

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

3050 K STREET, N.W.

SUITE 400

WASHINGTON, D.C. 20007

(202) 342-8400

FACSIMILE

(202) 342-8451

www.kelleydrye.com

JOHN J. HEITMANN

DIRECT LINE: (202) 342-8544

EMAIL: jheitmann@kelleydrye.com

NEW YORK, NY  
TYSONS CORNER, VA  
CHICAGO, IL  
STAMFORD, CT  
PARSIPPANY, NJ  
BRUSSELS, BELGIUM

AFFILIATE OFFICES  
MUMBAI, INDIA

September 28, 2006

VIA ECFS

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

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

Dear Ms. Dortch:

On September 22, 2006, I met with Mr. Scott Bergmann, Legal Advisor to Commissioner Adelstein for wireline issues, on behalf of ScanSource, Inc. ("ScanSource") to discuss the proposed merger of AT&T, Inc. ("AT&T") and BellSouth Corporation ("BellSouth"). At that meeting, Mr. Bergmann asked whether the Federal Communications Commission ("FCC" or "Commission") has previously adopted "fresh look" requirements. In response to Mr. Bergmann's question, ScanSource hereby submits the instant *ex parte* letter.

As detailed below, the Commission has adopted fresh look requirements numerous times since 1991, particularly in the context of interexchange switched and special access services.

- In 1991, the Commission issued a *Report and Order* in CC Docket No. 90-132 in which it examined the state of competition in the interstate, interexchange marketplace, including the market for 800 services. As part of its effort to foster competition for 800 services, the Commission "require[d] AT&T to permit customers with Tariff 12 packages that include inbound service to terminate these packages within ninety days of the time

800 numbers become portable without the imposition of any termination liabilities.”<sup>1</sup>  
The Commission reaffirmed its fresh look requirement upon reconsideration.<sup>2</sup>

- In 1992, the Commission adopted a *Report and Order and Further Notice of Proposed Rulemaking* in which it adopted a fresh look requirement that capped the charges that a local exchange carrier could impose on special access customers with contracts terms greater than three years and which were entered into prior to the issuance of the FCC’s Order.<sup>3</sup> The Commission concluded that the “existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to ‘lock up’ the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment.”<sup>4</sup>
- The Commission also adopted a fresh look requirement as part of the *Local Competition Order*.<sup>5</sup> The Commission determined *inter alia* that CMRS providers that were parties to pre-existing agreements with ILECs which did not provide for mutual compensation had the option to renegotiate those contracts with no termination liabilities or other contract penalties. The Commission explained that “we have ample authority under section 4(i) of the 1934 Act as well as section 251 of the 1996 Act, to order this remedy” and that “[c]ourts have held that ‘the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful . . . and to modify other provisions of private contracts when necessary to serve the public interest.’”<sup>6</sup>
- In 2002, the Commission issued a *Report and Order and Second Further Notice of Proposed Rulemaking* in CC Docket 96-45 in which it *inter alia* modified the Commission’s revenue-based methodology for universal service contributions to require contribution based on projected revenues, as opposed to historical revenues.<sup>7</sup> In response

---

<sup>1</sup> *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5906 (1991).

<sup>2</sup> *See Competition in the Interstate Interexchange Marketplace*, 7 FCC Rcd 2677, ¶17 (1992).

<sup>3</sup> *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-65 (1992), *recon.* 8 FCC Rcd 7341, 7342-59 (1993) (fresh look to enable customers to take advantage of new competitive opportunities for special access under expanded interconnection), *vacated on other grounds and remanded for further proceedings sub nom. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (1994). *See Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154 (1994).

<sup>4</sup> *Id.*, 7 FCC Rcd at 7463-64, ¶201.

<sup>5</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶1094-95 (1996). *See also, id.* at n. 2635 (citing Commission precedent regarding fresh look).

<sup>6</sup> *Id.*, ¶1095, quoting *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

<sup>7</sup> *Federal-State Joint Board on Universal Service*, 17 FCC Rcd 24952 (2002).

to concerns from AT&T that it may be prevented by then-existing contracts from recovering its universal service contributions from certain business customers, the Commission concluded that “contributors should be afforded a fresh look at existing contracts and may be permitted to renegotiate contractual terms that prohibit the pass through of universal service recovery charges.”<sup>8</sup>

As demonstrated by the foregoing, the Commission has ample precedent and authority to impose the fresh look condition proposed by ScanSource and numerous competitive carriers seeking to fill the void created by the potential loss of AT&T as an alternative to BellSouth in BellSouth’s legacy service territory. ScanSource urges the Commission to include ScanSource’s fresh look condition in any list of conditions it imposes, if it somehow were to find that reducing similarly situated enterprise customers’ viable local service choices from three carriers to two is in the “public interest.” Of course, it remains ScanSource’s position that the above-captioned applications should be denied, as approving a merger such as this one that is certain to drive up the costs of telecommunications services for enterprise customers, and others, serves the interests of only a few at the expense of the greater good.

If you have any questions regarding this submission, please feel free to contact me.

Respectfully submitted,



John J. Heitmann

cc: Scott Bergmann  
Michelle Carey  
Scott Deutschman  
Ian Dillner  
Tom Navin

---

<sup>8</sup> *Id.*, 17 FCC Rcd at 24981.