December 7, 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:

In its *ex parte letter* dated November 28, 2006, Global Crossing makes yet another attempt to justify its proposal that the Commission condition approval of the AT&T/BellSouth merger on "baseball-style" arbitration of Applicants' special access rates and terms.[1] Global Crossing asserts that its proposal is a "narrowly tailored" market-oriented solution to "identifiable harms" resulting from the merger and is justified for the same reasons that the Commission imposed arbitration conditions in its *Hughes* and *Adelphia* cable merger orders. Global Crossing further contends that its proposal is fully consistent with the requirements of the Communications Act. As detailed below, each of these assertions is false, and Global Crossing's latest filing has only underscored that its arbitration proposal – which would replace market-oriented solutions with Commission-administered, case-by-case rate regulation – is both unlawful and unworkable. The Commission thus properly rejected such proposals in the SBC/AT&T and Verizon/MCI merger orders and should likewise reject this proposal in this merger review.

Global Crossing contemplates mandatory arbitration of special access rates, terms and conditions whenever a customer seeks a contract tariff on terms AT&T is unwilling to offer at any location within the 22-state AT&T and BellSouth regions. Each party would be required to submit a "final offer." The arbitrator would be directed to adopt the final offer that is most "commercially reasonable" and to give primary weight to evidence of rates, terms, and conditions offered by CLECs on "similar" routes, which is evidence that is legally irrelevant under the Commission's precedents and which are also data that CLECs have the ability and incentive to distort. As Global Crossing now acknowledges, the arbitrator's decision would necessarily be subject to *de novo* review by the Commission.

As an initial matter, this proposal is anything but "narrowly tailored" to address a merger-specific harm. BellSouth does not provide special access service in AT&T's region, and AT&T

[1] *Ex Parte* Letter from Paul Kouroupas to Marlene Dortch (FCC), WC Docket No. 06-74 (Nov. 28, 2006) ("Global Crossing 11/28/06 *Ex Parte*"); *see also* Global Crossing Comments, WC Docket No. 06-74, at 3-6 (Oct. 24, 2006); *Ex Parte* Letter from CompTel, *et al.*, to Marlene Dortch (FCC), WC Docket No. 06-74 (Sept. 22, 2006) ("CompTel 9/22/06 *Ex Parte*"); Global Crossing Comments, WC Docket No. 06-74, at 7-14 (June 5, 2006).

is an insignificant supplier of special access services in BellSouth's region. Indeed, unrefuted record evidence establishes that there are no more than 31 buildings scattered across the entire BellSouth region where the merger could possibly cause the elimination of alternatives to BellSouth's special access services, and AT&T has no wholesale customers in any of those buildings. As Applicants have shown and as the Department of Justice and every tribunal to have reviewed the merger have found, the merger thus will have no adverse effect on competition in the provision of special access services, and no special access merger conditions are warranted. But even if the Commission were to conclude otherwise, any narrowly tailored remedy would necessarily target only these 31 buildings. By proposing an arbitration procedure that would apply throughout the 22-state regions of AT&T and BellSouth, Global Crossing is seeking to "redress," not the effects of the merger, but an alleged (and disputed) lack of competition in the special access marketplace that is independent of the merger, that is being considered by the Commission in pending industry-wide special access rulemaking proceedings, and that cannot be addressed here under settled Commission precedent.

This situation is not remotely similar to those which led the Commission to impose arbitration conditions in its *Hughes* and *Adelphia* merger orders. The Commission found that a specific consequence of both of those vertical mergers was to give the merged entity the ability and incentive to charge excessive prices for affiliated regional sports network programming in order to impede competition from potential video distribution rivals. The Commission further found that, because of a gap in the Commission's program access rules, competing multi-channel video programming distributors ("MVPDs") had no existing remedy against such discrimination and overcharges. Here, by contrast, the merger has no effect on Applicants' ability or incentive to increase special access prices, and even if it did, Section 208 of the Act gives customers an explicit – and expeditious – remedy against any overcharges. The analogous merger orders are thus not *Hughes* and *Adelphia*, but *SBC/AT&T* and *Verizon/MCI*, where the Commission rejected an identical Global Crossing special access arbitration proposal, properly holding that the issue is not merger-specific (and must therefore be raised in the pending industry-wide rulemaking proceedings) and, in any event, that arbitration had not been shown to be a "superior" alternative to the existing section 208 complaint process.

Nor is Global Crossing's proposal remotely "market oriented" or "deregulatory." It is designed to eliminate the pricing flexibility that the Commission granted AT&T and BellSouth to allow them to compete more effectively and to mandate – on a contract-by-contract basis – that the merged firm's rates be based on CLECs' charges in pricing flexibility areas, subject to an adjustment based on comparative cost differences. And because *de novo* review is statutorily required, adoption of the proposal would *add* regulatory procedures to the existing system and create a need for far more oversight and litigation at the Commission than exists under the present system or even under the rate of return regime that the Commission abandoned as unworkable more than a decade ago. Beyond that, Global Crossing's proposal is inconsistent with requirements of the Communications Act and settled law in myriad respects.

The Arbitration Proposals Address No Merger-Specific Harm And Are Not Remotely Justified By The *Hughes* and *Adelphia* Orders. Global Crossing recognizes that its proposed arbitration condition could be imposed only if it could remedy some specific harm resulting from the merger. Thus, Global Crossing begins its letter with bald assertions that the proposed arbitration condition is a "narrowly tailored, market oriented solution to identified harms resulting from AT&T's proposed acquisition of BellSouth"[2] that should be imposed here for the same reasons that an arbitration requirement was adopted in *Hughes* and *Adelphia*.[3] But these assertions are false in every respect.

First, the arbitration proposal has *nothing* to do with any harms that have been or could be attributed to the AT&T-BellSouth merger. BellSouth does not provide special access services in AT&T's region at all, and the merger thus has no possible effect on special access competition anywhere in the AT&T region. Nor is AT&T a significant wholesale special access supplier in the BellSouth region. AT&T primarily builds special access facilities to serve its own retail customers and rarely sells special access services to CLECs in the BellSouth region. Indeed, AT&T accounts for less than 1% of total wholesale special access sales,[4] and many other facilities-based suppliers compete in the few metropolitan areas in the BellSouth region where AT&T currently operates local networks.[5] There are at most 31 buildings (out of more than 200,000 commercial buildings with special access demand) in the entire BellSouth region that could even potentially be adversely affected by the transaction.[6] The Department of Justice has already concluded that the impact on special access competition is therefore so minimal "that divestitures [or other conditions are] unnecessary to preserve competition."[7] All 19 state commissions that have reviewed this transaction agreed, approving the merger without arbitration or any of the other special access conditions merger opponents propose here.

Global Crossing's proposed arbitration condition could scarcely be more disconnected from these facts or from any possible harms attributable to the merger. The arbitration proposal

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[2] Global Crossing 11/28/06 *Ex Parte*, at 1.

[3] *See, e.g.*, Memorandum Opinion and Order, *Gen. Motors Corp. and Hughes Elec. Corp., Transferors, and the News Corp., Transferee, for Authority to Transfer Control*, 19 FCC Rcd. 473, 700 ¶ 173 (2004) ("*Hughes Merger Order*"); Memorandum Opinion and Order, *Applications for Transfer of Control of Adelphia Communications Corp., Time Warner Cable, Inc., and Comcast Corp.*, FCC 06-105, ¶ 155 (rel. July 21, 2006) ("*Adelphia Merger Order*").

[4] *See* Joint Opposition of AT&T Inc. and BellSouth Corporation, WC Docket No. 06-74, at 24 (June 20, 2006) ("Joint Opp."); Public Interest Statement, WC Docket No. 06-74, at 65-68 (March 31, 2006); *id.*, Declaration of Dennis W. Carlton and Hal S. Sider ¶ 100 ("Carlton/Sider Decl."); *id.*, Declaration of Barry L. Boniface ¶ 20; *Ex Parte* Letter from Gary L. Phillips (AT&T) to Marlene H. Dortch (FCC), WC Docket No. 06-74 (Sept. 1, 2006).

[5] There are literally dozens of other facilities-based competitors with local fiber in the metropolitan areas where AT&T has local fiber networks. *See* Carlton/Sider Decl., at 43 Table 7.1; *see also* Joint Opp., Reply Declaration of Dennis W. Carlton and Hal. S. Sider ¶ 23. Further, an average of at least four competitors are collocated in all but two of the central offices where AT&T has fiber-based local collocations. *Id.* ¶ 25.

[6] *Ex Parte* Letter from Gary L. Phillips (AT&T) to Marlene H. Dortch (FCC), WC Docket No. 06-74, at 2 and Exhibit 10 (Sept. 28, 2006). Moreover, no competitor relies on AT&T wholesale special access services in any of these 31 buildings, and competitors can obtain access to all of these 31 buildings using TELRIC-priced UNEs.

[7] Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T's Acquisition of Bellsouth, at 2 (Oct. 11, 2006).

is not focused on the tiny number of locations in the BellSouth region where the merger could even theoretically affect competition, nor is it designed to address any harms that might theoretically stem from those situations. Rather, Global Crossing and its allies are quite candid in focusing on longstanding generic complaints, which they have been pressing for years in prior merger proceedings and Commission dockets, that special access rates are too high and that existing special access regulation is overly market oriented. They are undeniably attempting to use this merger as a hook for obtaining a whole new regulatory regime, to govern special access services throughout the entire 22-state territory of AT&T and BellSouth, albeit nowhere else.

This is a textbook example of the sort of non-merger-specific complaint that relates to the entire industry and that must therefore be addressed in an industry-wide rulemaking proceeding. Here, of course, such industry-wide proceedings are already underway, and the merger opponents have had ample opportunity to make their case for new rules in those proceedings. While AT&T and BellSouth have demonstrated in those proceedings that the CLECs' special access complaints are overblown and that wholesale rule changes are unnecessary, it is plain that if any changes are to be adopted, they must be adopted in those rulemaking proceedings, and not imposed solely on AT&T as a "merger condition."[8]

The Commission held exactly that in its *SBC/AT&T* and *Verizon/MCI* merger orders. There, as here, Global Crossing proposed baseball style arbitration of contract tariffs for special access services. Global Crossing acknowledged that Section 208 of the Act gives it and other CLECs a remedy against allegedly unreasonable special access rates or terms, but Global Crossing contended that CLECs generally lacked the resources to pursue this remedy and that the Commission should therefore impose arbitration as a merger condition. The Commission properly rejected this claim, concluding that even if CLECs are dissatisfied with the avenues that Congress has made available for challenging special access rates and believe that "the resources required . . . to pursue a section 208 complaint . . . outweigh the possible benefits in particular instances, this is not a merger-specific concern to be addressed in this proceeding."[9]

Second, Global Crossing's reliance on *Hughes* and *Adelphia* is wholly misplaced. In those proceedings, the Commission imposed arbitration conditions because it (1) identified discrete competitive harms caused by the mergers, and (2) determined that the Act and the Commission's rules did not provide affected persons with effective remedies against those discrete merger-specific harms. Here, by contrast, the merger itself will not affect the rates, terms, and conditions for special access services, and even if it did, the Communications Act already provides special access purchasers with an explicit statutory remedy.

[8] Because the proposed condition is not merger-related, there also could be no rational basis for singling out AT&T for mandatory arbitration, but not other price cap ILECs like Verizon and Qwest, which also happen to be significant competitors and access purchasers in AT&T's region. Under the proposed condition, Verizon and Qwest could invoke arbitration and potentially force AT&T to provide access at rates of their choosing, while AT&T would have no comparable right in their regions. These are among the many ways in which Global Crossing's proposal would only unfairly skew and supplant market outcomes, rather than facilitate them.

[9] *SBC/AT&T Merger Order* ¶¶ 55 n.161, 177 n.499; *accord Verizon/MCI Merger Order* ¶¶ 55 n.157, 189 n.511.

In particular, the *Hughes* and *Adelphia* mergers both resulted in the vertical integration of an MVPD with a company that owned regional sports networks ("RSNs"). The Commission found that these RSNs are uniquely important to the success of an MVPD, because RSNs "typically purchase exclusive rights to show sporting events, and sports fans believe there is no good substitute for watching their local and/or favorite team play an important game."[10] Specifically, the Commission found in *Adelphia* that "the transactions would enable [the merged entity] to raise the price of RSNs by imposing uniform price increases applicable to all MVPDs," including their own affiliates and that such "strategies are likely to result in increased retail rates and fewer choices for consumers seeking competitive alternatives to [Applicants]."[11] Likewise, in *Hughes*, the Commission found that "the proposed transaction will enhance [Applicants'] incentive and ability to temporarily withhold or threaten to withhold access to its RSN programming to increase the fees for the programming, over and above what it could negotiate absent the transaction, to the ultimate detriment of the public."[12] Thus, in both the *Adelphia* and *Hughes* transactions, the Commission identified clear merger-specific harms.

Even so, the Commission imposed the arbitration conditions only because it also found that its existing rules did not provide competing MVPDs with a remedy against the identifiable harms that would result from the mergers. Specifically, it concluded that its program access rules (which provide for complaints) do not apply when programming is delivered terrestrially (as RSN programming often is) and, in any event, "do not afford a remedy for allegations of competitive harm due to uniform price increases."[13] Moreover, as Commissioner McDowell noted, the program access rules "for years have not been enforced in the expeditious manner contemplated by our own rules. . . . In fact, it seems that many disputes are never resolved."[14]

None of these circumstances exist here. Foremost, as noted, this merger raises *no* merger-specific special access harms that can properly be addressed in this merger proceeding, much less harms that Global Crossing's across-the-board arbitration proposals are narrowly tailored to address. Rather, the harms alleged by advocates of mandatory arbitration are industry-wide concerns associated with industry-wide special access regulation that will be unaffected by this merger. And, those seeking industry-wide regulatory reform of special access can do so (and are doing so) in the ongoing industry rulemakings that the Commission has initiated.

Furthermore, unlike *Hughes* and *Adelphia*, there are no regulatory gaps that raise competitive concerns in this proceeding. On the contrary, the Commission's existing special access rules fully protect special access customers from the alleged overcharges and other anticompetitive conduct arbitration proponents claim to fear. AT&T is required to tariff its special access rates and terms and to offer such services on a nondiscriminatory basis, and it

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[10] *Hughes Merger Order* ¶ 133; *see also id.* (RSNs offer "unique" programming that has "no close substitutes"); *Adelphia Merger Order* ¶ 124 (same).

[11] *Adelphia Merger Order* ¶ 123; *see also id.* ¶ 159 (noting these "transaction-specific" results of the merger).

[12] *Hughes Merger Order* ¶ 147.

[13] *Adelphia Merger Order* ¶ 155; *accord id.* ¶ 120; *Hughes Merger Order* ¶ 162.

[14] *Adelphia Merger Order*, Separate Statement of Robert McDowell, at 1.

must comply with the Commission's access charge, price cap and pricing flexibility rules.[15] This regime provides extensive safeguards to access purchasers,[16] including Section 208 of the Act, which expressly provides a complaint remedy and expressly mandates expeditious Commission resolution of such complaints.[17] As the Commission concluded in the *SBC-AT&T Merger Order*, it is therefore difficult to conceive how the proposed arbitration remedy, which would only add a layer to the required Commission consideration, could improve matters, and there is no basis even to consider it where, as here, it would not remedy any merger-specific harm.

The Arbitration Proposals Are Not Remotely Deregulatory Or Market Oriented And Are In Many Respects Unlawful. The arbitration proponents' claims that their proposals are "deregulatory" and "market oriented" are equally false. The very purpose of these proposals is to *eliminate* market solutions and replace them with heavy-handed, contract-by-contract rate regulation administered by commercial arbitrators and overseen on a case-by-case basis by the Commission. Unlike "deregulatory" proposals, which *reduce* Commission involvement in privately negotiated arrangements designed to meet competition, the proposals of Global Crossing and its allies would exponentially increase Commission intrusion in those arrangements, turning back the clock and effectively recreating the unworkable cost-of-service regulation that the Commission abandoned years ago in favor of price caps and pricing flexibility. As noted, the Commission recognized some of these problems when it considered these same arbitration proposals in the *SBC/AT&T* and *Verizon/MCI* merger proceedings and concluded that: "it is not clear that Global Crossing's proposed alternative to the section 208 complaint process would necessarily be superior."[18]

But the problems with the Global Crossing proposal are far greater than the Commission then acknowledged. Under the proposals as framed, the Commission would be enmeshed in countless rate proceedings, each of which would require it to resolve disputes over costs, rates, and myriad other factors. Beyond that, the specific proposals ignore requirements of Section 205 of the Act that would require the Commission to make a range of other determinations, as discussed in greater detail below. Adoption of the proposals would thus embroil the Commission and the industry in a regulatory quagmire of unprecedented proportions.

As noted, the proposed condition would apply across the combined companies' entire 22-state region, inviting literally thousands of special access customers to invoke the new arbitration mechanism in AT&T's and BellSouth's many pricing flexibility MSAs. Although the arbitration proponents tout the cost and time-saving benefits of third-party baseball arbitration, they now concede that it would be unlawful for the Commission simply to delegate to private arbitrators its statutory mandate to oversee special access regulation, and, indeed, that the Commission would

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[15] 47 U.S.C. §§ 201-205; 47 C.F.R. §§ 69.701- 69.731.

[16] *See WorldCom, Inc.* v. *FCC*, 238 F.3d 449 (D.C. Cir. 2001) (existing tariff and pricing flexibility regime sufficient to protect access ratepayers).

[17] 47 U.S.C. § 208(b)(1) ("the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint is filed").

[18] *SBC/AT&T Merger Order* ¶ 177 n. 499.

be obligated to conduct *de novo* reviews.[19] Accordingly, the Commission would be quickly inundated with numerous individualized contract tariff disputes, each of which would have to be considered *de novo*; it would be naïve to think otherwise.

It is critical to recognize that, in this context, *de novo* Commission consideration would necessarily take the form of a prescription under 47 U.S.C. § 205. However labeled, the arbitration proposals contemplate Commission-imposed rates implemented through tariff (as Section 203 would require for any new rate to become effective) and would operate to force AT&T to file new rates that are different from those it has filed in its existing tariffs or that it offered to file in a new contract tariff.[20] Accordingly, the Commission would be required to follow the procedures set forth by Congress in Section 205 that govern any rate prescription. Under the terms of Section 205, the Commission cannot prescribe a rate unless it first finds that the rate that the carrier has proposed and filed is itself unjust, unreasonable, or unjustly discriminatory in violation of Sections 201 and 202 of the Act.[21] As the D.C. Circuit has cautioned, "the[se] mandates of the Act are not open to change by the Commission."[22]

Accordingly, the Commission could not lawfully implement an arbitration regime that upheld a lower rate chosen by an arbitrator merely on the ground that this rate is "just and reasonable." Rather, the Commission could not require the lower rate unless it first determined that the rates that AT&T has filed and proposed are themselves unjust and unreasonable and outside the zone of just and reasonable rates. And because there is a broad range of rates that are just and reasonable, the mere fact that an arbitrator (or the Commission) believes that a CLEC-proposed rate is more "commercially reasonable" could not remotely establish that AT&T's existing rate or proposed new contract tariff rate is unjust and unreasonable.[23] Thus, adoption of the arbitration proposals would mean that the Commission would have to conduct a review and

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[19] *See* Global Crossing 11/28/06 *Ex Parte*, at 3. *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").

[20] *See, e.g., MCI Telecomms. Corp.* v. *FCC*, 627 F.2d 322, 337 (D.C. Cir. 1980) (it "is the actual impact of the FCC's actions, rather than the language it uses, which determines whether or not the FCC has 'prescribed' tariffs or other conditions under the statute").

[21] 47 U.S.C. § 205; *see AT&T* v. *FCC*, 487 F.2d 864, 872-80 (2d Cir. 1973) (a "full opportunity for hearing" and express Commission findings that the carrier-initiated rate is unjust and unreasonable and the prescribed rate is just and reasonable "are essential to any exercise by the Commission of its authority" to prescribe rates).

[22] *Southwestern Bell Corp.* v. *FCC*, 43 F.3d 1515, 1519 (D.C. Cir. 1995) ("Commission is not free to circumvent or ignore th[e] balance [created by Congress]. Nor may it rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation").

[23] *FPC* v. *Conway Corp.*, 426 U.S. 271, 278 (1976) ("there is no single cost-recovering rate, but a zone of reasonableness: statutory reasonableness is an abstract quality represented by an area, not a pinpoint").

make findings regarding at least two sets of rates – the rates that AT&T filed or proposed and any lower rate that an arbitrator selected.[24]

The Commission and the courts have recognized these absolute statutory requirements in the specific context of special access services offered in pricing flexibility areas. In the *Pricing Flexibility Order* itself, the Commission made clear that the pricing flexibility rules give LECs the *option* of negotiating discounts from generally applicable tariffed rates and terms, where the LEC believes that competitive conditions warrant such concessions.[25] And, as the D.C. Circuit confirmed just last week, neither the statute nor the Commission's rules do or could impose any obligation on AT&T to offer or negotiate any discount off of its tariffed special access rates.[26]

Equally important, and even apart from the "precise procedures and limitations" embodied in Section 205,[27] the Commission could not, consistent with its statutory responsibilities, resolve these new special access proceedings under the "final offer" approach that Global Crossing and others advocate. The Commission has elsewhere recognized that such strict baseball-style arbitration is far too inflexible to be used where the agency must ensure compliance with the Communications Act and the Commission's policies, and the Commission's actual experience refutes Global Crossing's unsupported assertions to the contrary.[28] For

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[24] Nor could the Commission lawfully forbear from the just and reasonable requirement while simultaneously imposing an arbitration condition. Under the forbearance statute, the Commission could forbear only if it found that special access markets were so competitive that regulation is unnecessary to ensure just and reasonable rates, to protect consumers, or to serve the public interest – precisely the opposite of the assumption underlying the arbitration proponents proposals. *See* 47 U.S.C. § 160(a). Any finding that the special access marketplace is sufficiently competitive to forbear from the just and reasonable requirement would therefore necessitate elimination of any arbitration requirement as well and should counsel against its imposition in the first place.

[25] *See, e.g.*, Fifth Report and Order & Further Notice of Proposed Rulemaking, *In re Access Charge Reform*, 14 FCC Rcd. 14221 ¶ 124 (1999) ("[u]pon satisfaction of the Phase I triggers, we find that price cap LECs should be permitted to offer volume and term discounts to enable them to respond to competition") (emphasis added); *WorldCom Inc.* v. *FCC*, 238 F.3d 449, 456 (D.C. Cir. 2001) (Phase II provides "freedom to raise or lower rates outside of price cap regulation"). *See also* Second Report and Order, *In re Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd. 6786 ¶ 302 (1990) (finding price cap rules lawful, because "[w]e are not prescribing any particular rates, nor are we requiring or forbidding any particular tariff revisions – carriers remain free to decide when tariff revisions are to be filed and the nature and extent of those revisions").

[26] *BellSouth Telecomms., Inc.* v. *FCC*, No. 05-1032, slip op. at 8-9 (D.C. Cir., Dec. 1, 2006) (rejecting argument that discount was unlawful in part because "the company had no obligation to offer a volume discount plan at all," which would have left purchasers worse off than discounts they were challenging).

[27] *AT&T* v. *FCC*, 487 F.2d at 874.

[28] *See* Order, *In re Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended*, 16 F.C.C.R. 6231 ¶ 5 (2001) ("Experience gained by states in arbitrating scores of interconnection disputes over the past five years suggests that 'final

example, when the Commission conducted arbitration proceedings between Verizon and various CLECs for interconnection agreements in Virginia pursuant to 47 U.S.C. § 252(e)(5), it recognized the need to depart from baseball-style arbitration to resolve outstanding issues in numerous instances.[29]

Thus, far from reducing the Commission's involvement in special access oversight, the proposed third party "arbitration" conditions would create the need for a radical increase in Commission oversight, and generate far more special access litigation than under the Commission's current pricing flexibility regime. There would undoubtedly be numerous rate proceedings in which the Commission would be required to mandate the specific rates and terms that AT&T could offer in particular contracts to particular customers for particular special access services. And because the Commission would under any version of these proposals be conducting its own extensive review and would not be bound by the arbitrator's decision, the arbitration itself would serve no purpose except to *add* a layer of regulatory review to the existing system.[30]

The Commission's task in these *de novo* rate proceedings would be further complicated by the rules of decision Global Crossing and others have proposed. In an attempt to rig the proceedings to generate lower rates, Global Crossing would have the arbitration focus not on which final offer is just and reasonable or nondiscriminatory – after all, AT&T's existing price cap compliant rates and terms are already presumptively just and reasonable and in most cases are "deemed lawful" under Section 204(a)(3) – but on the more amorphous standard of which is more "commercially reasonable." Global Crossing and other CLECs argue that the arbitrator should be required to give "the greatest weight" to what AT&T's non-ILEC competitors charge for the same services.[31] Thus, from the outset there would be a fundamental disconnect between

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offer' arbitration may not always afford the arbitrator sufficient flexibility to resolve complex interconnection issues. Accordingly, we now amend section 51.807(f)(3) to provide the arbitrator additional flexibility in certain circumstances. The arbitrator shall have discretion to require the parties to submit new final offers, or adopt a result not submitted by any party, in circumstances where a final offer submitted by one or more of the parties fails to comply with the Act or the Commission's rules."). For this reason, Global Crossing's reliance on earlier Commission statements in the FCC's 1996 *Local Competition Order* is misplaced. *See* Global Crossing Comments, at 10 (June 5, 2006) (citing *Local Competition Order*, 11 FCC Rcd. at 15499 ¶ 1294).

[29] Forfeiture Order, *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*, 18 FCC Rcd. 17722 ¶¶ 24, 103, 140, 387, 432, 457 (2003).

[30] This would be true even under the original proposals for deferential (and unlawful) "arbitrary and capricious" review. *See, e.g.*, CompTel 9/22/06 *Ex Parte,* Exh. B at II.C.15. The Commission would still have to undertake its own independent review of the evidence and the arbitrator's analysis; decide whether the arbitrator's decision was arbitrary and whether the resulting rates and terms were just and reasonable; and write an order that would withstand judicial review.

[31] *See, e.g.*, CompTel 9/22/06 *Ex Parte*, Exh. B at II.C.3; Global Crossing 9/8/06 *Ex Parte*, Attachment at 20.

the arbitrator's focus and what the statute requires the Commission to assess. Moreover, AT&T does not have access to the rates that non-ILEC competitors charge, since such rates are not subject to tariff, and comparing the two final offers based on the litany of factors and comparisons the CLECs have proposed would always be open to substantial dispute.[32] As a result, the Commission would inevitably be required to conduct what amounts to a full-blown ratemaking case, because the party seeking *de novo* review (whether AT&T or the special access customer) would argue that the arbitrator did not give appropriate consideration to the rate comparison evidence (even assuming it were available) or to the evidence of cost and other differences between networks that render such comparisons meaningless.[33]

More fundamentally, however, any Commission decision affirming rate reductions on the basis of comparisons with CLEC rates would be patently unlawful. Ironically, it is the CLECs that established the precedents that it is unlawful to find a rate unreasonable merely because it is higher than a competing carrier's rate.[34] And these principles are especially pertinent in this context, because CLECs typically target their entry to the densest and lowest-cost areas, which means that they often have a substantially different cost structure than an ILEC. Accordingly, the mere fact that an ILEC's special access rates may be higher than a CLEC's should not even be a relevant consideration, much less one worthy of the "greatest weight." The Commission would be left with little choice, therefore, but to consider network cost and other relevant differences between the various competing carriers, even though such an approach would be contrary to the Commission's "just and reasonable" inquiry under the current regulatory regime.[35] The difficulty of this type or reconciliation of costs and prices, however, is precisely

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[32] *See, e.g.*, CompTel 9/22/06 *Ex Parte*, Exh. B at II.C.4 (listing six additional factors the arbitrator may consider); Global Crossing 9/8/06 *Ex Parte*, Attachment at 20 (listing ten factors the arbitrator may consider).

[33] The Commission could also anticipate participation by third parties claiming that the contracts resulting from baseball arbitration are unreasonably discriminatory – claims that only the Commission (not a private arbitrator) has the perspective to judge.

[34] *See, e.g.*, *Sprint Communications Co.* v. *MGC Communications, Inc.*, 15 FCC Rcd. 14027 ¶ 6 (2000) ("Relying, as it does, solely on the competing ILEC rate as a benchmark for what is just and reasonable, Sprint has failed to meet its burden"); Seventh Report and Order & Further Notice of Proposed Rulemaking, *Access Charge Reform*, FCC 01-146, CC Docket No. 96-262, ¶ 55 (2001) (discussing CLEC claims that ILEC access rates cannot be used as a benchmark for CLEC access rates); Comments of BayRing Communications, *et al.*, *Access Charge Reform*, CC Docket No. 96-262, at 8 (filed Jan. 11, 2001) ("CLEC access rates have little in common with ILEC rates, and should not be considered for purposes of establishing a benchmark"); Comments of the Association for Local Telecommunications Services, *Access Charge Reform*, CC Docket No. 96-262, at 8 (filed Jan. 11, 2001) (arguing that "CLEC networks have cost characteristics that differ from ILEC networks"); Reply Comments of Focal Communications Corp., *et al.*, *Access Charge Reform*, CC Docket No. 96-262, at 8 (filed Jan. 26, 2001) (arguing that "CLECs incur costs differently than price-cap ILECs").

[35] *See, e.g.*, *AT&T Corp.* v. *Business Telecom, Inc.*, 16 FCC Rcd. 12312, 12324 (2001) (examining costs as the "touchstone" of the reasonableness of a carrier's rates would run afoul of the "policies and purposes of the 1996 Act," which rely upon "market factors to dictate appropriate rates").

why the Commission moved away from rate of return to price cap regulation years ago, and it should not be revived now.[36]

Even worse, there is a serious risk that CLECs could game the process under the rules of decision proposed by Global Crossing. To the extent that certain CLECs are net purchasers of special access, they would have an incentive to offer very low prices to a few customers in an attempt to influence arbitrators' judgment of what is "commercially reasonable." But even in the best of circumstances, the "evidence" relating to CLEC alternatives is likely to be spotty, highly selective, and difficult to verify. All of these deficiencies would create yet additional burdens for the Commission in *de novo* rate proceedings. Discovery would inevitably be necessary to get a clearer and more comprehensive picture of the evidence on which the arbitrator relied and to ensure that there has been no CLEC gamesmanship.

In short, the arbitration proposals are not in any sense "market-based" – ILECs have no obligation to offer any discounts to CLECs and no party to a competitive market negotiation is ever forced to accept any "final offer" that the other party (or anyone else) deems "more" commercially reasonable. Rather, the transparent goal of these proposals is to use a merger condition as a vehicle to achieve a massive re-regulation of special access markets that goes beyond even what merger opponents have sought in the Commission's pending special access rulemaking proceeding. These merger opponents apparently hope that arbitrators will act as a surrogate Commission, dictating the specific (and CLEC-selected) prices that AT&T may charge for hundreds of services in dozens of pricing flexibility areas. It would be difficult to construct a more intrusive and regulatory system – indeed, it would have the ironic effect of imposing specific, government-mandated prices for AT&T's special access services in the areas where it faces the *most* competition, while AT&T would enjoy considerably greater pricing freedom under a price cap plan in less competitive areas.

In truth, it is the Commission's existing rules that provide for "market oriented" outcomes. AT&T has tariffed special access rates, and where it has been demonstrated that facilities-based competition is established, the Commission's rules give AT&T the *option* to negotiate lower rates. Global Crossing's proposal would transform this permissive, market-oriented regime into a rigid and intrusively regulatory regime, by forcing case-by-case, contract-by-contract prescription of rates. The whole purpose of this proposal is not to facilitate freely-entered contracts, but to supplant them by imposing CLEC-proposed rates and terms to which AT&T would never voluntarily agree. This is the antithesis of a market-oriented approach, and it would not remotely serve the public interest.

For all of these reasons, the Commission should expeditiously approve the proposed merger without the proposed special access arbitration condition (or any of the other special access conditions merger opponents continue to press).

[36] There is no question that the real burden of making the correct cost comparisons would fall to the Commission in its *de novo* rate proceedings; arbitrators are not suited to address these issues appropriately, particularly in an expedited proceeding, and in all events they could not tailor their awards to their findings if required simply to pick one of the two "final offers."

Sincerely,

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