

October 3, 2006

BY ECFS

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

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

Dear Ms. Dortch:

Several of the nation's largest cable operators have joined the ranks of those who urge the Commission to prejudge industry-wide issues that are the subject of pending rulemaking proceedings in order to saddle AT&T with obligations that are wholly unrelated to any impact of its merger with BellSouth. This latest eleventh hour attempt to co-opt the merger process is as improper as previous ones. Cablevision, Cox, Charter, Insight and Advance/Newhouse ask the Commission to grant them broad (and remarkably one-sided) new interconnection and intercarrier compensation rights in advance of the Commission's resolution of those same industry-wide questions in active rulemaking proceedings.¹ The idea that these large cable companies, which have successfully interconnected and exchanged traffic with AT&T and BellSouth for years and have telephone customer bases that are growing by leaps and bounds and already number in the millions, could be deserving of such special treatment (much less require it to compete in the marketplace) would be hard to swallow in any context. It should be rejected out of hand in the context of *this* proceeding to review a transaction that will have no impact on the merged company's dealings with cable companies.

The Commission has consistently "declined to consider in merger proceedings matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability."² The cable companies have thus filed their *ex parte* in the wrong docket. The Commission's pending intercarrier compensation and IP-enabled services rulemaking proceedings, in which the cable companies are active participants, are addressing all of the industry-wide interconnection and compensation questions raised by their filing here, and those

¹ See *Ex Parte* Letter from Advance/Newhouse Communications, Cablevision Systems Corp., Charter Communications, Cox Communications, and Insight Communications Company, Inc. to Marlene H. Dortch (FCC), WC Docket No. 06-74 (Sept. 27, 2006) ("*Cable Ex Parte*"); Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (rel. March 3, 2005) ("*ICC FNPRM*"); Notice of Proposed Rulemaking, *IP-Enabled Services*, WC Docket No. 04-36, (rel. March 10, 2004).

² *SBC-SNET Merger Order*, 13 FCC Rcd. 21292, ¶ 29 (1998).

rulemaking proceedings are the proper fora for them to air their views on those subjects. Indeed, these questions of how, where and on what terms companies should interconnect and exchange both TDM and IP traffic are the central issues under review in these rulemaking proceedings, and each of the cable companies' specific proposals is under consideration there. For example, the cable companies ask the Commission to foist on AT&T all of the costs of their decisions to establish relatively few points of interconnection ("POIs") with AT&T's and BellSouth's networks,³ the same ruling they seek on a generic basis in the rulemaking proceedings and one that would prejudge "POI and the allocation of transport costs" issues that the Commission has characterized as among "the most contentious" and difficult issues.⁴ They ask the Commission to require AT&T, without compensation, to bear the entire burden of deploying the IP-to-TDM translation equipment necessary to translate their IP traffic that they want delivered to AT&T's TDM customers; that question is before the Commission in the rulemaking proceedings.⁵ Consistent with their advocacy in the rulemaking proceedings, they seek sole discretion to decide when they will exchange traffic with AT&T on a bill-and-keep basis (no matter how large the traffic or cost imbalances).⁶ And they urge the same transiting service regime they have proposed in the rulemaking proceedings – expansive new transiting obligations that fall only on incumbent LECs and that have no statutory grounding.⁷

³ Although the cable companies attempt to frame the issue as AT&T's refusal to accept their POI choices, both AT&T and BellSouth comply fully with their section 251(c)(2) obligations to allow interconnection at technically feasible points. The real dispute is over an appropriate allocation of transport costs that encourages efficient interconnection decisions and appropriately compensates a carrier that must transport traffic over long distances because of another carrier's POI decisions.

⁴ See ICC FNPRM, ¶ 91. Compare *Cable Ex Parte* at 10-11 with *Cablevision ICC Reply* at 4 ("CLECs should be entitled to connect with ILECs at the POI locations that best ensure that they and their customers may benefit from the efficiencies generated by their use of new technologies"); Comments of Cox Communications, Inc., CC Docket No. 01-92, at 17 (May 23, 2005) ("*Cox ICC Comments*") (the 1996 Act "authorizes competitors to interconnect at any technically feasible point within the incumbents' network") (internal quotations omitted); *ICC FNPRM*, ¶ 91 ("the POI and the allocation of transport costs are some of the most contentious issues in interconnection proceedings").

⁵ Compare *Cable Ex Parte* at 9-10 with Reply Comments of Cablevision *et al.*, CC Docket No. 01-92, at 3-4 (July 20, 2005) ("*Cablevision ICC Reply*") (asking the Commission to "take action to regulate" "IP-to-IP" interconnection and criticizing Verizon for failing to provide an "IP interface for service providers to terminate in an IP format").

⁶ Compare *Cable Ex Parte* at 11 with *Cablevision ICC Reply* at 4 ("bill and keep is the most practical" and should be "phased in"); *Cox ICC Comments* at i (seeking "either 'bill and keep' compensation or compensation at some other level"); *ICC FNPRM*, ¶ 74 (seeking comment on "proposed bill-and-keep regimes").

⁷ Compare *Cable Ex Parte* at 13 with *Cox ICC Comments* at ii ("incumbent LECs should be required to offer transit services at TELRIC rates"); *ICC FNPRM*, ¶¶ 129-31 (seeking comment on "whether we should . . . require the provision of transit service" and, if so, the "scope of such regulation" and "the terms and conditions for transit offerings").

AT&T and BellSouth strongly support reform and additional clarity in the rules of the road for interconnection and intercarrier compensation, but that reform must come through rules of general applicability that apply fairly to all industry participants, not through merger conditions that would apply only to AT&T. Indeed, there is perhaps no area where it is more important to adhere strictly to the Commission's admonition that the public interest is better served by addressing generic issues like these not with merger conditions but with rules of general applicability. The Commission has made intercarrier compensation reform a top priority, and participants from virtually all segments of the industry, including AT&T and BellSouth, have worked hard to develop an industry consensus on a new set of equitable interconnection and compensation rules that will meet both current and future needs.⁸ Such a difficult undertaking could only be undermined by addressing issues piecemeal in a merger proceeding. Indeed, by singling out one industry segment for favored treatment (*i.e.*, cable) – and a single company for disfavored treatment (*i.e.*, AT&T) – such action would both exacerbate inequities in the current rules and seriously weaken the incentives of the cable companies to participate responsibly in the Commission's efforts to implement comprehensive reforms.

In attempting to explain why they are only now raising issues that they claim are of such "critical importance,"⁹ the cable companies highlight another reason why it would be inappropriate to consider their proposals in this merger proceeding. The cable companies claim that they "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."¹⁰ AT&T agrees that any company seeking to interconnect and exchange traffic with AT&T should first attempt to reach agreement through private negotiation, and AT&T stands ready to entertain any serious cable company proposal presented through the ordinary business channels used by all others that seek such arrangements. However, the cable companies' suggestion that a meeting between their trade association and AT&T's Washington, D.C. office should excuse them from any further obligation to negotiate difficult issues is simply irresponsible.

In any event, the cable companies' merger condition proposals would be wholly improper even if the matters they addressed were not both the subject of pending rulemaking proceedings and attempts to bypass the negotiation process. The Commission conditions its approval of a merger "only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms)."¹¹ Here, the cable companies claim that both AT&T and BellSouth "*today*" have both the incentive and ability to discriminate against mass market cable telephony services through the exercise of interconnection market power.¹² That assertion is impossible to square with the cable companies' success in obtaining interconnection and intercarrier compensation terms that have already allowed them to win millions of new telephony customers. But even if the cable

⁸ See Public Notice, *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, CC Docket No. 01-92, DA 06-1510, at 1 (July 25, 2006).

⁹ *Cable Ex Parte* at 3

¹⁰ *Id.*

¹¹ *SBC-AT&T Merger Order*, ¶ 19.

¹² *Cable Ex Parte* at 3 (emphasis added).

companies' claim of *existing* market power was well-founded (which is not the case), this transaction – which will combine only non-overlapping mass market local facilities – plainly will *not enhance* any such incentives or abilities.

The cable companies' claim to the contrary is a makeweight. They contend that the accelerated rollout of wireline IP-video services in the BellSouth region – an important public interest *benefit* of the transaction – will somehow boost the merged company's incentives to discriminate against cable companies in the provision of bundled services in the BellSouth region. But BellSouth *already* competes against triple and quadruple play cable bundles – offered in many instances by these very cable companies – and providing BellSouth with additional video service capabilities that could only *improve* its competitiveness against its cable competitors could not possibly increase its incentives to respond with unlawful discrimination.

It is telling that the cable companies fail to document a single incidence of actual discrimination against their voice services, and, as the decline in BellSouth's access lines and the corresponding increase in cable company telephone customers starkly confirms, the cable companies are and will remain more than capable of competing effectively in the BellSouth region and elsewhere. Moreover, as the Commission has recognized, any concerns about the types of telephone discrimination the cable companies claim to fear are necessarily *reduced*, not heightened, in the context of bundled service plans on which they focus.¹³ And the reality is that today's environment – in which cable companies are free to provide telephone, Internet and video services whenever and wherever they choose, while telephone companies are forced to fight pitched battles (often instigated by the cable companies themselves) merely to vindicate their rights to provide competing video services – gives *cable companies*, not telephone companies, an artificial and unwarranted leg up in competition for the provision of bundled services.¹⁴ For all of these reasons, the cable companies' complaints are beyond the proper

¹³ See *SBC/AT&T Merger Order* (“[t]he likelihood that consumers subscribing to bundled service plans consider the price and characteristics of the bundle as a whole, rather than individual components of the bundle, *decreases* the likelihood that an increase in the price [or decrease in the quality] of stand-alone [telephone] services . . . would lead a consumer to switch to an alternative provider for its bundle of services”) (emphasis added).

¹⁴ The cable companies offer no explanation at all why the merger would, as they assert, “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,” *Cable Ex Parte* at 6. And they refute their own “benchmarking” and “enlarged footprint” claims by recognizing that today's environment is one of robust *intermodal* competition – *i.e.*, one in which the bottleneck concerns that animated the benchmarking and footprint concerns of a prior era are entirely absent and that relevant “benchmarks” could no longer, in any event, rationally be limited to the ILECs. See *id.* at 2 (“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”).

scope of this merger proceeding, and the Commission should here, as it did in the SBC/AT&T merger proceeding, reject their baseless claims.¹⁵

Finally, it is worth noting that the cable companies' claim that they must be put at the head of the intercarrier compensation reform line "to fulfill the promise of robust competition in the local mass market,"¹⁶ does not hold water, even apart from its irrelevance to this merger proceeding. As their submission documents, these five cable companies alone already provide telephone service to more than three million customers. And their recent press releases speak volumes about the tremendous successes they continue to enjoy and refute any suggestion that they are hampered by their interconnection and intercarrier compensation arrangements. For example, Charter announced that during the second quarter of 2006 it "made telephone service available to nearly 750,000 additional homes, bringing total homes passed with telephone service to approximately 4.7 million,"¹⁷ and it "remains on track to make the service available to between 6 million and 8 million homes by year-end 2006."¹⁸ Cox, which already has nearly two million telephone customers and has announced that "robust competition" from its IP telephony offerings "will be available in all Cox markets by the end of the year,"¹⁹ touts that it "has proven that cable providers can be successful as telephone providers."²⁰ Cablevision's over one million telephony customers include "one-third of [its] cable television customers and more than one half of the company's high-speed Internet customers,"²¹ and it has added half of those telephone customers since June 2005.²²

In sum, the Commission should reject the cable companies' attempt to inject into this merger proceeding generic issues that are far afield from any impact of the proposed transaction. The nation's cable companies will do just fine waiting with the rest of the industry for the

¹⁵ See *SBC-AT&T Merger Order*, 20 FCC Rcd. 18290, ¶¶ 107 ("We are also not persuaded by commenters' claims that the merger will increase the merged entities' incentive and ability to raise the costs of mass market rivals") (citing comments of Cox); *id.* ¶ 178 (2005) (complaints about "interconnection arrangements" are "not appropriately addressed in the context of this merger review").

¹⁶ *Cable Ex Parte* at 13.

¹⁷ Press Release, *Charter Reports Second Quarter 2006 Financial Operating Results* (Aug. 8, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-newsArticle&ID=893335>.

¹⁸ *Id.*

¹⁹ Press Release, *Cox Digital Telephone to be Available in all Cox Markets by End of Year* (July 13, 2006), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=76341&p=irol-newsArticle&t=Regular&id=881924>.

²⁰ *Id.*

²¹ Press Release, *Cablevision's Optimum Voice Surpasses One Million Customers* (July 18, 2006), available at http://www.cablevision.com/index.jhtml?id=2006_07_18.

²² Press Release, *Cablevision Systems Corporation Reports Final Second Quarter 2006 Results* (Sept. 21, 2006), available at http://www.cablevision.com/index.jhtml?id=2006_09_21.

Commission's orderly resolution of its pending intercarrier compensation and IP-enabled services proceedings with rules of general applicability.

Sincerely,

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