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*EX PARTE*

January 4, 2007

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

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

Dear Ms. Dortch:

On December 29, 2006, the Federal Communications Commission ("Commission") issued a Press Release announcing that it had approved the proposed merger of AT&T, Inc. and BellSouth Corporation, effective immediately. While the approval *Order* was not released at that time (and has yet to be released), based on the Press Release part of the merger approval was acceptance by the Commission of a number of "merger commitments" filed the previous day by AT&T by way of an *ex parte* communication. In one of the "conditions," AT&T/BellSouth promised to adjust the prices of certain special access services that are currently subject to "Phase II Pricing Flexibility," both by realigning these prices with the carrier's "Phase I" rates and, in one case, by reducing certain prices by 15%.<sup>1</sup> As explained below, however, AT&T/BellSouth stated its intention of filing tariffs that would limit the benefits of these pricing reductions in an unlawfully discriminatory manner. In the event AT&T/BellSouth files such tariffs, the Communications Act and Commission precedent require the Commission to reject these unlawful provisions.

Qwest Communications International Inc. ("Qwest"), on whose behalf this *ex parte* presentation is filed, has a direct interest in these price reductions. Its subsidiary, Qwest Communications Corporation ("QCC") is a provider of long distance and other telecommunications services and is a major purchaser of the affected services from AT&T/BellSouth. Thus, QCC would take advantage of any non-discriminatory price reductions offered in the interstate access tariffs of AT&T/BellSouth.

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<sup>1</sup> The affected services are DS1, DS3 and Ethernet services. Merger Commitments, Special Access, Commitment Number 6. We refer to these services herein as the "affected services."

However, in its “merger conditions,” AT&T/BellSouth specifically promised to file tariffs for the affected services that would be patently unlawful in violation of the non-discrimination provisions of Section 202(a) of the Communications Act. Another Qwest subsidiary, Qwest Corporation (“QC”), is a Bell Operating Company (“BOC”) and offers incumbent local exchange carrier (“ILEC”) services throughout fourteen states, including services that are comparable to the affected services. AT&T/BellSouth stated in the “merger condition” in question that Qwest and other ILECs subject to price cap regulation would not be able to purchase the affected services under the AT&T/BellSouth interstate access tariffs unless they agreed to adjust their own prices for the same or similar services and actually filed federal tariffs to that effect. In other words, AT&T/BellSouth proclaimed in the “merger condition” the right to discriminate against QCC in its purchase of tariffed services unless QC agreed to price its own services in the manner dictated by AT&T/BellSouth. The “merger condition” then proclaims that, unless QC and other ILECs have complied with AT&T/BellSouth’s demands on the pricing of their services, “the AT&T/BellSouth ILECs shall be deemed by the Commission to have substantial cause to make any necessary revisions to the tariffs under which they provide the services subject to this commitment to [QC and other ILECs] to prevent or offset any change in the effective rate charged such entities for such services.”

Chairman Martin and Commissioner Tate obviously saw the problems inherent in what AT&T/BellSouth was trying to accomplish, and noted in their separate statement (released with the Press Release announcing the approval of the merger) that “even when AT&T attempts to fulfill its merger commitment by filing its tariffs, the Commission is not bound to approve these tariffs. Indeed, consistent with the Commission’s prior policies and precedent, we would oppose such discriminatory practices and would encourage such tariffs to be rejected.”<sup>2</sup>

Quite simply, any effort by AT&T/BellSouth to bind the Commission to accept its proposed discriminatory tariff is null, void and to no effect. The Commission could not, even if it were so disposed, take action affecting QC’s interstate tariffs without following the administration procedures in Title II and the Commission’s rules. Nor could it develop a radically new approach to the non-discrimination requirements of the Act and its own rules without following the notice and comment provisions of the Administrative Procedure Act. Should AT&T/BellSouth seek to either file a discriminatory tariff, or to notify Qwest and others of its intent to do so,<sup>3</sup> legal processes can prevent the illegal conduct from actually coming to fruition. The Commission has not “deemed” that AT&T/BellSouth has “substantial cause” to violate the Communications Act by filing a discriminatory tariff, and any action by AT&T/BellSouth to actually implement this particular “merger commitment” in a manner that discriminates against QC or any other ILEC should be summarily rejected by the Commission. It is important to keep in mind that, no matter what AT&T/BellSouth filed as a “merger condition,” the Commission

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<sup>2</sup> Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, p. 6.

<sup>3</sup> The “merger commitment” states that AT&T/BellSouth will send a letter to QC and other affected ILECs advising them of the fact that they must be about the business of modifying their own tariffs to avoid invocation of the planned discriminatory provisions of the AT&T/BellSouth tariff.

has not changed its non-discrimination rules and Congress has not changed Section 202(a) of the Act. AT&T/BellSouth does not have *carte blanche* to file an unlawful tariff.

Procedure and process aside, it must also be pointed out that the proposal of AT&T/BellSouth to create a discriminatory tariff whereby a lower rate is available to companies that agree to offer lower rates for their own services in different geographic markets would result in a patent violation of the Communications Act. Section 202(a) of the Act prohibits “any unjust or unreasonable discrimination in charges . . . for or in connection with like communication service . . .” In this case, AT&T/BellSouth have stated that it will file a tariff that charges different rates for the *identical* communication services, based solely on whether the customer is willing to adjust the price at which it sells its own services to AT&T/BellSouth, among its other customers. Qwest has uncovered no decision in which a tariff was permitted to take effect (or found lawful) when a challenged discrimination was based on factors having nothing to do with the tariffed offering itself. To the contrary, what is often known as “personal discrimination” (discrimination based on the identity of the customer) has been uniformly prohibited.<sup>4</sup> In fact, consistent with this long-standing and consistent prohibition against discrimination among similarly situated customers, AT&T itself has “previously argued that Section 202(a) bars such personal discrimination.”<sup>5</sup>

The point is, whatever justifications have been proffered to justify a discriminatory rate over the years, the only ones that have been found to have any merit whatsoever are those that relate to the service offering itself, even when discrimination has been found predicated on an economical

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<sup>4</sup> See *Interstate Commerce Commission v. Delaware, Lackawanna & Western Railroad Company*, 220 U.S. 235, 252-3 (1911), in which the Supreme Court observed:

The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement.

See also, *Wight v. United States*, 167 U.S. 512, 516-7 (1897); *Barringer & Co. v. United States*, 319 U.S. 1, 6 (1943); *American Trucking Associations, Inc. v. FCC*, 377 F.2d 121, 130 (D.C. Cir. 1966), *cert denied*, 386 U.S. 943 (1967); *In the Matter of National Exchange Carrier Association, Inc. Revisions to Tariff FCC No. 1*, Memorandum Opinion and Order, 3 FCC Rcd 694, 695, 696 (1988); *In the Matter of Ameritech's Plan to Provide Comparably Efficient Interconnection to Providers of Pay Telephone Services, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 4238, 4249 (1997); *Interconnection facilities Provided to the International Record Carrier*, Final Decision and Order, 63 FCC 2d 761 (1977), *aff'd sub nom. Western Union International, Inc. v. FCC*, 568 F.2d 1012 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978); *In the Matter of Telpak Tariff Sharing Provisions of American Telephone and Telegraph Co. and the Western Union Telegraph Co.*, Decision, 23 FCC 2d 606, 616 (1970), *aff'd in part sub nom. AT&T V. FCC*, 449 F.2d 439 (2d Cir. 1971).

<sup>5</sup> In Re AT&T's Tariff 15 Holiday Rate Plan, 4 FCC Rcd 8222 (1989) (Separate Statement of Commissioner Patricia Diaz Dennis).

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response to competitive conditions (rather than the cost of service itself).<sup>6</sup> The concept that a carrier can discriminate in its rates for the identical service among customers based on whether these customers conform their own pricing practices to the carrier's preference is, frankly, bizarre. Indeed, there is no principled difference between AT&T/BellSouth's plan to discriminate against Qwest and other ILECs based on their pricing of certain of their tariffed services and a plan whereby AT&T/BellSouth would make discounted tariffed services available only to computer suppliers who priced their computers according to AT&T's dictates. AT&T/BellSouth's statement that it will seek to introduce just such an unlawful discrimination into its own interstate access tariffs simply cannot be countenanced.<sup>7</sup>

We submit that the Commission should take immediate action to squelch the notion that AT&T/BellSouth can lawfully file a tariff that discriminates against Qwest and other ILECs on the basis of how they choose to price their own services. The Separate Statement of Chairman Martin and Commissioner Tate is a good beginning, and, should AT&T/BellSouth actually seek to implement its unlawful plan, either by filing an unlawful tariff or by sending a letter to Qwest and others demanding that they modify their own tariffs or face AT&T's unlawful discrimination, immediate and decisive action by the Commission will be necessary.

Please contact the undersigned with questions.

Very truly yours,

/s/ Robert Connelly

cc: Thomas Navin ([Thomas.Navin@fcc.gov](mailto:Thomas.Navin@fcc.gov))  
Michelle Carey ([Michelle.Carey@fcc.gov](mailto:Michelle.Carey@fcc.gov))

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<sup>6</sup> Of course, simply because competitive conditions may warrant some discrimination in rates does not mean that a carrier can simply ignore Section 202(a) in the face of competition. See *American Trucking Associations, supra*. Even the "single customer pricing" issues raised in the AT&T Tariff 15 proceedings dealt with specific routes and services, not with discrimination against customers based on factors unrelated to the offering, and would not support the AT&T/BellSouth position even if the Tariff 15 proceedings had resulted in a definitive interpretation of the law. See *In the Matter of AT&T Communications; Tariff F.C.C. No. 15*, Order Concluding Investigation, 16 FCC Rcd 11445 (2001); *In the Matter of AT&T Communications Tariff F.C.C. No. 15*, Memorandum Opinion and Order, 6 FCC Rcd 5648 (1991), remanded in an unpublished order, D.C. Cir., Jan. 21, 1992, *In the Matter of Southwestern Bell Telephone Company, Tariff F.C.C. No. 73*, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311 (1997).

<sup>7</sup> It should be noted that QC's special access prices -- towards which the unlawful AT&T/BellSouth proposal is targeted, are reasonable and competitive. There would be no public benefit to the proposed increased regulation of QC's rates.