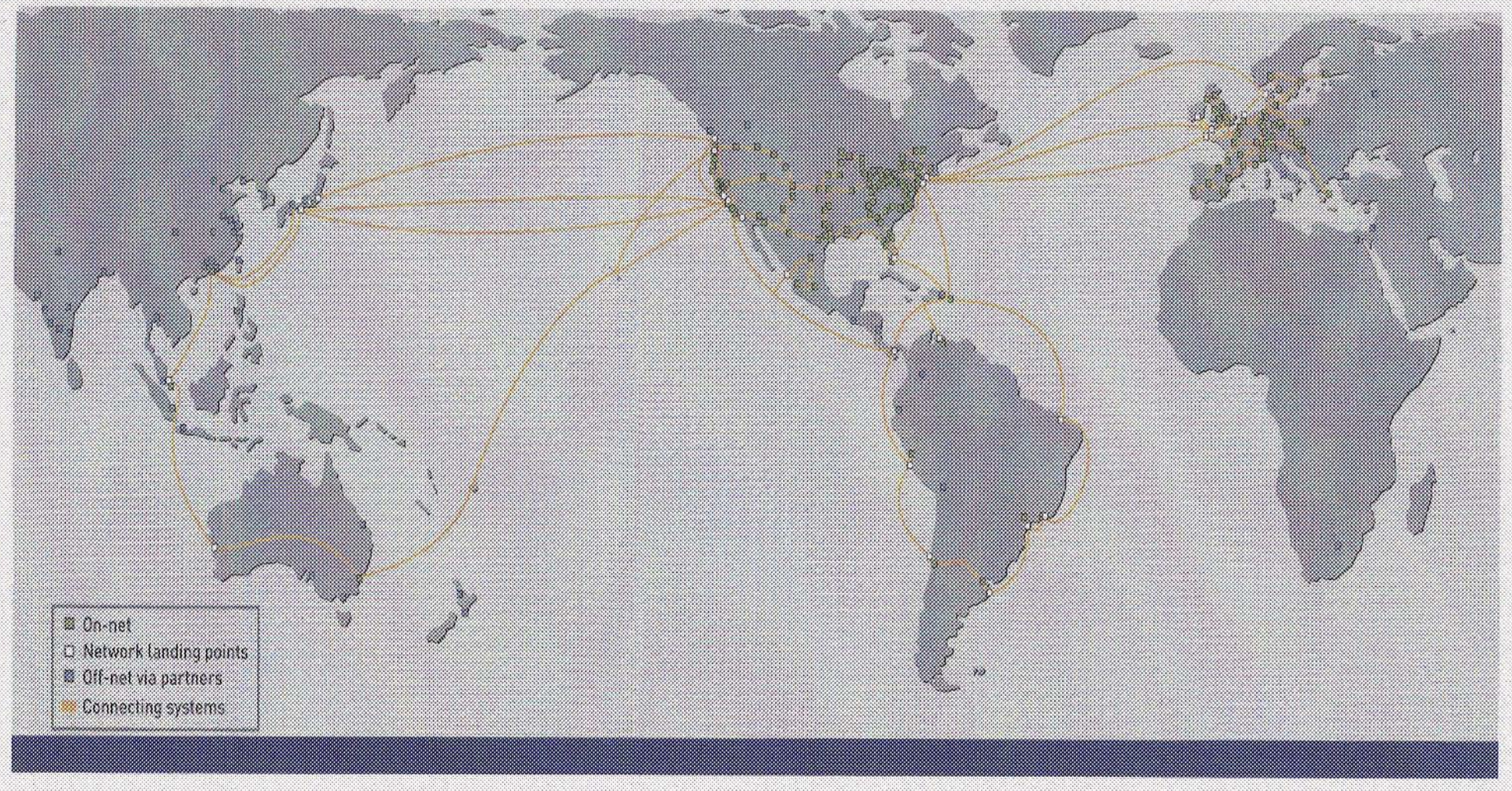
List A B C D E

# The New Global Village

## AT&T/BellSouth Merger

Global Crossing



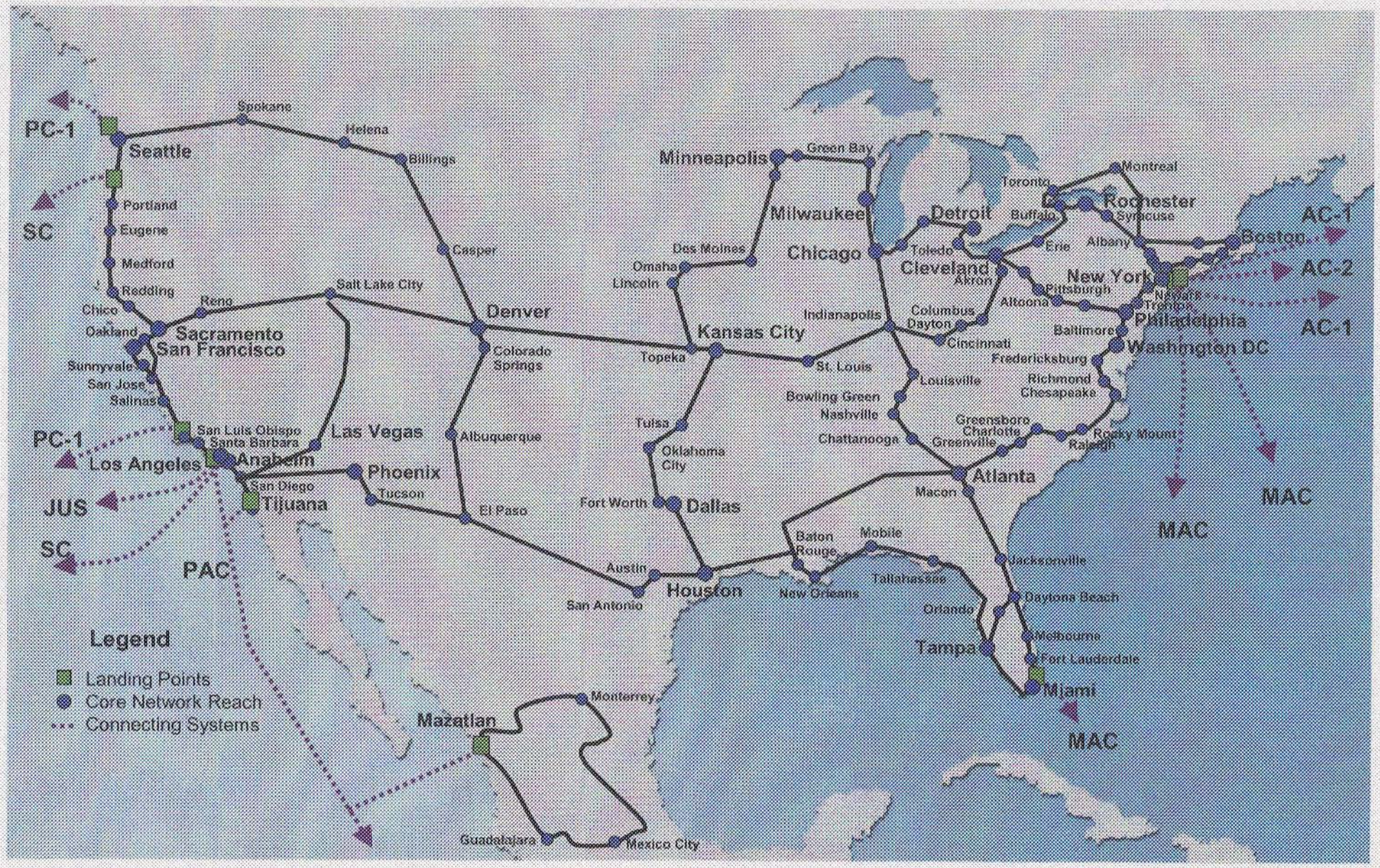

# Global Crossing's Global IP Network

**Global Crossing's highly secure IP network is managed and operated end-to-end. It is a network that will not be replicated in the near future, if ever.**

Global Crossing Proprietary and Confidential



Global Crossing




# Global Crossing's North America Network Relies on Third-Party Special Access to Reach End User Customers

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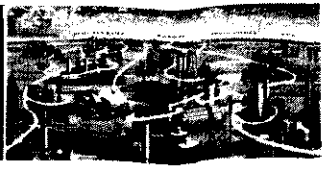
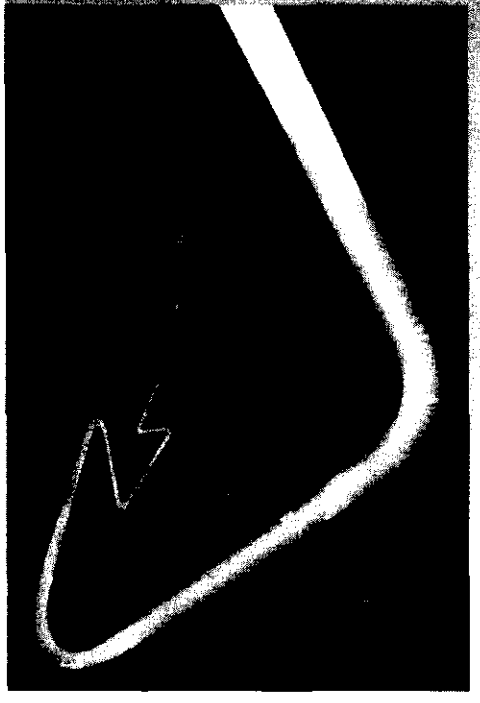
Global Crossing

# Global Crossing at a Glance



**Global Crossing was founded seven years ago based on an idea ahead of its time ... IP**



**Network:** Core network connects more than 300 cities in over 30 countries, delivers services to 575+ major cities in over 50 countries.

Industry leading network performance: availability and packet delivery of "five nines" (99.999+%)

More than 28 billion minutes of VoIP traffic transported over VoIP platform by end of 2004

**Services:** A fully integrated and interoperable suite of IP and legacy services for carriers and enterprises including IP VPN Service, VoIP Service and IP Video

**Customers:** More than 40% of Fortune 500 companies
700 carriers, mobile operators and ISPs

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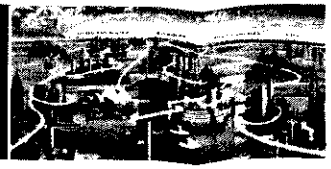
Global Crossing

# The New Global Village

## AT&T's Acquisition of BellSouth Strengthens Their Pricing Power in the Special Access Market

Global Crossing

# AT&T's Acquisition of BellSouth Further Concentrates the Special Access Market



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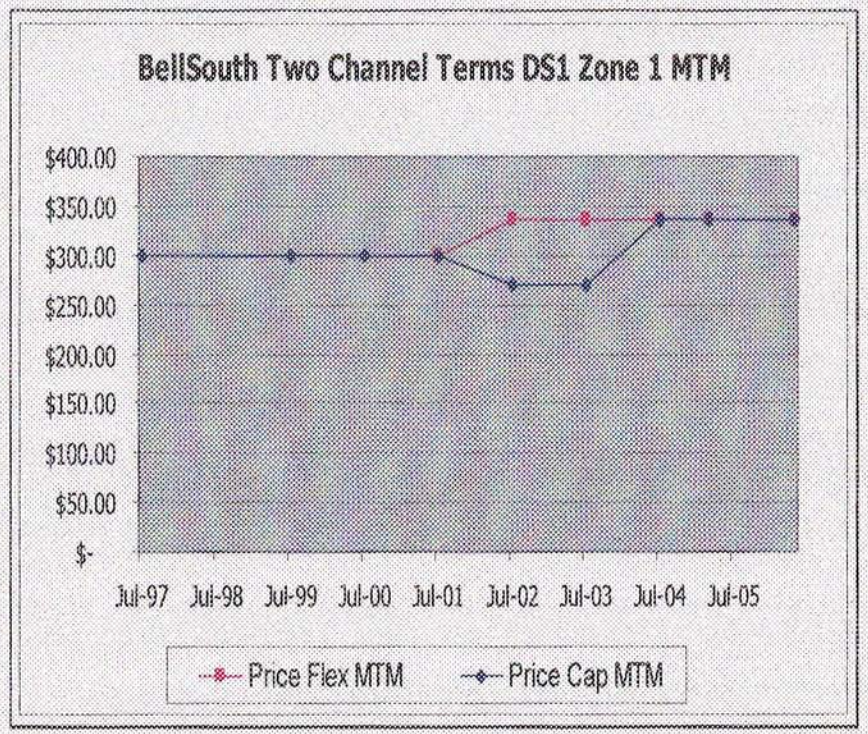
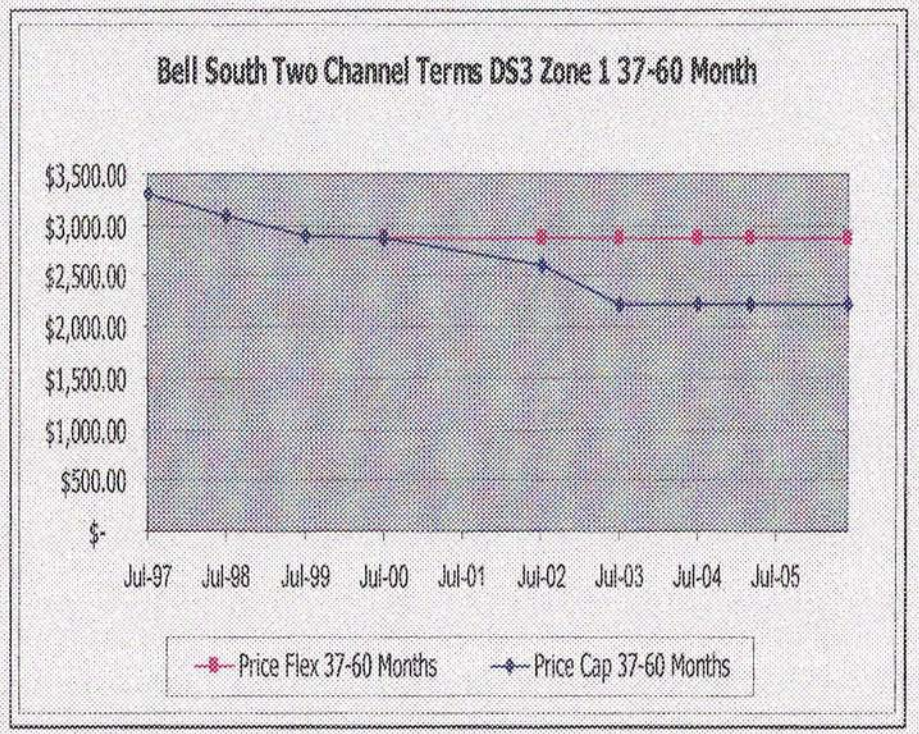
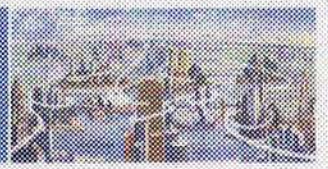
# BellSouth Already Exercises Pricing Power

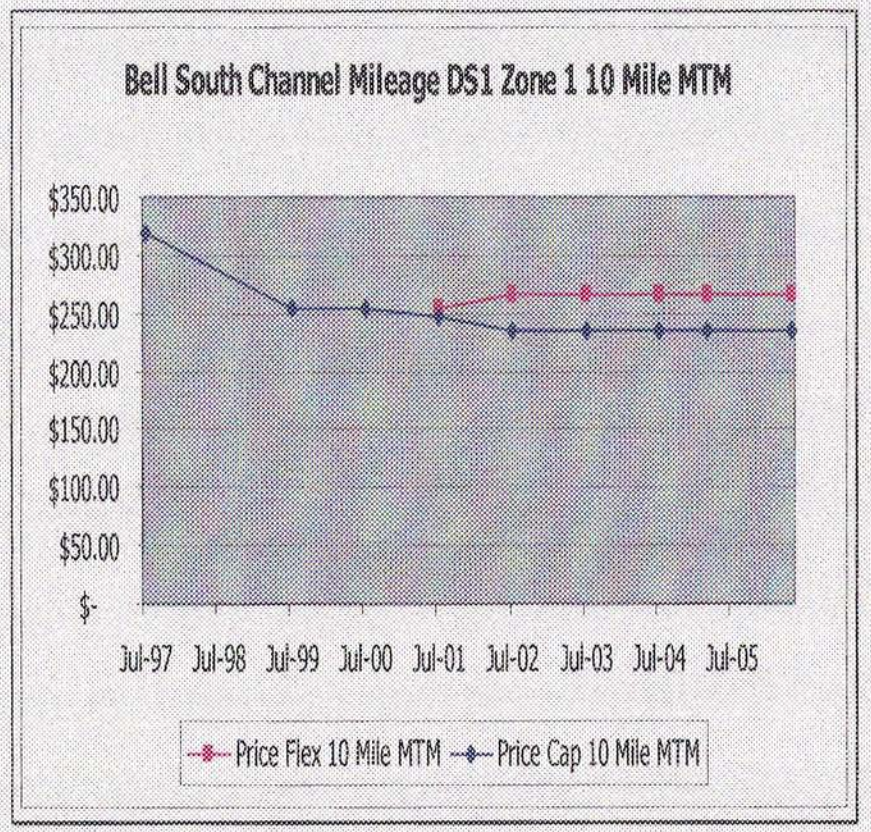


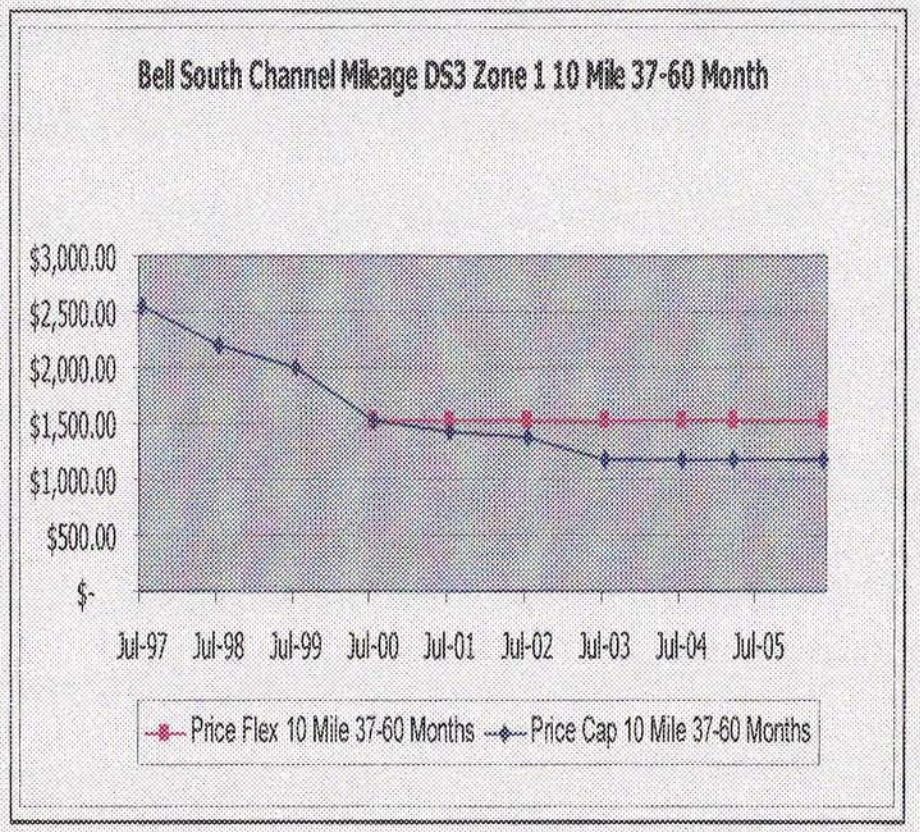




**Source:** FCC #1 CT DS1: 7.5.9.A, page 7-144.1(Price Cap); 23.5.2.9.A, page 23-80(Price Flex); CM DS1: 7.5.9.B.2, page 7-146(Price Cap); 23.5.2.9.B.2, page 23-163(Price Flex)
FCC #1 CT DS3: 7.5.9.A.3.v, page 7-145.0.7.1(Price Cap); 23.5.2.9.A.3.v, page 23-117(Price Flex); CM DS3: 7.5.9.B.5.h, page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

# BellSouth Already Exercises Pricing Power



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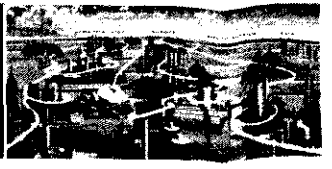
Global Crossing

# Choice is Further Limited by Volume Discount Plans



## AT&T

- **MVP Discount Plan**: Must maintain 95% of baseline year's special access spend over a 5 year term to receive a discount on special access services. *See Ameritech FCC Tariff 2, section 19; PACBell FCC Tariff 1, section 22; SWBT FCC Tariff 73, section 38.*

- **HCTPP Discount Plan**: Must commit to a base level spend on dedicated T-1s, and maintain 91% of that spend over a 5 year term to receive a discount. *See SWBT FCC Tariff No. 73, Section 7.2.20.*

- **DS1 TPP Discount Plan**: Must commit to a base level of DS-1 channel terminations and maintain 80% of that level for 3 years to receive a discount. *See PacBell FCC Tariff No. 1, Section 7.4.18.*

## BellSouth

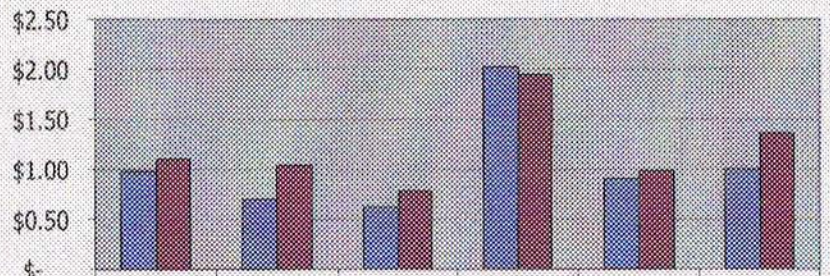
- **ACP Discount Plan: Must maintain a Global Crossing/Bellsouth negotiated commitment level, normally 90%, to receive the discount. This covers dedicated DS0's/DS1's, which are signed up for 49 months, and switched DS1's/DS3's, which are signed up for 24 months. *See Bellsouth FCC Tariff, section 2.4.8.b.***

- **TAP Discount Plan: Must maintain between $10 million and $100 million monthly revenue to receive the discount. *See Bellsouth FCC Tariff, section 2.4.8.h***

# Comparison of long-haul and short-haul pricing

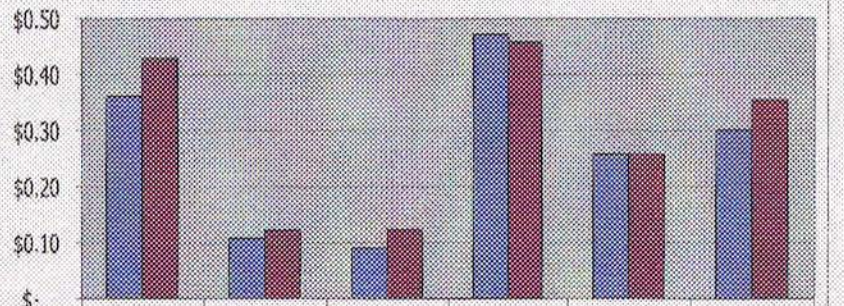
## Rates per DSO Circuit Mile
## 10 Mile Month-to-Month Sample

DS1 RBOC rates per DSO Circuit Mile
Zone 1 - 10 mile - Month to Month Circuit




| | BST | QWST | SBC- PAC | SBC - AMER | SBC - SWBT | VRZN |
|---|---|---|---|---|---|---|
| PRICE CAP | $0.98 | $0.71 | $0.63 | $2.02 | $0.90 | $0.99 |
| PRICE FLEX | $1.10 | $1.05 | $0.79 | $1.93 | $0.98 | $1.37 |

DS3 RBOC rates per DSO Circuit Mile
Zone 1 - 10 mile - Month to Month Circuit




| | BST | QWEST | SBC- PAC | SBC - AMER | SBC - SWBT | VRZN |
|---|---|---|---|---|---|---|
| PRICE CAP | $0.36 | $0.11 | $0.09 | $0.47 | $0.26 | $0.30 |
| PRICE FLEX | $0.43 | $0.12 | $0.12 | $0.46 | $0.26 | $0.35 |

**Comparable Global Crossing long haul rate:**

**DS1: $0.0275 per DS0 circuit mile**

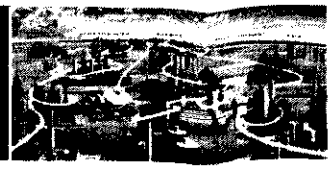
**DS3: $0.0050 per DS0 circuit mile**

Global Crossing Proprietary and Confidential



Global Crossing

# The combination of AT&T and BellSouth is a merger to monopoly in over 55% of the buildings served by AT&T



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# The New Global Village

**The Commission Has Previously Addressed Similar Problems of Market Dominance Exacerbated by Merger**

Global Crossing

# The Commission Has Previously Implemented Market-based Solutions to Concentration in the Video Market

## ➔MB Docket 03-124 – Transfer of Hughes Electronics to News Corp.

"We conclude that News Corp. currently possesses significant market power with respect to its RSNs within each of their specific geographic regions, and that the proposed transaction will enhance News Corp.'s incentive and ability to temporarily withhold or threaten to withhold access to its RSN programming to increase the fees it receives for the programming, over and above what it could negotiate absent the transaction, to the ultimate detriment of the public." (para. 147)

"At the outset, we agree with commenters that there are no reasonably available substitutes for News Corp.'s RSN programming and that News Corp. thus currently possesses significant market power in the geographic markets in which its RSNs are distributed." (para. 148)

"As commenters correctly observe, the increased *ability* of an RSN owner to credibly threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow the RSN owner to extract higher prices, which are ultimately passed on to consumers." (para. 151)

# The Commission Has Previously Implemented Market-based Solutions to Concentration in the Video Market

## MB Docket 05-192 – Transfer of Adelphia to Comcast and Time Warner

"Based on the record and our own independent economic analysis in the Economic Appendix, we conclude that the transactions will increase the Applicants' incentive and ability to adopt a uniform price increase strategy for RSN programming and that the program access rules will not likely deter such conduct. As noted above, the program access rules do not prohibit a vertically integrated programmer from increasing prices charged to competing MVPDs if the price increase is not discriminatory or if the programming is delivered terrestrially. Moreover, we find that a uniform price increase has no effect on the actual costs borne by an RSN's affiliated MVPD because, as DIRECTV states, the "payment goes from one pocket into another."Thus, the prospect of charging itself a higher rate for an affiliated RSN would not deter Comcast or Time Warner from charging a uniformly higher rate to DBS operators or other competing MVPDs. Uniform price increases will, in turn, result in higher cable prices and fewer alternatives for consumers.
(para. 140)

"Our analysis demonstrates that the transactions are likely to result in a public interest harm based on the ability of Applicants to impose uniform price increases on carriage of RSN programming. This could not only harm consumers of existing MVPDs but also could hamper entry by new MVPD competitors, thereby denying consumers the significant benefits of emerging MVPD competition. Because the program access rules do not afford a remedy for allegations of competitive harm due to uniform price increases, we determine that conditions are necessary to mitigate the foregoing potential harms." (para. 155)

"To mitigate potential harms from uniform price increases, as well as other strategies discussed below, we impose a remedy based on commercial arbitration such as that imposed in the *-News Corp.-Hughes Order*. The arbitration remedy, as set forth in Appendix B, will constrain Comcast's and Time Warner's ability to increase rates for RSN programming uniformly or otherwise disadvantage rival MVPDs via anticompetitive strategies."
(para. 156)

## Compulsory "Final Offer" Arbitration Can Facilitate Commercial Negotiations and Allow the Commission to Continue its Experiment in Price Deregulation

➔"We agree with the JCC that a neutral dispute resolution forum would 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…"We therefore create a mechanism whereby an aggrieved MVPD may choose to submit a dispute with News Corp. over the terms and conditions of carriage of RSNs to commercial arbitration to constrain News Corp.'s increased incentive to use temporary foreclosure strategies during carriage negotiations for RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN, and require News Corp. to permit the MVPD to continue to carry the RSN while the dispute is being resolved." (MB Docket 03-124 Order at para. 173)

➔"By requiring commercial arbitration where negotiations fail to produce a mutually acceptable set of prices, terms and conditions, we reduce the incentives and opportunities for News Corp. to remove programming and thus eliminate the additional credibility of programming withdrawal as a bargaining tool…."Our arbitration condition is also intended to push the parties towards agreement prior to a complete breakdown in negotiations. Final offer arbitration has the attractive "ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator." (MB Docket 03-124 Order at para. 174)

# The New Global Village

## Commercial Arbitration is a Narrow Remedy for Market Failure

Global Crossing

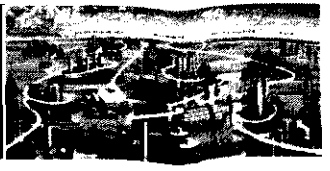
# Proposed Arbitration Process

- The commercial arbitration remedy would be available to:
  - Any carrier seeking special access services ("Requesting Carrier") from AT&T in its incumbent service territories that, 90 calendar days following the closing of the transaction, has more than 180 calendar days remaining on its existing special access agreement with such carrier.
  - 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, including but not limited to SBC, BellSouth, Ameritech, SNET, Pacific Bell.

- 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.

# Proposed Arbitration Process



➔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"), 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," may be filed with the AAA 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 AAA 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 AAA within two business days of being notified by the AAA that the Requesting Carrier has filed a formal demand for arbitration.

➔The Requesting Carrier's final offer may not be disclosed until the AAA has received the final offer from AT&T. Upon receipt of both offers, the AAA 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.

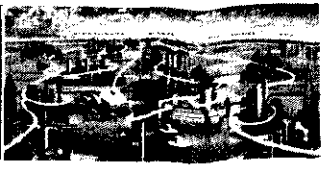
➔The final offers shall be in the form of a contract for access services for a minimum period of 1 year and a maximum period of 3 years, with automatic renewals.

# Proposed Rules of Arbitration

➔The arbitration will be decided by a single arbitrator 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 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, and which is most consistent with existing federal telecommunications policy.

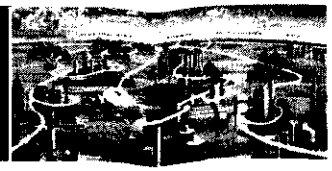
# Proposed Arbitration Process



**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.

# Proposed Arbitration Process



➔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.

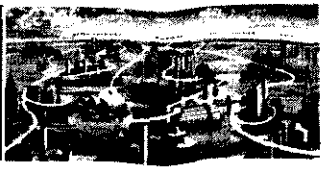
➔If the arbitrator finds that one party's conduct, during the course of the negotiations or arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including attorney fees) against the offending party.

➔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. AT&T will issue a credit to the Requesting Carrier in the 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.

➔Each party shall pay its own fees and costs, and the parties shall split the arbitrator's fees and costs equally.

➔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.

# Arbitration is Easily Manageable



→Final offer arbitration is a simple and quick process

→AT&T currently manages hundreds of state and federal regulatory and court proceedings every year without difficulty

→Not all Requesting Carriers will invoke arbitration

→Arbitration would only be available for disputes under Phase I and Phase II pricing flexibility contracts

→Arbitration decisions are limited to the parties involved

# The New Global Village

Thank you.

Global Crossing