

November 13, 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*

**REDACTED FOR PUBLIC INSPECTION IN WC DOCKET NO. 06-74**

Dear Ms. Dortch:

AT&T and BellSouth submit this letter to respond to an October 27, 2006 *ex parte* presentation by Global Crossing that purports to compare the Atlanta area special access rates of BellSouth and other providers and to show “BellSouth’s pricing power and the impact of AT&T’s exit from the BellSouth market.”<sup>1</sup> In fact, the only relevant data supplied by Global Crossing starkly confirms that the proposed merger can have no material impact on competition. And Global Crossing’s resort to misleading “apples-to-oranges” comparisons that it boasts are the type of “evidence” that it hopes to supply to commercial arbitrators provides yet another reason why any arbitration condition would be especially inappropriate.

First, Global Crossing’s submission dramatically reinforces the already overwhelming record evidence that special access competition is robust and that the merger will not cause any competitive harm. Global Crossing frankly admits that there are “a variety of carriers” in Atlanta providing DS1 and DS3 wholesale special access services in competition with BellSouth. While even Global Crossing’s charts recognize three of the numerous non-AT&T alternatives to BellSouth,<sup>2</sup> Applicants have previously demonstrated that there are at least 14 alternative special access providers in Atlanta (just as there are many alternative providers in each of the other areas in BellSouth’s region in which AT&T operates local networks).<sup>3</sup> Global Crossing’s charts also

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<sup>1</sup> See *Ex Parte* Letter from Paul Kouroupas (Global Crossing) to Marlene H. Dortch (AT&T), WC Docket No. 06-74, at 1 (filed Oct. 27, 2006) (“Global Crossing Letter”).

<sup>2</sup> Global Crossing Letter, at 1.

<sup>3</sup> See Carlton/Sider Decl. at 43 Table 7.1; see also Carlton/Sider Reply Decl. ¶ 23.

confirm that AT&T is among the *highest priced* providers of special access services in the BellSouth region,<sup>4</sup> providing additional evidence that AT&T (which provides less than one percent of total wholesale special sales in the BellSouth region) is not a significant wholesale special access competitor in the BellSouth region.<sup>5</sup> And, as the Department of Justice recognized, “[i]n each metropolitan area where [AT&T and BellSouth] have significant overlapping facilities, . . . postmerger, [the merged firm] would continue to face several competitors with extensive local networks” and the “merged firm would have existing or potential facilities-based competition at nearly all of the buildings served by AT&T before the merger.”<sup>6</sup>

Second, Global Crossing’s allegation that BellSouth’s tariffed special access rates are too high is both irrelevant and inaccurate. It is irrelevant because it is not merger-specific. BellSouth’s tariffed special access rates were implemented before the merger was announced and comply with the governing Commission rules and regulations. Global Crossing’s allegations are thus nothing more than an attack on the existing special access regulatory regime, and the Commission has repeatedly held that such issues are not appropriate fodder in merger proceedings.<sup>7</sup>

In any event, Global Crossing’s claim that its charts compare “actual pricing data Global Crossing utilizes in its decision-making process for the purchase of special access services in Atlanta” can only be designed to mislead.<sup>8</sup> The charts attached to Global Crossing’s letter reflect BellSouth’s *undiscounted* special access “rack rates” – not the rates that Global Crossing actually pays to BellSouth and which Global Crossing undoubtedly uses in its decision-making process. Comparing BellSouth’s rack rates to the discounted special access rates that Global Crossing actually pays to other competitors in Atlanta is, at best, an “apples-to-oranges” comparison. In

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<sup>4</sup> See Global Crossing Letter, Attached Charts (showing that AT&T’s DS1 and DS3 special access rates are the highest among the multiple other special access providers in the BellSouth region); see also Joint Opposition, at 21 (noting that AT&T is “often among the *highest-priced* CLECs for Local Private Lines”) (emphasis in original); *id.* n.76 (providing examples).

<sup>5</sup> See Joint Opposition at 24.

<sup>6</sup> Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T’s Acquisition of BellSouth: Investigation Concludes That Combination Would Not Reduce Competition, at 2 (Oct. 11, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/218904.pdf](http://www.usdoj.gov/atr/public/press_releases/2006/218904.pdf).

<sup>7</sup> See, e.g., Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, ¶ 55 (2005) (“*SBC/AT&T Merger Order*”) (“to the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors using special access inputs, such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing”) (internal quotation marks omitted); Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶ 55 (2005) (“*Verizon/MCI Merger Order*”) (same).

<sup>8</sup> Global Crossing Letter, at 1.

fact, after accounting for the various term, volume and other discounts contained in the BellSouth/Global Crossing agreement, the rates that Global Crossing actually pays to BellSouth are as much as **[Begin Highly Confidential]** **[End Highly Confidential]** lower than the rack rates improperly used in Global Crossing's charts.

Notably, Global Crossing admits that the inaccurate and misleading pricing comparisons presented in its letter and charts are precisely the type of information it would present if the Commission were to delegate special access disputes to commercial arbitrators.<sup>9</sup> This admission underscores why the Commission should reject the ill-conceived and ill-defined requests for such "baseball" style arbitration procedures. Although Global Crossing plainly would like to supplant the expert agency with a commercial arbitrator, who is not likely to possess the Commission's technical and regulatory expertise, and who thus is more likely to be swayed by the misleading and inaccurate data presented by Global Crossing, Congress gave authority to the *Commission* to ensure that interstate special access rates are just, reasonable and non-discriminatory.<sup>10</sup> Any attempt by the Commission to sub-delegate this authority to private arbitrators would be unlawful, particularly in the absence of *de novo* Commission review of each arbitration award<sup>11</sup> – and for good reason. Turning over the regulation of special access to multiple private arbitrators would play havoc with the "just and reasonable" and nondiscrimination requirements that are the cornerstone of sections 201 and 202. Inconsistent and irreconcilable decisions would be inevitable – all the more so because commercial arbitrators lack the necessary expertise to implement the complex and technical regulatory regime governing tariffed special access services in a coherent and unified fashion. This is not a recipe for just and reasonable rates; it is a recipe for endless disputes and litigation that will serve no one's interests.

Information in this letter discusses the "characteristics of [a] specific customer[]." Accordingly, AT&T and BellSouth are designating the redacted portion of this letter as Highly Confidential Information and Copying Prohibited pursuant to the Second Protective Order in this proceeding.<sup>12</sup> In addition to the CD on which this letter was filed, AT&T is providing to the Staff copies of the unredacted filing. Counsel for parties to this proceeding may review the

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<sup>9</sup> See Global Crossing Letter, at 2 (explaining that "the sort of evidence illustrated in the attached charts" is the kind of evidence it would "present to an experienced commercial arbitrator").

<sup>10</sup> See, e.g., 47 U.S.C. §§ 201, 202, 204, 206, 208 (2006).

<sup>11</sup> See, e.g., *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) ("[I]f anything, the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization").

<sup>12</sup> *In re AT&T Inc. & BellSouth Corp. Applications for Approval of Transfer of Control*, WC Dkt No. 06-74, Second Protective Order, DA 06-1415, at 2 ¶ 5 (rel. July 7, 2006) (defining "Highly Confidential Information") ("Second Protective Order").

unredacted filing at the offices of Crowell & Moring LLP and should contact Jeane Thomas of that firm at (202) 624-2877 to coordinate access.

Sincerely,

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