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December 29, 2006

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Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of AT&T, Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, WC Docket No. 06-74

Dear Ms. Dortch:

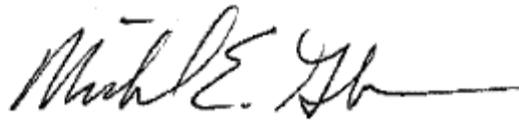
We have not participated in this proceeding to date, and take no position here on the merits of the merger or on whether any conditions are warranted. Late yesterday, however, the parties submitted a new set of proposed conditions that for the first time propose to limit the benefit of certain conditions to some carriers but not to others. Such a condition, whether proposed by the parties or imposed by the Commission, would be discriminatory on its face and would subject any carriers that are denied those benefits to a competitive disadvantage. *See, e.g.*, 47 U.S.C. § 202(a) (prohibiting unreasonable discrimination in charges or services for like communication services directly or indirectly); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990) (invalidating order allowing a carrier to charge a tariffed, regulated rate to certain customers and not others). As such, such a condition would be subject to serious legal challenge and likely would not be sustainable.

Moreover, just as flatly denying the benefit of such a condition to some carriers would be legally problematic, so too is the proposal to impose added requirements on certain carriers in order to qualify for the benefit of the condition. Not only would such a condition be unlawfully discriminatory, but merger conditions cannot be used as a backdoor way to impose requirements on a non-party to the merger. Indeed, to the extent the Commission adopts conditions here, they presumably are based on the Commission's conclusion that the conditions will alleviate some concern about potential adverse effects of *the merger* and any requirements must be limited to *the parties to the merger*. Any other issues can be addressed only through a rulemaking of general applicability in which all potentially affected parties have a full opportunity to participate. Indeed, the courts have previously invalidated Commission efforts to circumvent governing legal standards and procedures by doing through merger conditions what could only

Ms. Marlene H. Dortch
December 29, 2006
Page 2

be accomplished through other means, such as through forbearance or rulemaking proceedings. *See Ass'n of Commc'ns Enterprises v. FCC*, 235 F.3d 662, 666 (D.C. Cir. 2001) (invalidating FCC effort to use a merger condition to circumvent the forbearance standard).

Sincerely,

A handwritten signature in black ink, appearing to read "Michael E. Copps", with a long horizontal flourish extending to the right.

cc: Chairman Kevin Martin
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Tate
Commissioner Robert McDowell
Daniel Gonzalez
Michelle Carey
Scott Deutchman
Scott Bergmann
Ian Dillner
John Hunter
Thomas Navin
Julie Veach
Samuel Feder