Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Inc. and BellSouth Corporation	)	WC Docket No. 06-74
Applications for Approval of Transfer of	)	DA 06-2035
Control	)	
	)	

COMMENTS ON AT&T'S PROPOSED CONDITIONS

ADVANCE/NEWHOUSE COMMUNICATIONS
CABLEVISION SYSTEMS CORPORATION
CHARTER COMMUNICATIONS
COX COMMUNICATIONS, AND
INSIGHT COMMUNICATIONS COMPANY

Dated: October 24, 2006

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Pursuant to the October 13, 2006 Public Notice[1/] issued by the Federal Communications Commission ("Commission") in the above-captioned proceeding, Advance/Newhouse Communications, Cablevision Systems Corporation, Charter Communications, Cox Communications, and Insight Communications Company ("the Cable Companies"), by and through their counsel, hereby submit these comments on the merger conditions proffered by AT&T and BellSouth. These comments also respond to AT&T's *ex parte* letter dated October 3, 2006 that addressed conditions proposed by the Cable Companies on September 27, 2006.[2/]

AT&T's failure to include the interconnection-related conditions proposed by the Cable Companies, with the exception of a limited condition on transiting, renders its proposal

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1/ *Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corporation, Commission Seeks Comment on Proposals Submitted by AT&T Inc. and BellSouth Corporation*, WC Docket No. 06-74, Public Notice, DA 06-2035 (rel. Oct. 13, 2006). The Wireline Competition Bureau released an erratum to the public notice on October 16, 2006. *See Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corporation, Commission Seeks Comment on Proposals Submitted by AT&T Inc. and BellSouth Corporation*, WC Docket No. 06-74, Erratum (rel. Oct. 16, 2006) ("*Erratum*").

2/ Letter from Gary L. Phillips, AT&T Inc., and Bennett L. Ross, BellSouth Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (Oct. 3, 2006) ("*AT&T Letter*").

inadequate. Even with respect to those matters for which AT&T has proffered conditions, including transiting and forbearance, the proposed conditions must be strengthened to provide even minimum protection against anticompetitive practices. These issues are discussed in greater detail below.

I. AT&T'S PROPOSED CONDITIONS ARE INADEQUATE BECAUSE THEY DO NOT ADDRESS INTERCONNECTION

AT&T's proposal fails to address the critical interconnection-related conditions required to ensure that the promise of robust competition between cable providers and AT&T is achieved. As explained in the Cable Companies' September 27, 2006 *ex parte* letter,[3/] the merger will greatly enhance the incentives and ability of AT&T to wield its market power over interconnection to undermine cable-provided voice services. These services, particularly as provided using voice over Internet protocol ("VoIP") technology, offer the only significant hope for widespread and sustainable facilities-based residential competition in the near future. To ensure that consumers reap the benefit of this competition, the Cable Companies proposed a narrow, targeted set of conditions that directly address the ability of AT&T to use its bottleneck control over interconnection to undermine cable-provided voice services.[4/]

AT&T's primary response to these conditions, filed on October 3, is to suggest that the cable providers "wait in line with the rest of the industry" to see if the Commission will address interconnection issues in its pending intercarrier compensation and IP-enabled services proceedings -- proceedings that have been pending before the Commission for years with no

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[3/] Letter from Cody J. Harrison, Advance/Newhouse Communications, *et. al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (Sept. 27, 2006) ("*Cable Letter*").

[4/] *Cable Letter* at 9-13 (asking the Commission to adopt measures that foster efficient interconnection and adopt conditions to reduce the cost and delay of interconnection negotiations).

definite deadline for conclusion.[5/] AT&T argues that there is no reason to single out cable companies for "special treatment" and acts as though the merger has nothing to do with cable competition.[6/] But it is AT&T that has singled out cable companies. AT&T identifies cable-provided voice services, particularly as provided as part of a bundle of voice, video, and broadband Internet services, as its most potent threat in the mass market.[7/] It touts as the primary benefit of the merger the significantly enhanced ability to compete against cable, particularly in the BellSouth region, that will result from the integration of the companies' wireline and wireless networks.[8/] To suggest that these facts will not increase AT&T's incentives to use the power it retains over interconnection to undermine its prime competitors is to ignore the entire history of telecommunications regulation.

AT&T is also wrong to suggest that the existence of pending rulemaking proceedings somehow precludes adoption of conditions addressing similar issues in merger proceedings.[9/] Its own actions in this proceeding and in SBC's acquisition of AT&T belie that argument. SBC's proposed conditions in its merger with legacy AT&T and the conditions proposed by AT&T here

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5/ *See Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, 16 FCC Rcd. 9610 (2001). In 2005 the Commission, seeking to refresh the record concerning the adoption of a uniform intercarrier compensation regime system, issued a further notice of proposed rulemaking. *See Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685 (2005); *see also IP-Enabled Services,* Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004).

6/ *AT&T Letter* at 1.

7/ *See, e.g., 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*"); *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 88 (filed Mar. 31, 2006) ("*Public Interest Statement*").

8/ *See, e.g., Public Interest Statement* at 24.

directly relate to issues in pending rulemakings. For example, AT&T proposes conditions relating to special access pricing and performance metrics even though there are pending rulemakings addressing those very same issues.[10/] It also proposed conditions in both mergers relating to pricing for unbundled network elements ("UNEs") even though the Commission has a pending proceeding to review the UNE pricing methodology.[11/] Rather than the hard and fast rule against conditions that overlap issues in pending rulemakings that AT&T suggests, AT&T is really arguing that it should have the right to pick-and-choose which overlapping issues it will address in its mergers. The Commission certainly need not concede to such a self-serving policy.

Below, the Cable Companies respond to AT&T's specific objections regarding the Cable Companies' proposed conditions regarding the single point of interconnection, mitigating the costs of interconnection negotiation, and the applicability of sections 251 and 252 to cable VoIP providers as set forth in the Cable Companies' September 27 *ex parte* filing.

A. The Cable Companies' Proposed Single Point of Interconnection Condition Is Necessary to Ensure AT&T Complies with its Obligations

AT&T objects to a condition that would ensure that new entrants can choose technically feasible points of interconnection, including a single point of interconnection in a LATA, even though such a condition would merely ensure that it complies with existing rules and

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[9/] *AT&T Letter* at 1-2.

[10/] *See e.g.*, *Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994 (2005); *see also Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, 16 FCC Rcd. 20641 (2001).

regulations.[12/] AT&T argues that it allows entrants to choose technically feasible interconnection arrangements and that the real dispute concerns who should bear the cost of delivering traffic to the point of interconnection ("POI").[13/]

In fact, AT&T's policy prevents competitors from choosing a single point of interconnection as a practical matter. Cox, for example, recently had to arbitrate this issue in Arkansas, Kansas, and Oklahoma because AT&T would have required Cox to establish further interconnection points in a LATA once traffic exceeded an arbitrary limit set by AT&T.[14/] Cox (and the CLEC Coalition, of which it was part) prevailed in these arbitrations, but it had to expend significant resources to confirm established Commission policy.

Charter similarly has experienced AT&T's refusal to comply with the single POI policy. In Illinois, for example, AT&T is demanding that Charter obtain interconnection trunks to every tandem in the LATA even though Charter is serving only two rate centers in the LATA.

11/ *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 18 FCC Rcd. 18945 (2003).

12/ *See e.g*., *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.*, Memorandum Opinion and Order, 17 FCC Rcd. 27039, ¶ 52 (2002) ("*Virginia Arbitration Order*") ("Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point. This includes that right to request a single point of interconnection….").

13/ *AT&T Letter* at 2, n.3.

14/ Docket No. 05-081-U, *Petition of Southwestern Bell Telephone, L.P. D/B/A SBC Arkansas for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Arkansas 271 Agreement ("A2A")*, Memorandum Opinion and Order (APSC Oct. 31, 2005) ("*Cox Arkansas Arbitration Order*"); *see also* Docket No. 05-BTKT-365-ARB*, In the Matter of the Petition of the CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b) of the Telecommunications Act of 1996*, Arbitrator's Determination (KCC June 6, 2005) ("*Cox Kansas Arbitration Order*"); Cause No. PUD 200400497, *Petition of CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma under Section 252(b) of the Telecommunications Act of 1996*, Order No. 52219 (OCC March 24, 2006) ("*Cox Oklahoma Arbitration Order*").

Moreover, AT&T wants Charter to order two-way trunks despite the fact that the traffic will be one-way - from AT&T to Charter - and Charter would never utilize those trunks for its originating traffic. Likewise, in Wisconsin, AT&T is demanding that Charter obtain two-way trunks directly to each access tandem in the LATA. These types of requests add cost and inefficiency to Charter's network while making it easier and cheaper for AT&T to move its traffic on AT&T's side of the network. Further, AT&T is able to delay significantly Charter's entry as it insists on this type of interconnection even when there is no such requirement in law or in the applicable interconnection agreement.

AT&T's other objection to the Cable Companies' proposed condition on the point of interconnection -- that the "real" dispute is about who should pay to deliver traffic to the POI -- reveals the very problem that the Cable Companies' conditions are designed to redress. The Commission's rules clearly require each provider to bear the financial burden of delivering their originating traffic to the point of interconnection.[15/] By persistently disputing requirements that are clearly set forth in the Communications Act of 1934, as amended ("Act"), and the Commission's rules, AT&T unnecessarily raises its rivals' costs and delays market entry.

The Cable Companies therefore propose the following condition to confirm the single POI rule and to confirm that each party bears the financial responsibility to bring their originating traffic to the POI:

> <u>Single POI per LATA</u>
>
> AT&T/BellSouth shall permit competitive providers to choose a single, technically feasible point of interconnection ("POI") on AT&T/BellSouth's network, including choosing a single point of

[15/] *Virginia Arbitration Order* ¶ 52 ("[U]nder [the Commission's] rules, to the extent an incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic.").

> interconnection in a LATA. AT&T/BellSouth and the competitive provider shall each bear the financial responsibility for bringing their originating traffic that is subject to section 251(b)(5) of the Act to the chosen point of interconnection. AT&T/BellSouth and the competitive provider may mutually agree to establish additional points of interconnection as justified by sound network engineering and business practices. AT&T/BellSouth cannot unilaterally require the competitive provider to establish additional POIs based on levels of traffic set solely by AT&T/BellSouth.

Adoption of this condition will preclude AT&T from raising its rivals' costs by continually asserting its anticompetitive, multi-POI policy.

B. The Cable Companies' Proposed Conditions Mitigate Unnecessary Transaction Costs Imposed by AT&T

The location of points of interconnection is not the only issue on which AT&T acts to impose unnecessary arbitration costs on its competitors. AT&T uses many different stall tactics for the sole purpose of increasing negotiation costs. For example, AT&T often forces cable providers to arbitrate interconnection terms that the state commission has already concluded AT&T must provide. AT&T's affiliate in Connecticut, Southern New England Telephone ("SNET"), for example, forced Cablevision to arbitrate its request that the carriers exchange traffic on a bill and keep basis, even though SNET previously agreed to a bill and keep arrangement with Cablevision and offered bill and keep to legacy AT&T.[16/] When Cablevision's agreement was due for renewal, it requested that the parties maintain their existing agreement, including the bill and keep arrangement. SNET refused, even though during the negotiations it entered into a voluntarily negotiated agreement with AT&T that included a bill and keep arrangement. Moreover, at a time when carriers could pick-and-choose portions of an agreement, SNET also refused to allow Cablevision to adopt portions of the AT&T/SNET agreement despite allowing AT&T's affiliate, TCG, to opt into the same agreement. Cablevision was forced to file a petition for arbitration simply to exercise its legal rights to obtain the same arrangements SNET voluntarily provided to other similarly situated carriers and which it previously provided to Cablevision.[17/]

It is because of the types of practices discussed above[18/] that the Cable Companies proposed several conditions designed to mitigate AT&T's ability to impose on them the costs of protracted negotiations and arbitrations.[19/] These conditions will streamline the negotiation process, a goal that AT&T, which also must expend time and resources negotiating and arbitrating agreements, should readily embrace. The Cable Companies, for example, proposed that competitors be permitted: (1) to opt into any negotiated or arbitrated interconnection agreement approved and effective in any AT&T/BellSouth in-region state, subject to state

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[16/] The Cable Companies proposed a condition that would permit bill and keep, a very efficient method of exchanging VoIP traffic, at the request of the cable provider. Such a condition would preclude the type of stalling tactics engaged in by SNET.

[17/] Docket No. 02-07-05, *Petition of Cablevision Lightpath - CT, Inc. for Arbitration Pursuant to Sections 252(b) and 252(i) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with The Southern New England Telephone Company ("SBC SNET")*, Cablevision Lightpath - CT, Inc. Petition for Arbitration (filed July 12, 2002). After reviewing the issue, the Connecticut Department of Public Utility Control determined that denying Cablevision access to the same arrangements other carriers were permitted to obtain would be discriminatory and unacceptable. SNET appealed the decision to federal district court, but later withdrew its appeal. *See* Docket No. 02-07-05, *Petition of Cablevision Lightpath – CT, Inc. for Arbitration Pursuant to Sections 252(b) and 252(i) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with The Southern New England Telephone Company*, Decision (CTDPUC Jan. 15, 2003) ("Arbitration Decision").

[18/] The examples of interconnection-related abuses by AT&T's various operating companies set out in these comments thoroughly address AT&T's comment that the Cable Companies have failed to identify a single incident of discrimination. *AT&T Letter* at 4.

[19/] *Cable Letter* at 9-12.

specific pricing or performance plans;[20/] (2) to extend the term of existing agreements; and (3) to use an expiring agreement as the baseline for a new agreement.

AT&T has said nothing about these conditions, which, to the best of the Cable Companies' knowledge, are not the subject of any pending rulemaking proceeding. Because competitors cannot begin providing service until interconnection terms have been resolved, AT&T has the ability, simply through the negotiation and arbitration process, to delay market entry. Similarly, AT&T/BellSouth (whose negotiating and arbitration resources dwarf those of its cable competitors)[21/] has the ability to increase cable's relative costs of providing competitive phone service to consumers far above the relative costs that AT&T/BellSouth incurs for such activities by forcing its competitors to arbitrate (and re-arbitrate) issues unnecessarily, by refusing to extend existing business arrangement, and by insisting on continually re-negotiating interconnection agreements (thereby forcing the Cable Companies to re-negotiate hundreds of terms not otherwise affected by intervening changes in the law and to expend far more resources than necessary). Accordingly, the Cable Companies propose the following conditions:

> <u>Reducing Transaction Costs</u>
>
> (1) AT&T/BellSouth shall make available any entire effective interconnection agreement, whether negotiated or arbitrated, that was or is entered into by AT&T/BellSouth or any affiliate, in any state in the merged entity's 22-state incumbent LEC operating territory, subject to technical feasibility and state-specific pricing and performance plans.
>
> (2) AT&T/BellSouth shall not refuse a request to opt into an agreement on the grounds that the agreement has not been

20/ The Commission has adopted a similar condition in previous BOC mergers. *See e.g., 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*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶ 388 (1999) ("*SBC/Ameritech Merger Order*").

21/ *See infra* n.32.

> amended to reflect changes of law, provided the requesting party agrees to negotiate an amendment regarding such change of law immediately after it has opted into the agreement.
>
> (3) AT&T/BellSouth shall allow a requesting party, at its option, to use the parties' pre-existing interconnection agreement as the starting point for negotiating a new agreement.
>
> (4) AT&T/BellSouth shall permit a party to extend the parties' current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect changes of law after the agreement has been extended. During this period, the interconnection agreement may be terminated only via a competitor's request unless terminated pursuant to the agreement's "default" provisions.

The Cable Companies' proposed interconnection agreement-related conditions directly address AT&T's ability to engage in this form of anticompetitive behavior.

C. The Applicability of Section 251 and 252 to Cable VoIP Providers Should Be Addressed

The conditions proffered by the Cable Companies designed to solidify and make reasonably accessible the Act's interconnection obligations will be of little use if AT&T takes the position that section 251 protections and section 252 procedures are not available to cable VoIP providers. The Commission has recognized that the obligations imposed on ILECs by section 251 are required to check the market power of Bell Operating Companies ("BOCs") over interconnection, and this power is not diminished when cable companies offer competitive phone service using packet-switched, rather than circuit-switched, technology.[22/] The Cable Companies have thus proposed that AT&T may not refuse to abide by its section 251 and 252 obligations when requested by a cable voice provider, regardless of the technology or regulatory classification of the service.

[22/] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, ¶ 84 (2005) ("*Qwest Forbearance Order*").

The importance of this requirement is highlighted by the fact that a similar obligation is included in the draft telecommunications legislation in both the House and the Senate.[23/] Notably, the Congressional Budget Office has confirmed that "based on government and industry sources, the incremental cost of making interconnection available to IP-enabled carriers would be minimal."[24/] Ensuring the applicability of sections 251 and 252 to requests for interconnection and network elements by cable VoIP providers, which AT&T has identified as its most potent competitive threat in the mass market, will in turn ensure that residential consumers will reap the benefits of competition.[25/]

AT&T has reportedly objected to this condition on several grounds, stating that cable companies "want to be treated as telecommunications providers but [it] can't confer that jurisdiction on [Cable VoIP providers]," and that AT&T "can't tell state regulatory commissions they have to start arbitrating [negotiations between VoIP providers and AT&T]."[26/] These arguments are distractions that elevate form over substance. As an initial matter, the Commission has historically predicated its approval of BOC mergers on the existence of broad

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23/ An Act to Promote the Deployment of Broadband Networks and Services, H.R. 5252 (House version), 109th Cong. § 301 (providing that "[a] facilities-based VOIP service provider shall have the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251 and 252, if the provider elects to assert such rights"); H.R. 5252 (Senate version), 109th Cong. § 213 (same).

24/ Report of the Senate Committee on Commerce, Science, and Transportation on H.R. 5252 Together With Additional Views, S. REP. NO. 109-355, at 20 (2006).

25/ *See e.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Provider*s, 11 FCC Rcd. 15499, ¶ 179 ("*Local Competition Order*") (finding that national rules implementing section 251(c)(2) "are necessary to further Congress's goal of creating conditions that will facilitate the development of competition in the telephone exchange market.")

26/ Edie Herman, *AT&T Not Inclined to Offer More Merger Conditions, Quinn Says*, COMM. DAILY, Oct. 23, 2006, at 2. AT&T did not make this argument in its October 3, 2006 response to the Cable Companies' proposed conditions.

conditions designed to ameliorate the public interest harms of the merger.[27/] AT&T's proposed acquisition of BellSouth will harm the public interest if cable VoIP providers are unable to obtain from AT&T the same interconnection rights and protections that competitive local exchange carriers ("LECs") receive. There is nothing to suggest that the Commission is precluded from accepting a condition that AT&T effectively treat cable VoIP service providers as competitive carriers for interconnection purposes. Nor is there any doubt that the Commission has authority to make sections 251 and 252 available to cable VoIP providers.[28/] And, as discussed below, once the parties agree to negotiate and cannot reach agreement, the state commission has jurisdiction to arbitrate the issue.

More specifically, section 252 charges states with the obligation to mediate and arbitrate "any open issues" that arise in interconnection negotiations between incumbent LECs and requesting carriers.[29/] If, as a condition of this merger, the Commission determines that a cable VoIP provider should be treated as a requesting carrier for purposes of section 251, then a state commission would have the authority and the duty to participate in the arbitration between such a provider and AT&T and to approve and enforce any negotiated agreement by operation of section 252. The Commission, not AT&T, would be defining the scope of the section 252 process, as it has the authority to do under the Act. AT&T's claims to the contrary should be dismissed.

27/ *See, e.g., 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*, Memorandum Opinion and Order, 15 FCC Rcd. 14032, ¶ 253 (2000); *SBC/Ameritech Merger Order* ¶ 52.

28/ *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 266, 378 (1999) ("The FCC has rulemaking authority to carry out the 'provisions of the Act' which include sections 251 and 252, added by the Telecommunications Act of 1996.").

29/ 47 U.S.C. § 252(b).

It is no reason to reject *a priori* the Cable Companies' proffered condition on the grounds that a state commission might take the position that it has no jurisdiction to approve, arbitrate, or enforce an interconnection agreement between AT&T and a cable VoIP provider (although AT&T should, as part of the condition, be precluded from itself raising that issue either before the state commission in the first instance (or the Commission acting in the place of a state commission) or as the basis of an appeal of a state commission action). If a state commission raises such an objection, a cable VoIP provider can contest it in the context of the specific circumstances in which it is raised. If a state commission refuses to discharge its responsibility, the Commission could step in pursuant to section 252(e)(5) of the Act.

Finally, even if a state were to refuse to approve, arbitrate, or enforce an interconnection agreement between AT&T and a cable VoIP provider, the proposed condition has substantial pro-competitive value. At a minimum, it would permit a cable VoIP provider to opt into an existing interconnection agreement pursuant to section 252(i) of the Act. Regardless of whether the resulting agreement between AT&T and the cable VoIP provider is deemed by the state to be a section 252 agreement, it nevertheless is a contractual obligation binding AT&T to provide the agreement's interconnection services to the cable VoIP provider. Such an agreement is enforceable as a matter of contract law. Furthermore, any failure on the part of AT&T to make section 251 interconnection available to cable VoIP providers would be enforceable as a merger condition.[30/]

AT&T should therefore be required to comply with the following condition:

[30/] *SBC Communications v. FCC*, 373 F.3d 140 (D.C. Cir. 2004) (upholding the Commission's forfeiture for violation of the shared-transport merger condition attached to the SBC/Ameritech merger).

> <u>Section 251 Rights for Cable Providers</u>
>
> AT&T/BellSouth shall agree to treat any cable telephony provider, regardless of the technology used or the classification of service, as a requesting telecommunications carrier under sections 251 and 252 and shall owe such provider the obligations it owes to a requesting telecommunications carrier under section 251(c). AT&T shall permit such cable telephony providers to opt into any entire interconnection agreement, including, without limitation, any opt in rights established as a condition of this merger. AT&T shall not contest the authority or jurisdiction of a state commission to approve, arbitrate or enforce any interconnection agreement negotiated with any cable telephony provider, either before the state commission (or the Commission acting in the place of a state commission) or on appeal of a state commission determination regarding such interconnection agreement. This condition shall not expire unless superseded by statute or regulation clarifying the applicability of sections 251 and 252 to IP-enabled voice providers.

D. The Cable Companies' Proposed Conditions are Merger-Related

Contrary to AT&T's protestation, the conditions proposed by the Cable Companies are directly related to the merger. As fully explained in the Cable Companies' September 27 *ex parte* filing, this merger is primarily about enhancing AT&T's dominant position in the mass market so as to better meet burgeoning cable-based voice competition. It is thus remarkable for AT&T to assert that this merger "will have no impact on the merged company's dealings with cable companies."[31/] Indeed AT&T expresses outrage that it should be singled out for any "special treatment," as if it had not initiated one of the largest telecommunications mergers in history and would not, as a result, become the biggest telecommunications company in the world. Post-merger AT&T will dwarf even the largest cable companies, let alone the smaller, second tier companies requesting these conditions.[32/] AT&T is no position to cry foul when

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31/ *AT&T Letter* at 1.

32/ After the merger, AT&T/BellSouth is estimated to generate $117 billion in revenue and will "become the largest domestic phone company with more than 70 million local-access lines…." *See* Lara confronted with narrowly-targeted conditions designed to ameliorate the increased incentives and ability to harm competition that will surely result from this merger.

II. IN ADDITION TO IGNORING THE CABLE COMPANIES' PROPOSED INTERCONNECTION CONDITIONS, THE CONDITIONS PROPOSED BY AT&T ARE INSUFFICIENT

AT&T's proffered conditions on transiting and forbearance are not adequate to mitigate the public interest harms the merger likely will cause in the residential market. Accordingly, the Cable Companies offer the following revisions to the conditions proposed by AT&T.

A. AT&T's Proposed Transiting Condition is Deficient

AT&T has proposed a modest condition addressing transiting. It proposes a ceiling for thirty (30) months on "rates paid by existing customers for their existing tandem transit service arrangements that AT&T and BellSouth incumbent LECs provide in the AT&T/BellSouth in-region territory."[33/] This provision is helpful, but insufficient. For one thing, as cable providers enter new markets, the condition could be interpreted as precluding them from receiving the benefit of this rate ceiling. It must be made clear that the condition applies to new as well as existing transiting arrangements to ensure that, as voice competition is extended to additional areas, AT&T may not target new competition with excessive transiting fees. Similarly, as the terms of existing interconnection agreements expire, AT&T may not use the re-negotiation to

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Jakes Jordan, *Justice Department Approves AT&T-BellSouth Merger Plan*, ASSOCIATED PRESS (Oct. 11, 2006); *see also* Ted Hearn, *DOJ Approves AT&T-BellSouth Merger*, COMM. DAILY (Oct. 11, 2006). In contrast, measured by revenue, AT&T/BellSouth will be five times larger than the largest cable company. Comcast currently has 21.7 million subscribers and its 2005 annual revenue was $22.3 billion. *See* Comcast 2005 Annual Report, Shareholder Letter, *available at*: http://www.comcast.com/2005ar/letter2.html (last viewed Oct. 24, 2006). AT&T/BellSouth's position is even more unequal with respect to the second and third largest cable providers, Time Warner has 11 million subscribers and Charter Communications has 3.8 million subscribers. *See* "Top 25 MSOs - As of June 2006," *available at*: http://www.ncta.com/ContentView.aspx?contentId=73 (last viewed Oct. 24, 2006).

ignore this rate ceiling. Transiting rates for new arrangements should be no higher that existing rates for providers in the same or similar area.

AT&T should also be required to continue to address transiting provisions in the context of section 251 obligations and interconnection agreements, as proposed in the Cable Companies' condition on transiting, and by others.[34/] In its October 3, 2006 response to the Cable Companies' transiting conditions, AT&T incorrectly claims that the companies seek "expansive new transiting obligations."[35/] Instead, the Cable Companies are simply asking AT&T to continue providing transiting services that it and other incumbent LECs have routinely included in their interconnection agreements.[36/]

AT&T's intransigence on this issue is already in evidence. In negotiating for replacement section 251/252 interconnection agreements with AT&T in Arkansas,[37/] Kansas,[38/] and Oklahoma,[39/] AT&T flatly refused the inclusion of *any* transiting services in its proposed interconnection agreement. Cox (a member of the CLEC Coalition) was forced to arbitrate the

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33/ *Erratum* at 5 (letter from Robert W. Quinn, Jr., AT&T Inc., to Kevin Martin, Chairman, FCC, dated Oct. 13, 2006, notifying the Chairman of its updated list of proposed conditions).

34/ *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"); *see also* letter from Karen Reidy, Comptel, to Marlene H. Dortch, Secretary, FCC, attachment at 2 (Sept. 22, 2006) ("*Comptel Conditions Letter*") ("The merged entity will provide transit service for traffic between any two parties that are interconnected with the merged entity pursuant to an interconnection agreement. The transit service will be subject to sections 251 and 252 of the Act and will be subject to prices at UNE switching rates. The merged entity will not assert that transit service is not subject to sections 251 and 252 of the Act.").

35/ *AT&T Letter* at 2.

36/ *Cox Arkansas Arbitration Order* at 17 (stating that "[t]ransit traffic has always been a part of the ICAs….").

37/ *Id*.

38/ *See Cox Kansas Arbitration Order*.

39/ *See Cox Oklahoma Arbitration Order*.

inclusion of transit terms in the contract. Although the CLEC Coalition prevailed on this issue in each arbitration, the CLEC Coalition members were required to spend considerable time and money simply to have AT&T continue a well-accepted practice.

Requiring as a merger condition the continued provision of transiting services pursuant section 251 is necessary in light of AT&T's continuing market power over such services, especially given AT&T's track record regarding its unwillingness to negotiate such terms. The Commission, in the *Qwest Forbearance Order*, specifically found that BOCs have market power over transiting services and refused to lift section 251(c)(2) interconnection obligations as a result.[40/] Indeed, by addressing the question in the context of section 251(c)(2) forbearance, the Commission implicitly found that transiting is within the scope of section 251(c)(2).

Moreover, AT&T's proposal does nothing to redress the exorbitant transiting rates that exist in some places. In Connecticut, for example, AT&T's standard transit rate is 3.5 cents per minute. After prolonged litigation, Cox was able to reduce this somewhat, to 2.3 cents per minute. Even that rate is ten times higher than the rates Cox pays in other AT&T states and eight times higher than it pays in BellSouth states. Imposing egregiously high transit rates is a classic example of an entity utilizing control over bottleneck facilities to raise rivals costs and this issue should be addressed in a more robust manner than proposed by AT&T. The Cable Companies thus propose that the transiting condition be modified as follows:

> Transiting
>
> The AT&T and BellSouth incumbent LECs will not increase the rates paid by existing customers for their existing tandem transiting service arrangements that the AT&T and BellSouth incumbent

[40/] *Qwest Forbearance Order*, ¶ 86, n.215 ("Competitive carriers that do not directly connect to one another then rely on the incumbent LEC to provide a transit service to carry traffic between their points of connection with the incumbent LEC, which often are collocated.").

> LECs provide in the AT&T/BellSouth in-region territory. As existing interconnection agreements are negotiated and as transit customers expand into new areas within this territory and request transiting arrangements in these areas, the transit rate for such arrangements will not exceed the rates paid under the customers' existing agreements with AT&T and/or BellSouth, or, if no transiting arrangements exist, the transit rate will not exceed the average transit rate available in interconnection agreements with other companies that have transiting arrangements using the same AT&T/BellSouth tandems. AT&T/BellSouth shall not refuse to negotiate the terms and conditions of transiting in the context of section 251 interconnection agreements.[41/]

B. AT&T's Proposed Forbearance Condition Is Too Limited

AT&T states that it will not seek forbearance from its section 251(c)(3) unbundled loop and transport obligations. This commitment is too limited. AT&T should also refrain from seeking forbearance from section 251 interconnection and collocation obligations, which are critical to the Cable Companies' ability to provide facilities-based voice competition in the local market. The Commission acknowledged this point by refusing to exercise its forbearance power with respect to those obligations in the *Qwest Forbearance Order*.[42/] AT&T's explicit restriction of this condition to UNEs suggests that AT&T may seek forbearance from critical interconnection and collocation provisions, even though these are precisely the provisions that

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41/ Maintaining transiting rates in section 251 interconnection negotiations in no way expands the jurisdiction of the states beyond that contemplated by the Act. The Act contemplates that parties may negotiate and arbitrate any issue in the context of section 251 negotiations. During the negotiation process the parties "are free to make any agreement they want without regard to the requirements of section 251(b) and (c)." *Coserv Ltd. Liability Corp. v. Southwestern Bell*, 350 F.3d 482, 487 (5th Cir. 2003). Once part of the negotiation process, "*any* open issue" may be brought before the state commission for arbitration. *See id.* (emphasis added). The Act thus contemplates extraordinarily broad state jurisdiction over issues raised and negotiated in the context of interconnection negotiations. As *Coserv* recognized, the incumbent local exchange carrier can refuse to negotiate issues not specifically listed in sections 251(b) and (c). *See id.* The condition proposed by the Cable Companies removes AT&T's ability to refuse to negotiate transiting provisions, but this requirement does not expand state jurisdiction.

42/ *Qwest Forbearance Order* ¶ 85.

the Commission found remain necessary to ensure robust facilities-based competition in the voice market. The forbearance condition should thus be modified as follows:

> Forbearance
>
> For thirty months after the Merger Closing Date, AT&T/BellSouth will not seek a ruling, including through a forbearance petition under section 10 of the Act, 47 U.S.C. § 160, or any other petition, altering the status of any facility being currently offered as a loop or transport UNE under section 251(c)(3) of the Act, or from any interconnection or collocation obligation under section 251 of the Act.

CONCLUSION

For the foregoing reasons, the Cable Companies urge the Commission to adopt the interconnection-related conditions set forth herein and in their prior filings so as to ensure robust voice competition for residential consumers.

Respectfully submitted,

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APPENDIX A

Cable Companies' Proposed Merger Conditions

Single POI per LATA

AT&T/BellSouth shall permit competitive providers to choose a single, technically feasible point of interconnection on AT&T/BellSouth's network, including choosing a single point of interconnection in a LATA. AT&T/BellSouth and the competitive provider shall each bear the financial responsibility for bringing their originating traffic that is subject to section 251(b)(5) to the chosen point of interconnection. AT&T/BellSouth and the competitive provider may mutually agree to establish additional points of interconnection as justified by sound network engineering and business practices. AT&T/BellSouth cannot unilaterally require the competitive provider to establish additional POIs based on levels of traffic set solely by AT&T/BellSouth.

Reducing Transaction Costs

(1) AT&T/BellSouth shall make available any entire effective interconnection agreement, whether negotiated or arbitrated, that was entered into by AT&T/BellSouth or any affiliate, in any state in the merged entity's 22-state incumbent LEC operating territory, subject to technical feasibility and state-specific pricing and performance plans.
(2) AT&T/BellSouth shall not refuse a request to opt into an agreement on the grounds that the agreement has not been amended to reflect changes of law, provided the requesting party agrees to negotiate an amendment regarding such change of law immediately after it has opted into the agreement.
(3) AT&T/BellSouth shall allow a requesting party, at its option, to use the parties' pre-existing interconnection agreement as the starting point for negotiating a new agreement.
(4) AT&T/BellSouth shall permit a party to extend the parties' current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect changes of law after the agreement has been extended. During this period, the interconnection agreement may be terminated only via a competitor's request unless terminated pursuant to the agreement's "default" provisions.

Section 251 Rights for Cable Providers

AT&T/BellSouth shall agree to treat any cable telephony provider, regardless of the technology used or the classification of service, as a requesting telecommunications carrier under sections 251 and 252 and shall owe such provider the obligations it owes to a requesting telecommunications carrier under section 251(c). AT&T shall permit such cable telephony providers to opt into any entire interconnection agreement, including, without limitation, any opt in rights established as a condition of this merger. AT&T shall not contest the authority or jurisdiction of a state commission to approve, arbitrate or enforce any interconnection agreement negotiated with any cable telephony provider, either before the state commission (or the Commission acting in the place of a state commission) or on appeal of a state commission determination regarding such interconnection agreement. This condition shall not expire unless superseded by statute or regulation clarifying the applicability of sections 251 and 252 to IP-enabled voice providers.

Transiting

The AT&T and BellSouth incumbent LECs will not increase the rates paid by existing customers for their existing tandem transiting service arrangements that the AT&T and BellSouth incumbent LECs provide in the AT&T/BellSouth in-region territory. As existing interconnection agreements are negotiated and as transit customers expand into new areas within this territory and request transiting arrangements in these areas, the transit rate for such arrangements will not exceed the rates paid under the customers' existing agreements with AT&T and/or BellSouth, or, if no transiting arrangements exist, the transit rate will not exceed the average transit rate available in interconnection agreements with other companies that have transiting arrangements using the same AT&T/BellSouth tandems. AT&T/BellSouth shall not refuse to negotiate the terms and conditions of transiting in the context of section 251 interconnection agreements.

Forbearance

For thirty months after the Merger Closing Date, AT&T/BellSouth will not seek a ruling, including through a forbearance petition under section 10 of the Act, 47 U.S.C. § 160, or any other petition, altering the status of any facility being currently offered as a loop or transport UNE under section 251(c)(3) of the Act, or from any interconnection or collocation obligation under section 251 of the Act.