Gary L. Phillips
General Attorney &
Asst. General Counsel

AT&T Services, Inc.
1120 20th Street NW, Suite 1000
Washington, D.C. 20036
Phone 202 457-3055
Fax 202 457-3074

October 3, 2006

VIA ELECTRONIC SUBMISSION
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Lobby Level
Washington, D.C. 20554

Re: Review of AT&T Inc. and BellSouth Corp. Application for Consent to Transfer Control, WC Docket No. 06-74

Dear Ms. Dortch:

AT&T and BellSouth (Applicants) respectfully respond to ScanSource's September 28 *ex parte*, in which ScanSource purports to demonstrate that there is ample precedent and authority for the imposition of a merger condition subjecting all of BellSouth's term and negotiated retail service arrangements to "fresh look" requirements.[1] As explained below, ScanSource's request for fresh look is based on a gaping lapse of logic that is prodigious even in the world of merger condition advocacy. It not only fails to provide support for its proposed fresh look requirement, it demonstrates that such a requirement would be unprecedented, unlawful, and wholly unwarranted.

According to ScanSource, the Commission has adopted fresh look requirements for interexchange switched and special access services "numerous times since 1991."[2] In fact, the Commission has done so only three times,[3] two of which were at least fourteen years ago and

[1] *See ex parte* letter from John J. Heitmann, Kelley Drye & Warren, to Marlene H. Dortch, September 28, 2006, WC Docket No. 06-74 ("ScanSource *ex parte*). *See also* Reply Comments of ScanSource, filed June 20, 2006 (ScanSource Reply) at 12 (proposing fresh look for all BellSouth term or negotiated service arrangements).

[2] ScanSource *ex parte* at 1.

[3] ScanSource's September 28 *ex parte* lists four such instances, but in one of those instances, the Commission found that the contract terms for which it was ordering fresh look were unlawful even under the Commission's pre-existing rules. *See* ScanSource September 28 *ex parte* at 2 (*citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 1094-95 (1996), which allowed CMRS providers to renegotiate interconnection arrangements that violated Commission rules by failing to provide for mutual compensation). Abrogation of an unlawful contract provision is not fresh look, but, rather an ordinary exercise by the Commission of its authority to enforce its own rules and to prescribe just and reasonable rates, term, and conditions of service.

markedly limited in their applicability.[4] Moreover, the Commission recently observed that fresh look "is a very rare occurrence" because it may be" unfair … disruptive to the marketplace, and ultimately inconsistent with the public interest."[5]

Of the three occasions in which the Commission has ordered at least limited fresh look for interexchange and/or access services, two occurred in conjunction with the adoption of new rules that, for the first time, opened a particular market to meaningful competition. In both cases, the Commission noted that customers that had entered into contracts prior to these market opening measures lacked competitive options and that fresh look was necessary for these customers to take advantage of the new options now available to them. Indeed, underscoring the limited availability of fresh look, the Commission hinged its fresh look requirement in both cases on a finding that the termination liability clauses to which its fresh look requirements were directed were, under the circumstances, unlawful. [6]

The other instance in which the Commission imposed fresh look involved adoption by the Commission of what it characterized as "a change in universal service policy that was not anticipated at the time existing contracts were signed"[7] and that would have denied carriers the ability to recover their universal service contribution costs under those contracts. In that

---

[4] In one of those instances, the Commission permitted customers with special access term plans in excess of three years, and that had been entered into prior to the adoption of the Commission's expanded interconnection order, to terminate their service arrangement, without penalty, on a central office-by central office basis when the first expanded interconnection arrangement became operational in that office. *Expanded Interconnection with Local Telephone Company Facilities,* 7 FCC Rcd 7369 (1992), *aff'd,* 8 FCC Rcd 7341 (1993). Even then, the Commission did not absolve the customer of paying *all* termination liabilities, but instead limited termination charges to the difference between the amount the customer had already paid and any additional charges that the customer would have paid for service under a shorter term corresponding to the term actually used, plus interest. On the other occasion, the Commission permitted AT&T Tariff 12 customers whose contracts included a bundled inbound calling capability to terminate their contracts during a 90-day fresh look window following the implementation of 800 number portability. *See Competition in the Interstate Interexchange Marketplace,* 6 FCC Rcd 5880, 5906 (1991), *aff'd* 7 FCC Rcd 2677 (1992).

[5] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 18 FCC Rcd 16978 (2003), ¶ 694, *vacated and remanded in part on other grounds, United States Telecom Ass'n. v. FCC,* 359 F.3d 554 (D.C. Cir. 2004), *cert. denied,* 125 S. Ct. 313, 316, 345 (2004). *See also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ¶ 486, *reversed and remanded in part on other grounds, United States Telecom Ass'n. v. FCC,* 290 F.3d 415 (D.C. Cir. 2002), *cert. denied WorldCom, Inc. v. United States Telecom Ass'n.,* 123 S. Ct. 1571 (2003) (rejecting fresh look notwithstanding the adoption of rules allowing CLECs under certain circumstances to convert special access circuits to unbundled network elements).

[6] Expanded Interconnection with Local Telephone Company Facilities, Order on Reconsideration, 8 FCC Rcd 7341 (1993) ¶ 17; Competition in the Interstate Interexchange Marketplace, Order on Reconsideration, 7 FCC Rcd at 2682, ¶ 25.

[7] *Federal-State Joint Board on Universal Service,* 17 FCC Rcd 24952, 24981 (2002).

instance, fresh look was necessary so that carriers would not be unfairly or unlawfully denied the opportunity to recover their costs of implementing a federal mandate.

Neither of these circumstances is remotely present here, and ScanSource does not attempt to argue that they are.[8] To the contrary, instead of arguing that its contracts were entered into prior to the advent of competition or that they will preclude cost recovery to which it is entitled, ScanSource *touts* these very contracts in the most glowing of terms. It reports that it currently relies on no less than five different telecommunications carriers – but, ironically, not AT&T - to meet its telecommunications needs. And it boasts that *"[by] spreading its telecommunications needs among several different carriers, each competing for ScanSource's other business, ScanSource is able to effectively meet its business requirements without sacrificing reliability, customer service, or the bottom line."*[9]

The reason, of course, that ScanSource was able to obtain such favorable contracts is that competition for enterprise customers has long been intense. The Commission recognized this vigorous competition as long as fifteen years ago, and it did so again last year in virtually identical circumstances to those presented here, holding that competition for business customers is "robust"[10] and likely to remain so.[11] More specifically, the Commission found that "myriad providers," including "foreign-based companies, competitive LECs, cable companies, systems integrators, and equipment vendors, and value-added resellers," are prepared to make competitive offers" to business customers.[12] It noted that competition was growing because cable, VoIP and wireless providers, in particular, were dramatically expanding their presence in the market. And it reiterated its longstanding recognition that medium and large business customers were uniquely positioned to take advantage of their competitive options because they tend to be highly sophisticated purchasers of communications services that are "likely to make informed choices based on expert advice about service offerings and price."[13]

Given this longstanding competition, there is no precedent or coherent rationale upon which the Commission could base a fresh look merger condition. Indeed, in light of the Commission's finding – underscored by mountains of evidence submitted by Applicants, as well

---

[8] ScanSource's claim that the merger will reduce competition for business customers is refuted by the more than 140 signed statements from a wide range of retail business customers which confirm the vibrant competition for retail business services; the plethora of competitive options they enjoy; and the lack of a significant competitive overlap between AT&T and BellSouth. *See* Joint Opposition of AT&T Inc. and BellSouth Corporation to Petitions to Deny and Reply to Comments, Appendix B. It also is belied by the fact that AT&T is not even among the five telecommunications carriers used by ScanSource.

[9] ScanSource Reply at 4-5 (emphasis added).

[10] *SBC/AT&T Merger Order,* ¶ 73, n. 223.

[11] *Id.*¶ 73.

[12] *Id.*.

[13] *Id.* ¶ 75.

as ScanSource's own reported experience – that "for all groups of business customers, there are multiple services and multiple providers that can meet their demand,"[14] there is no basis for *any* merger condition for enterprise services.

The merger of AT&T and BellSouth will bring significant benefits to all consumers and should be promptly approved without conditions.

If you have any further questions or seek additional information about this matter, please do not hesitate to contact me.

Sincerely,
/s/
Gary L. Phillips

cc: Scott Bergmann
Michelle Carey
Scott Deutschman
Ian Dillner
Nick Alexander

[14] *Id.* ¶ 77.