September 27, 2006

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

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

Dear Secretary Dortch:

Competition between cable companies and AT&T lies at the heart of its proposed merger with BellSouth. AT&T's submissions make clear that this merger is all about increasing the applicants' ability to compete against cable's multi-service products,[1/] which the applicants identify as their most potent competitive threat in the mass market.[2/] The promise of robust competition between cable providers and AT&T underpins the applicants' contention that the merger will not harm residential consumers, and is likely to factor significantly in any decision to approve this merger, just as it did in the SBC/AT&T merger.[3/]

The undersigned cable companies - Advance/Newhouse Communications, Cablevision Systems Corporation, Charter Communications, Cox Communications, and Insight Communications Company - all are deploying voice services to residential customers in direct competition with one or both of the merger applicants. Some of the companies have been providing voice services for a number of years; others have begun their roll out of phone services more recently.

Advance/Newhouse Communications, which manages Bright House Networks, has cable systems serving over 2.2 million customers in and around Tampa Bay and Central Florida, Indianapolis, Birmingham, Bakersfield, and Detroit, along with several smaller systems in Alabama and the Florida panhandle, and began offering facilities-based local, long distance, and international long distance services in 2004 and now has over 250,000 customers subscribing to its Digital Phone service. Cablevision began offering circuit-switched telephony in 1991, deployed its digital voice-over-cable service in 2003, and now serves more than one million IP-based and circuit-switched residential and commercial customers throughout New York, New Jersey, and Connecticut.

[1/] *BellSouth Corporation and AT&T Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T Inc.*, WC Docket No. 06-74, Application for Transfer of Control, Description of Transaction, Public Interest Showing and Related Demonstration, at vii, 25 (filed Mar. 31, 2006) ("Public Interest Statement").

[2/] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd. 18290, ¶ 87 (2005) ("*SBC/AT&T Merger Order*"); Public Interest Statement at 87-88.

[3/] *SBC/AT&T Merger Order* ¶ 3.

Charter Communications began offering telephone service in January 2002, launched the nation's first residential primary line IP-based voice service in September 2002, and currently serves over 258,000 customers in more than thirty markets across the United States. Cox began offering telephony over its upgraded cable networks in 1997 and now provides telephone service using both circuit-switched and packet-switched technology to over 1.8 million residential customers and over 150,000 business locations in more than twenty markets across the country, representing nearly all of Cox's footprint. Insight offers service to more than 100,000 circuit-switched telephony customers and is starting to deploy voice over Internet protocol ("VoIP") services throughout its four-state territory.

There is no doubt that cable is offering real, facilities-based competition to incumbent local exchange carriers ("ILECs") across the country, including AT&T and BellSouth. Consumers are reaping the benefit of this competition and these benefits are likely to expand significantly. A recent study by Microeconomic Consulting & Research Associates ("MiCRA") confirms the enormous benefits that cable competition can bring to residential and small business consumers.[4/] The MiCRA Study determined that residential cable telephony consumers could save an average of $135 or more each year by using a cable provider's telephone service rather than traditional wireline service offered by an ILEC.[5/] Overall, the lower prices that result from cable competition will save consumers more than $100 billion over the next five years, according to the MiCRA Study.

The MiCRA Study accurately notes, however, that the benefits of cable competition are not a sure thing. In the head-to-head competition with cable, the ILECs have a powerful weapon – their ability to discriminate against cable's voice service by imposing unreasonable, costly interconnection requirements. This clearly is the case with AT&T. AT&T, like the other Bell Operating Companies ("BOCs"), retains market power over interconnection, and cable telephony providers are wholly reliant on BOC interconnection. As the MiCRA Study points out, "[e]nsuring that facilities-based VoIP providers can obtain interconnection on reasonable terms and conditions is the single most promising way of bringing competition and enormous savings to wireline telephone service, where incumbents still control roughly 85% of the residential and small business market."[6/] It is therefore essential that the Commission protect the rights of cable telephony providers to efficient, non-discriminatory interconnection.

The merger provides an opportunity for the Commission to help ensure that the promise of robust competition between cable providers and the ILECs, and AT&T in particular, is achieved. As explained below, the merger will increase AT&T's incentives and ability to wield its market power over interconnection against its cable competitors. AT&T has the incentive and ability today to discriminate against cable's voice service to retain its own voice customers. This

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4/ *See generally* Michael D. Pelcovits and Daniel E. Haar, *Consumer Benefits from Cable-Telco Competition*, Microeconomic Consulting & Research Associates, Inc. (Sept. 2006), *available at* www.micradc.com/news/news.html ("MiCRA Study").

5/ *Phone Choice Could Save Consumers More than $100 Billion over Five Years*, Press Release, Microeconomic Consulting & Research Associates, Inc. (Sept. 2006) ("MiCRA Press Release").

6/ MiCRA Press Release.

incentive becomes magnified as AT&T seeks not only to retain its voice customers, but also to win the additional revenues available through the sale of the "triple" or "quadruple" play. By discriminating against cable's voice product, AT&T can undermine cable's bundled product and benefit its own business. All of the benefits of such discrimination redound to AT&T because cable customers who want the benefit of a bundled offering will have no alternative but to migrate to AT&T's bundle – and this will now be true in the much larger combined AT&T/BellSouth region.

We thus write at this juncture to emphasize the critical importance of fair and reasonable interconnection policies and practices to our ability to provide the robust competition that the applicants claim, and the regulators hope, will check the applicants' power in the local market. We had hoped that the interconnection issues most critical to the cable industry could be addressed through private negotiations between AT&T and the National Cable & Telecommunications Association ("NCTA"). As this approach proved not to be fruitful, we now offer this *ex parte* filing to inform the Commission of the critical importance of interconnection to our ability to compete and to the Commission's ability to rely on cable competition to prevent harm to consumers. If approval of this merger is to be premised on cable's ability to compete in the residential voice market, then the Commission must ensure that AT&T cannot utilize its enhanced market power over interconnection to undermine that premise. Otherwise, the merger will likely result in substantial harm to competition in the residential market.

I. The Merger Will Increase AT&T's Incentives and Ability To Exercise Its Market Power over Interconnection To Undermine Cable Competition.

The FCC has recognized that merely being identified as a competitor is sufficient to provide an ILEC with an incentive to discriminate against that competitor.[7/] Cable has been identified by AT&T and BellSouth as their most potent threat in the mass market. As the Commission noted it the *SBC/AT&T Merger Order*, "SBC views cable-based VoIP as its primary competitive threat in the mass market, and considers the prospect of consumer substitution to cable-based VoIP when devising its strategies and service offers."[8/] BellSouth similarly views cable as its "most important competitor" in the mass market.[9/]

AT&T and BellSouth thus have the incentive and ability today to discriminate against cable-based voice competition in order to protect their dominant position in the voice market. This incentive will greatly increase as a result of the merger, particularly in the BellSouth region. This is because the merger is specifically designed to bring IPTV to the BellSouth region and thus hasten competition with cable's bundle. Moreover, as the Commission has explained in previous BOC mergers, AT&T's incentive and ability to discriminate is also heightened by

7/ *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules,* CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶ 190 (1999) ("*SBC/Ameritech Merger Order*").

8/ *SBC/AT&T Merger Order* ¶ 87.

9/ Public Interest Statement at 88.

expanding its footprint into the BellSouth region and by eliminating BellSouth as a regulatory benchmark. These issues are described in more detail below.

A. The Applicants Have Market Power over Interconnection, A Critical Input Needed by Cable Companies to Compete in the Mass Market.

Like any other facilities-based competitor, cable companies cannot provide local service without efficient interconnection with ILEC networks. Each competitor, whether it uses IP, circuit-switched, or some other technology, must connect to the public switched telephone network ("PSTN"), including the 911 emergency services network, and must be able to provide its customers with the ability to exchange calls with customers of other carriers. New market entrants with relatively few customers, such as nascent cable voice services,[10/] are particularly reliant on interconnection with ILECs that have a substantial existing customer base.[11/]

The provision of cable IP-based voice services, no less than circuit-switched voice service, depends on the ability to obtain the physical interconnection necessary for the exchange of traffic. As early as 1996, the Commission recognized that:

> an entrant, such as a cable company, that constructs its own network will not necessarily need the services or facilities of an incumbent LEC to enable its own subscribers to communicate with each other. A firm adopting this entry strategy, however, still will need an agreement with the incumbent LEC to enable the entrant's customers to place calls to and receive calls from the incumbent LEC's subscribers.[12/]

10/ Competition from cable telephony, especially competitive services utilizing VoIP technology, is nascent. Cable's share of the local market pales in comparison to that of the ILECs. The applicants claim, for example, that cable companies have 5.5 million customers nationally, and that this number will grow to 22 million subscribers over the next four years. *See* Public Interest Statement at 82. To put those numbers into context, however, ILECs control nearly 144 million end user access lines. *See* Federal Communications Commission, *Local Telephone Competition: Status as of December 31, 2005*, Table 4 (rel. July 2006), *available at* http://www.fcc.gov/wcb/iatd/recent.html.

11/ The imbalance between the number of ILEC customers and the number of cable voice customers creates natural incentives for the ILECs to discriminate against cable voice providers. In this scenario, many calls from cable voice providers will terminate to customers served by the ILECs. The ILEC has the market power to charge higher termination rates or, alternatively, cable voice customers will see a reduced value of service by being unable to call customers served by the ILECs. *See* Letter from J.G. Harrington, Counsel for Cox Communications, Inc., to Marlene H. Dortch, FCC, WC Docket Nos. 05-65, 05-75 (filed July 28, 2005), *attaching* Gerald Brock, *Vertical Integration with Network Effects*, at 9 (July 21, 2005).

12/ *Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499, ¶ 13 (1996) ("*Local Competition Order*") (intervening history omitted), *aff'd by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

AT&T, like the other BOCs, retains market power over interconnection. This Commission recently confirmed this fact in the *Qwest Forbearance Order*.[13/] Even in a market where facilities-based entry by a cable company was deemed sufficient to relieve the incumbent carrier, Qwest, from many dominant carrier regulations, the Commission rejected Qwest's request to lift the interconnection obligations found in section 251(c)(2).[14/] The Commission held that "[f]orbearing from section 251(c)(2) interconnection and related section 251(c) requirements such as collocation likely would give Qwest, which is the only carrier in the Omaha MSA to have a ubiquitous network, the ability to exercise market power over interconnection in this market."[15/] The Commission's finding certainly applies to AT&T, which is far larger than Qwest, and AT&T's merger with BellSouth only serves to enhance its incentives to wield its market power against cable competition.

B. The Merger Increases Incentives To Discriminate against Cable Voice Services in Order To Undermine Cable's Bundle.

Competition between the cable companies and AT&T will increasingly center on providing consumers bundles of voice, video, broadband Internet, and wireless services over an IP platform. Indeed, most of the public interest benefits claimed for this merger involve enhancing AT&T's ability to provide an IP-based bundle to compete with the cable companies.[16/] As noted above, AT&T has a substantial advantage given its ability to discriminate against cable's voice product by imposing unreasonable and costly interconnection and access requirements. In doing so, AT&T undermines the attractiveness of cable's bundle *vis-à-vis* its own bundled offering. AT&T's incentives to discriminate become magnified as it seeks not only to retain its own voice customers, but also to win the lucrative revenues available through the sale of bundled video, Internet, and wireless IP-based services.

Although AT&T may have this incentive regardless of the merger because it has already embarked upon its IPTV deployment, BellSouth has not. As reported in the supplemental declaration of BellSouth Chief Technology Officer William L. Smith, BellSouth's plans to pursue video delivery are extremely limited – and those plans may or may not include IPTV technology.[17/] BellSouth's video plans involve only a small number of communities, with no deployment of services before 2007.[18/] BellSouth has made no decision to make a generally available IPTV offering.

13/ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶¶ 85-86 (2005) ("*Qwest Forbearance Order*").

14/ *Qwest Forbearance Order* ¶¶ 85-86.

15/ *Qwest Forbearance Order* ¶ 86.

16/ Public Interest Statement at 25 (describing the merger as designed to create a "more efficient and ubiquitous competitor to cable").

17/ *BellSouth Corporation and AT&T Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T Inc.*, WC Docket No. 06-74, Application for Transfer of Control, Declaration of William L. Smith, ¶¶ 8-13 (filed Mar. 31, 2006) ("Smith Decl.").

18/ Smith Decl. ¶ 22.

The merger is specifically designed to accelerate the roll out of IPTV services in the BellSouth region: "By combining the fiber-rich BellSouth network with the investments AT&T has already made to support a broad roll out of IPTV and AT&T's commitment to the IPTV service, the merger will enable AT&T to roll out U-Verse services quickly in the BellSouth region."[19/] The merger will integrate the currently separate networks of AT&T, BellSouth, and Cingular "into a single IP network to carry local and long distance voice, data and wireless traffic, making it possible to offer 'follow me' converged wireless/wireline services that will provide voice, data and video content to residential, business and government customers."[20/] By greatly expanding the scope and accelerating the timing of IPTV deployment so as to compete with cable's bundled services, the merger enhances the incentives to discriminate in the BellSouth region beyond what they would be absent the merger.

Moreover, the FCC recognizes that incentives to discriminate are particularly acute and harmful with respect to new types of services and competitors in the mass market. In this case, by harming cable's voice product, AT&T can knock out one element of the bundle, making it less attractive to consumers. The incentive to discriminate is particularly powerful because AT&T is the only other entity in its region capable of providing the triple or quadruple play. Thus, all of the benefits of such discrimination would redound directly to it. The merger imports this greatly heightened incentive created by the accelerated competition for bundled voice, Internet, and video directly into the BellSouth territory far more quickly than it otherwise would.

In addition to heightening the incentive and ability to harm cable competition through discriminatory interconnection, the merger will increase the incentives of Cingular to impose discriminatory roaming requirements on the wireless services that cable telephony providers will include in their bundle of services. The merger is designed to consolidate AT&T's control over Cingular and enhance its ability to provide seamless wireless services with AT&T's wireline voice, Internet, and IPTV services. The Commission must be vigilant that Cingular does not impose arbitrary and discriminatory roaming requirements in an effort to undermine the bundle of services offered by cable companies.

C. The Public Interest Harms the Commission Has Found in Previous BOC Mergers Are Fully Applicable to AT&T's Proposed Acquisition of BellSouth.

The Commission has repeatedly found that BOC mergers substantially harm the public interest because a BOC's expansion of its footprint through acquisition heightens its incentives to discriminate and eliminates a critical regulatory benchmark.[21/] These harms are particularly

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19/ Public Interest Statement at 24.

20/ Public Interest Statement at ii.

21/ *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd. 14032, ¶¶ 127-208 (2000); *SBC/Ameritech Merger Order* ¶¶ 101-247; *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd. 19985, ¶ 16 (1997).

acute with respect to new and emerging technologies. Commenters in this proceeding have explained that the Commission's findings in previous BOC mergers retain vitality and are fully applicable to AT&T's proposed acquisition of BellSouth.[22/]

A BOC's expansion into another ILEC's region via acquisition heightens its incentives to discriminate against national entrants because it will directly reap all of the benefits of discrimination in both its legacy region and the region of its merger partner. This analysis is directly applicable to competition from cable companies. Many cable companies have multi-regional footprints and provide service in both the AT&T and BellSouth region. Cox Communications, for example, operates major cable systems in both the AT&T (Arkansas, California, Connecticut, Kansas, Ohio, and Oklahoma) and BellSouth (Florida, Georgia, and Louisiana) home regions.[23/] Charter Communications operates cable systems in every state of AT&T's home region and every state of BellSouth's home region, except Florida.[24/] Insight Communications also operates in both AT&T (Illinois, Indiana, and Ohio) and BellSouth (Kentucky) states.[25/] The Commission's findings in previous BOC mergers of increased incentives to discriminate against competitors with a presence in the regions of both of the merging BOCs therefore apply to cable providers.

The FCC's prior merger analysis directly applies to cable companies in other ways. The Commission has recognized that ILEC discrimination can be of particular concern with regard to new and emerging technologies.[26/] The FCC noted, for example, that as BOCs compete with competitive providers of new services, "they have an incentive to discriminate against companies that depend on them for evolving types of interconnection and access arrangements necessary to provide services."[27/] Moreover, the Commission found that detection of discrimination is more difficult with new technologies.[28/]

22/ A number of commenters warn that the expanded footprint of the merged company will increase the incentives and ability of the merged company to discriminate against competitors. *See, e.g.*, Access Point, *et al.* Petition to Deny at 20-24; Cbeyond Communications, *et al.* Comments at 88-96; Mobile Satellite Ventures Subsidiary LLC Comments at 5; Sprint Nextel Corporation Comments at 6-9; Time Warner Telecom Petition to Deny at 42-45. Many of the same commenters, as well as others, also explain that the merger's elimination of a key regulatory benchmark will hamper the Commission's continuing efforts to ensure competition. *See, e.g.*, Access Point, *et al.* Petition to Deny at 13-17; Cbeyond Communications, *et. al.* Comments at 78-88; Earthlink Petition to Deny at 32-35; Mobile Satellite Ventures Subsidiary LLC Comments at 6; Time Warner Telecom Petition to Deny at 49-74.

23/ Cox Communications 2004 Annual Report, at 1, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=76341&p=irol-reportsannual.

24/ Charter Communications 2004 Annual Report, at 1, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-reportsannual.

25/ Insight Communications 2003 Annual Report, at n1, *available at* www.ir.insight-com.com/phoenix.zhtml?c=106462&p=irol-reportsAnnual.

26/ *SBC/Ameritech Merger Order* ¶ 201.

27/ *SBC/Ameritech Merger Order* ¶ 202.

28/ *SBC/Ameritech Merger Order* ¶ 196 ("This discrimination is likely to be particularly acute with regards to advanced or customized access services for which detection of discrimination is most difficult.").

The new technology of concern at the time of the SBC/Ameritech merger was emerging competitive digital subscriber line ("DSL") service. Today it is emerging voice services using IP technology. Although the technology has changed, the underlying concerns remain the same. The Commission's concerns about CLEC DSL providers were certainly borne out. Today there is virtually no competitive DSL service in the mass market.[29/] The fate of the CLEC DSL industry is highly instructive and directly bears out the concerns about heightened ability and incentives to discriminate against new technologies.

AT&T contends that times have changed and that the concerns that underlay the Commission's findings in previous BOC mergers relating to the expanded footprint and loss of regulatory benchmarks have fully dissipated. It claims, for example, that BOCs no longer have the ability to discriminate against rivals based on market power over bottleneck inputs.[30/] The Commission, however, specifically rejected this claim with regard to interconnection in the *Qwest Forbearance Order*, even as to the considerably smaller Qwest. AT&T also claims that regulators now have sufficient experience with competition in the mass market and are far more able to detect discrimination.[31/] But regulators have little experience with IP-based voice services and the new forms of interconnection that surely will be required. Indeed, the rules of the road regarding VoIP interconnection are far from settled, providing AT&T ample room to engage in difficult to detect forms of discrimination.

AT&T also proffers similar arguments with respect to benchmarking. It claims benchmarking is no longer useful or necessary because interconnection obligations have been "concretely defined" and are now set in state performance plans.[32/] AT&T goes so far as to suggest that disputes over interconnection have "largely disappeared" and that section 251 and section 271 obligations are fully implemented.[33/]

This is simply not true. The nation is undergoing a fundamental shift from circuit-switched service to IP-based services, of which IP-based voice is of particular importance in the mass market, and the rules of engagement for such services are hardly "concretely defined." Moreover, competition for IP-based bundles is just beginning and it will be vitally important to compare the practices of the BOCs as they relate to their prime competitors, the cable companies. As the Commission noted in the *SBC/Ameritech Order* "[c]omparative practices

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29/ Following a brief period in 2000-01 when CLECs' market share of DSL services rose as high as approximately seven percent (7%), the CLEC's DSL market share plummeted below four percent (4%) by the end of 2001, and has remained five percent (5%) or less since the time. *See* Federal Communications Commission, *High-Speed Services for Internet Access: Status as of June 30, 2001*, at Table 5 (rel. Feb. 2002); Federal Communications Commission, *High-Speed Services for Internet Access: Status as of December 31, 2001*, at Table 5 (rel. July 2002); *see also, e.g.*, Federal Communications Commission, *High-Speed Services for Internet Access: Status as of December 31, 2005*, at Table 6 (rel. July 2006) (reporting the CLEC share of the DSL market at the end of 2005 to be 3.7 percent (3.7%)). All reports cited above are available at http://www.fcc.gov/wcb/iatd/comp.html.

30/ Public Interest Statement at 116.

31/ Public Interest Statement at 118.

32/ Public Interest Statement at 120-22.

33/ As noted above, the Commission has specifically rejected the claim that section 251(c)(2) interconnection obligations have been fully implemented. *See Qwest Forbearance Order* ¶¶ 85-86.

analyses are perhaps the regulators' and competitors' best means of staying abreast of . . . rapid technological advances, particularly in assessing the technical feasibility of novel access and interconnection configurations vital for the provision of new services and technologies."[34/]

Far from being the dead letter that AT&T attempts to portray, benchmarking remains critically important. The merger will eliminate one of the last potential sources for comparative practice analysis just as "novel access and interconnection configurations" for efficient cable voice interconnection are being developed. One way that the Commission can mitigate this loss is, as noted below, to require AT&T to implement IP-to-IP interconnection arrangements and offer direct interconnection rights to cable VoIP providers. Requiring AT&T to implement a more efficient method of direct IP interconnection as a condition of the merger would ensure regulatory oversight and development of robust and efficient IP interconnection arrangements that could serve as a benchmark.

II. The Promise of Robust Competition Requires Fair and Efficient Interconnection between Cable Providers and AT&T.

To ensure that consumers reap the benefits of competition that can be provided by cable telephony, the Commission must ensure that AT&T does not act on the heightened incentives created by the merger. Requiring AT&T to offer fair and efficient interconnection to its cable competitors can mitigate likely harms resulting from the merger. Outlined below are some steps the Commission may consider both in the context of the merger and in its broader assessment of interconnection policies.

A. Fostering Efficient Interconnection.

The Commission's finding in the *Qwest Forbearance Order* that section 251(c)(2) nondiscrimination requirements are needed to check BOC market power over interconnection has important implications for cable voice competition. The ability of cable voice providers to avail themselves of section 251(c)(2) interconnection protections is critical to their ability to compete. The Commission should thus consider requiring AT&T, as a condition of merger approval, to extend section 251/252 interconnection rights to all cable voice providers regardless of the underlying technology used to provide those voice services or the regulatory classification of the service. For example, all cable telephony providers should have the right to negotiate or opt into interconnection agreements and to interconnect directly with AT&T without the need for a third party intermediary, which can be inefficient.

AT&T's interconnection practices also should keep pace with the substantial advances in networking, technology, and efficiency that have spawned the widespread deployment of IP-based voice and other services. To improve the efficiency of cable VoIP interconnection, the Commission should direct AT&T, when requested by a cable voice provider, to establish interconnection arrangements that enable the exchange of VoIP traffic using an optical level, IP-based interface. This would permit the hand off of IP traffic without the originating carrier first having converted the traffic to TDM, which is inefficient, denies the public the benefit of

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34/ *SBC/Ameritech Merger Order* ¶ 109.

advances in technology and network architecture, unnecessarily adds potential points of failure, and forces unnecessary costs on AT&T's rivals.[35/]

AT&T has steadfastly refused to permit IP-based interconnection at specified interconnection points, instead demanding that interconnecting providers provision tens of thousands of electrical handoffs at multiple points of interconnection. This practice creates various anticompetitive effects, including: (1) imposing on IP-based competitors excessive provisioning costs for additional interconnection trunks,[36/] (2) slowing the growth of competitive IP services by refusing to dedicate staff and resources to provision sufficient trunking facilities, and (3) forcing IP-based competitors to deploy ever more costly gateways and other equipment that are needed to convert the traffic from IP to TDM. Although AT&T is capable of and is already utilizing IP-based transport and interconnection on its own network, it has refused to provide such capabilities to cable VoIP competitors or even to disclose the manner in which it performs such interconnection within its own network.[37/] Accordingly, the Commission should require AT&T to provide IP interconnection at points identified by the requesting carrier.

More generally, the Commission should reaffirm the right of competitors to choose technically feasible points of interconnection, including identifying a single interconnection point per LATA. AT&T has used its power over interconnection to deny or interfere with this fundamental requirement, by, for example, forcing cable operators to interconnect either at end offices or multiple tandems when the competitor only desires a single point of interconnection ("POI") in a LATA. Requiring competitors to deploy multiple interconnection points is not supported by any reasonable business justification and is costly, inefficient, and in direct violation of the Commission's rules.[38/] BellSouth, by contrast, permits competitors to establish a

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[35/] Antitrust theory certainly recognizes that entities with market power over critical inputs can thwart competition through raising their rivals' costs. *See generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals ' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986).

[36/] Because competing carriers pay AT&T's costs through transport charges, AT&T has little incentive to limit trunk provisioning.

[37/] The Commission's rules for circuit-switched telephone service establish baseline requirements for interconnection, including making all technically feasible forms and points of interconnection available. *See* 47 C.F.R. § 51.305(c) ("Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities."); *id.* § 51.305(d) ("Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality."); *id.* § 51.305(g) ("An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of this section.").

[38/] 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a) ("An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network . . . [a]t any technically feasible point within the incumbent LEC's network."); *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, et al.*, CC Docket No. 00-218, Memorandum Opinion and Order, 17 FCC Rcd. 27039, ¶ 52 (2002) ("[C]ompetitive LECs may request interconnection at any technically feasible point."); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, ¶ 112 (2001) ("[A]n single POI per LATA. As a result of the merger, AT&T's anticompetitive practice is likely to be exported to the BellSouth region.[39/]

The Commission can deter this anticompetitive outcome by confirming that cable telephony providers may establish a single POI per LATA at a technically feasible point on AT&T's network chosen by the cable telephony provider, as required by the Commission's rules. If AT&T disputes the technically feasible point selected by the cable provider, the Commission should emphasize, consistent with its current rules, that the burden of proof is on AT&T to demonstrate that the interconnection point chosen by the cable provider is not technically feasible.[40/] In addition, AT&T and the cable telephony provider should each be responsible for delivering their originating traffic to the POI with each party solely responsible for any necessary transport on its side of the POI without the imposition of additional transport or direct end office trunking charges. Nor should AT&T be permitted to require the establishment of additional physical or "virtual" interconnection points, which ultimately evade the single POI and cost responsibility requirements.

Finally, the Commission can enhance the efficiency of local mass market competition between cable providers and AT&T by requiring AT&T to exchange non-access traffic, including VoIP traffic, on a bill and keep basis at the request of a cable voice provider. A cable provider's ability to request a bill and keep arrangement should not depend on the balance of traffic exchanged between it and AT&T nor on the cable provider's acceptance of any additional conditions. Requiring AT&T to make bill and keep arrangements available would preclude AT&T from imposing asymmetrical and unsupported charges on cable voice providers for the exchange of traffic between their networks.

B. Reducing the Cost and Delay of Negotiating Interconnection Agreements.

In prior mergers, the Commission has expressed concern about ILECs slow-rolling competitors in negotiations for critical inputs, and adopted conditions to ease interconnection discussions for competitors.[41/] Cable telephony providers have experienced firsthand the delays and costs that can be imposed when attempting to negotiate, or even just to opt into, interconnection agreements with the merger applicants. The combined resource imbalance created by the merger, on the heels of the AT&T/SBC merger, will fundamentally disrupt a core goal of the Communications Act, namely that entrants and incumbents would be able to negotiate and arbitrate as equals. This resource imbalance would clearly advantage AT&T because the costs of arbitration (per customer) for a cable telephony provider would far exceed any costs incurred by AT&T. As a result, any express or implicit strategy by AT&T that creates

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[incumbent carrier] must allow a requesting telecommunications carrier to interconnect at any technically feasible point.").

39/ *SBC/Ameritech Merger Order* ¶ 115 (noting that "[t]he acquiring firm has a particularly strong incentive to eliminate conflicting policies of the acquired firm that would jeopardize its chosen strategy to resist competitive entry").

40/ 47 C.F.R. § 51.305(e) ("An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.").

41/ *SBC/Ameritech Merger Order* ¶ 204.

unnecessary litigation and/or arbitration costs would harm competitors far more than it would harm AT&T. The Commission thus should consider requiring AT&T to abide by procedures that would streamline the interconnection agreement adoption process and eliminate areas of potential friction.

Specifically, we recommend that AT&T should be required to permit cable telephony providers to opt into any entire interconnection agreement, whether negotiated or arbitrated, in any state across the merged entity's footprint, subject to technical feasibility and exclusive of state-specific pricing and performance plans.[42/] The FCC has previously noted the risk (and costs) associated with unnecessary re-arbitration of interconnection issues, observing that "any carrier attempting to arbitrate issues that have previously been resolved in an arbitration solely to increase another party's costs would be in violation of the duty to negotiate in good faith."[43/]

This risk is best addressed by directly limiting AT&T's incentive to increase its competitors' costs by serially arbitrating the same issue(s). AT&T also should not be permitted to refuse a request to opt into an agreement just because the existing agreement has not been amended to reflect changes in law, provided the cable provider agrees to negotiate an amendment after it has opted into the agreement. Nor should AT&T be permitted to require competitors to enter into separate interconnection agreements for one state simply because AT&T has multiple affiliates operating in the same state. Additionally, instead of always starting with AT&T's latest template agreement, cable providers should be able, at their option, to use their pre-existing agreement as the starting point for negotiations on a new agreement. And finally, AT&T should afford cable voice providers the option of extending current agreements for a period of up to three years, subject to amendment to reflect changes in law.[44/] Requiring the renegotiation of interconnection agreements every two to three years is enormously wasteful and simply sets up continuous cycles of negotiation and arbitration.

C. Cable Providers Are Critically Reliant on ILEC Transiting Services.

In addition to direct interconnection, cable telephony providers require transiting services. As recognized in the *Qwest Forbearance Order*, the BOCs are the only providers with ubiquitous connections to both cable operators and every other voice provider, and as such, are uniquely situated to provide transit services.[45/] Transiting is often the only economically

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42/ Similar conditions have been suggested by other commenters in this proceeding. *See, e.g.*, Access Point, *et al.* Petition to Deny at 74 (suggesting the merged company be required to make any interconnection agreement negotiated in one state available in all other states throughout the merged company's region, subject to state-specific pricing); Cbeyond Communications, *et al.* Comments at 104 (same). This recommendation is similar to conditions voluntarily agreed to by SBC and Bell Atlantic when they acquired Ameritech and GTE, respectively.

43/ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 01-338, Second Report and Order, 19 FCC Rcd. 13494, ¶ 28 (2004).

44/ During that period, interconnection agreements should be terminated only at the competitor's request (except in cases of default), with specific terms and sections being opened for negotiation according to the agreement's change of law provisions.

45/ *Qwest Forbearance Order* ¶ 86 ("Due to the ubiquity of Qwest's network and its direct connection obligations, competitive carriers have constructed their networks using direct interconnection with Qwest and collocation as a way to interconnect with all of the carriers in the Omaha MSA. If we were to forbear from section efficient and rational way for cable operators to ensure that their customers can reach any party they wish to call, and "the availability of transit service is increasingly critical" because carriers "may have no efficient means by which to route traffic" to other carriers "[w]ithout the continued availability of transit service."[46/]

Both AT&T and BellSouth want to make transit traffic arrangements a commercial service offering available only in commercial contracts or tariffs at "market rates" that are significantly higher than the transit rates that have been approved by state commissions in generic pricing proceedings or via arbitrations. Given that cable voice providers "rely on the incumbent LEC to provide a transit service,"[47/] the Commission must ensure that those services are available to cable operators on just and reasonable terms, and at cost-based prices. More specifically, it should require AT&T to provide transiting as a section 251 interconnection service and at rates no greater than state-approved reciprocal compensation transport and termination rates.[48/]

CONCLUSION

In sum, the ability of cable providers to fulfill the promise of robust competition in the local mass market is reliant on fair and efficient interconnection with AT&T. AT&T unquestionably retains market power over this critical bottleneck input. The merger substantially increases AT&T's incentives and ability to wield this power against cable's telephony services in order to advantage its own services, particularly IP-based bundled services. To ensure that the merger does not undermine competition, the Commission should consider taking steps to mitigate AT&T's enhanced power over interconnection.

251(c)(2), we believe Qwest would be able to exercise market power by refusing directly to connect to its competitors and forcing them to reconfigure their networks in order to exchange traffic – an expensive proposition – or pay Qwest significantly higher interconnection fees.").

46/ *Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685, ¶ 125 (2005).

47/ *Qwest Forbearance Order* at n.215.

48/ Other parties have similarly recognized the importance of transiting services and have proposed conditions addressing transiting. *See, e.g.,* Sprint Nextel Corporation Comments at 11 (requesting that the Commission "require the newly merged company to offer transit service at cost based rates and not the so-called 'market based' rates AT&T and BellSouth have sought in the states.").

Respectfully submitted,

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