



November 28, 2006

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

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

Dear Ms. Dortch:

Global Crossing submits this letter in response to AT&T's *ex parte* dated November 13, 2006. Throughout this proceeding, Global Crossing has proposed a narrowly tailored, market oriented solution to identified harms resulting from AT&T's proposed acquisition of BellSouth.¹ Global Crossing's proposal mirrors conditions the Commission has imposed in parallel circumstances with other merger transactions.² The harms arise from AT&T's dominant position in the special access market, which will only be increased as a result of its proposed acquisition of BellSouth. AT&T's market dominance allows it to impose unreasonable terms and conditions on its special access customers, including (1) excessive mileage charges, (2) extreme volume and term commitment requirements, and (3) a lack of service level agreements ("SLAs").

¹ See, Comments of Global Crossing North America, Inc. filed June 5, 2006.

² See, e.g., *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473 (2004) ("*Hughes/News*") and *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelfia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelfia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, MB Docket No. 05-192, FCC 06-105 (rel. July 21, 2006) ("*Adelfia*").

Rather than propose burdensome new substantive regulations governing AT&T's market practices, Global Crossing instead proposed a simple procedural rule that affords AT&T's special access customers (and AT&T as well) the right to seek final offer, or baseball style, arbitration during the negotiation of special access contracts. Global Crossing believes the availability of final offer arbitration will reduce AT&T's ability to require unreasonable terms and conditions for special access services and bring them more in line with terms and conditions which would exist in a truly competitive marketplace as evidenced in part by the terms offered by competing special access providers who lack market power.

In its objection to this proposal AT&T appears to express a preference for further regulation by stating that –

“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.”

AT&T is essentially arguing that baseball style arbitration lacks the structure and rigor of regulated rates.³ While Global Crossing prefers the market based approach embodied in its arbitration proposal, we would not object if the commission selected rigorous access rate regulation as an appropriate remedy for AT&T's increased dominance in the special access market resulting from its proposed acquisition of BellSouth. AT&T claims on the one hand the special access market is competitive. Yet on the other hand it claims that baseball arbitration will lead to rates that are not “just and reasonable” and perhaps violative of the non-discrimination requirements of Section 201 and 202 of the Communications Act. If the Commission agrees with AT&T that the special access market is competitive then disparate arbitration results should not give rise to any concerns because competitive markets do not produce uniform prices either. Indeed, the Commission expected as much when it granted Phase II pricing flexibility in the first place.⁴

³ Despite its professed fealty to the “just and reasonable and non-discrimination requirements...of Sections 201 and 202,” AT&T knows that in practice, there are in fact no restrictions on their imposition of unreasonable and discriminatory special access rates and terms under the existing regulatory regime. The record in this proceeding is replete with evidence of this. Moreover, AT&T incorrectly assumes that there will be numerous arbitrations. The more likely scenario is there will be a few high-profile arbitrations that will restore balance to the negotiations process after which parties will consummate their dealings without the need to resort to arbitration.

⁴ *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order, 14 FCC Rcd 14,221, 14,260 (1999), *aff'd*, *WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) (“*Pricing Flexibility Order*”)

If the market is as competitive as AT&T claims, AT&T's terms and conditions for special access service should be consistent with industry practice and easily withstand the scrutiny of experienced commercial arbitrators.⁵ But it is precisely because its practices are not commercially reasonable that AT&T objects to final offer arbitration. AT&T will not be able to continue to impose such unreasonable terms and conditions on its special access customers if final offer arbitration is adopted as the arbitration process will force ATT to offer reasonable market based terms and pricing or risk the adoption by the arbitrator of terms proposed by their customers on the basis that these terms more closely reflect market reality in a truly competitive and level playing field.

AT&T also argues that a remedy the Commission has imposed in two previous mergers somehow would be illegal in this context. AT&T asserts –

“...Congress gave authority to the *Commission* to ensure that interstate special access rates are just, reasonable and non-discriminatory. 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.” (Footnotes omitted).

AT&T's argument is facile at best. First, Global Crossing's arbitration proposal included *de novo* Commission review and it also calls for the Commission to establish criteria to guide arbitrators in their deliberations. In this context, however, *de novo* review would consist simply of a review of the prevailing final offer to ensure that it was consistent with Commission policy, rules and regulations (as well as Sections 201 and 202 of the Communications Act).⁶ AT&T's special access rates established pursuant to the *Pricing Flexibility Order* are currently subject to the same level of review.

Second, in its *Pricing Flexibility Order*, the Commission abdicated its rate-making authority in favor of allowing the “market” to set rates for special access services. Allowing parties to seek arbitration is no more a subdelegation of ratemaking authority than allowing the “market” to set rates in the first place. The arbitrator is merely facilitating the private negotiations the Commission has already authorized. Moreover, the arbitrator would not be setting rates, the arbitrator would simply be choosing between two sets of rates presented to it by parties authorized by the Commission to engage in price negotiations.

⁵ In its *ex parte* AT&T suggests that arbitrators would “lack the necessary expertise to implement the complex and technical regulatory regime governing tariffed special access services in a coherent and unified fashion” (*Ex Parte* at 3). As AT&T well knows, there are a host of knowledgeable arbitrators, many of whom AT&T has used itself, and Global Crossing's arbitration proposal allows for the parties to mutually agree upon the arbitrator(s).

⁶ Cf. *United States v. FCC*, 652 F.2d 72, 90-91 (D.C. Cir. 1980) (en banc) (“Someone must decide when enough data is enough. In the first instance that decision must be made by the Commission.... To allow others to force the Commission to conduct further evidentiary inquiry would be to arm interested parties with a potent instrument for delay.”).

Rather than embrace Global Crossing's narrowly tailored, market oriented approach, Global Crossing understands that AT&T has proposed a series of meager proposals with superficial appeal. Global Crossing further understands AT&T's latest proposal to include a commitment to reduce the price of channel terminations (a component of special access services) in areas where it enjoys Phase II pricing flexibility to the same level as if price cap regulation were still in effect.⁷ AT&T's proposal should be rejected because it fails to address the legitimate market concerns of its special access customers. The vast majority of AT&T's special access customers are under contract with AT&T. Unless AT&T is willing to re-price all of its contracts, these carriers will not benefit from AT&T's proposal. Secondly, AT&T can easily raise prices on the mileage component of special access to make up for the price reduction in the channel termination. So what may appear at first to be a meaningful proposal by AT&T in fact would be available only to carriers who are not currently under contract with AT&T and the benefit could easily be eclipsed by price increases in the mileage component of special access services.

Numerous carriers in this proceeding have identified very serious examples of AT&T's dominance in the special access market and AT&T refuses to address these core concerns. Instead, they make proposals with superficial appeal that fail upon close scrutiny. Global Crossing believes the imposition of final offer arbitration is a more market oriented, narrowly tailored procedural vehicle to address these problems and respectfully urges the Commission to adopt it.

Respectfully submitted,

GLOBAL CROSSING NORTH AMERICA, INC.

/s/

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⁷ AT&T's proposal, if understood correctly, validates the data Global Crossing submitted showing price flex rates to be higher than price cap rates. Considering the claimed *raison d'etre* for pricing flexibility was to allow AT&T and other incumbents to meet competitive pricing pressures in the special access market, AT&T's proposal begs the question of why price reductions are necessary to bring AT&T's rates in line with regulated rates.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Comments of Global Crossing North America, Inc. was served via electronic mail this 28th day of November, 2006, upon the following:

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