Gary L. Phillips
General Attorney &
Asst. General Counsel

AT&T Services, Inc.
1120 20th Street NW, Suite 1000
Washington, D.C. 20036
Phone 202 457-3055
Fax 202 457-3074

February 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 – Merger Conditions

Dear Ms. Dortch:

In the interest of facilitating expeditious approval of license transfers associated with its merger with BellSouth Corporation, AT&T Corp. ("AT&T") agreed to file revisions to its special access tariffs to offer reduced rates for certain services in MSAs where the Commission has granted AT&T Phase II pricing flexibility, provided that this commitment would apply to services provided to other price cap LECs (and their affiliates) only if they agree to make reciprocal reductions to their own Phase II pricing flexibility rates.[1] Verizon and Qwest would prefer to obtain reduced rates from AT&T without reducing their own significantly higher rates for these services, and they now contend that AT&T's merger commitment is "discriminatory on its face" and "patently unlawful in violation of the non-discrimination provisions of Section 202(a) of the Communications Act."[2]

These claims are neither ripe for consideration nor consistent with the governing case law, which recognizes that § 202(a) prohibits only "unjustifiably" different rates to similarly situated customers for the same service,[3] that rate differences may be justified by a wide range of marketplace and other considerations,[4] and, indeed, that rate differences are presumed to be reasonable where customers have competitive alternatives – as Verizon and Qwest concede is the case in Phase II MSAs where price cap LECs obtain pricing flexibility only after demonstrating

[1] *See* Letter from Robert W. Quinn (AT&T) to Marlene H. Dortch (FCC), dated December 28, 2006 (Special Access Commitment #6).

[2] *See* Letter from Michael E. Glover (Verizon) to Marlene H. Dortch (FCC), dated December 29, 2006 ("Verizon 12/29/07 Ex Parte"); Letter from Robert Connelly (Qwest) to Marlene H. Dortch (FCC), dated January 4, 2007 ("Qwest 1/4/07 Ex Parte").

[3] *MCI Telecomms. Corp.* v. *FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990).

[4] *NARUC* v. *FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984) ("the reasonableness of the price disparity must be judged by the circumstances in which it is assessed").

the existence of extensive facilities-based competition.[5] None of the prior decisions cited by Verizon and Qwest supports their contrary view, as later decisions of both the Commission and the courts expressly recognize. And given that their own special access rates are already substantially higher than AT&T's *existing* rates, there is simply no merit to their claim that a tariff that requires them to reduce their rates to obtain even steeper discounts from AT&T would somehow place them at a "competitive disadvantage." Verizon 12/29/07 Ex Parte at 1. Indeed, far from creating a competitive disadvantage, the reciprocity provision at issue *mitigates* the competitive inequity that would otherwise result from the merger commitment.

As an initial matter, the § 202(a) objections that Verizon and Qwest attempt to raise here are decidedly unripe. The implementation of this merger commitment requires a tariff filing, and because AT&T has not yet filed the tariff revisions at issue, all of Verizon's and Qwest's arguments are premature and speculative. Neither the precise terms of AT&T's tariff filings nor AT&T's specific justifications for the terms and conditions are before the Commission. The Commission has repeatedly held that claims of unreasonable discrimination involve fact-specific inquiries, and that it will not consider abstract claims that a future tariff filing may be discriminatory.[6] The courts have likewise consistently refused to entertain objections to a tariff until the Commission has entered a final order rejecting challenges to the lawfulness of the tariff.[7] As both the press release announcing the Commission's approval of the merger and the separate statement of Chairman Martin and Commissioner Tate make clear, Verizon and Qwest will have the opportunity to raise their (baseless) § 202(a) challenges after AT&T files its tariff revisions,[8] and there is thus no valid basis for the Commission to act on Qwest's request to "take

---

[5] *Pricing Flexibility Order* ¶ 80 ("once multiple rivals have entered the market and cannot be driven out, rules to prevent exclusionary pricing behavior are no longer necessary"); *Orloff* v. *FCC*, 352 F.3d 415 (D.C. Cir. 2003).

[6] *See, e.g., Competition in the Interstate, Interexchange Marketplace*, 6 FCC Rcd. 5880, ¶ 132 (1991); *AT&T Application to Acquire and Operate the Interests of Comsat International Communications, Inc., et al.*, 2 FCC Rcd. 6635, ¶ 24 (1987) (complaining parties "conclude this presupposed disparity in charges will be unlawfully discriminatory. Their argument is premature because AT&T has not filed the tariff setting forth its rates"); *In the Matter of Southwestern Bell Telephone Company Request for Waiver of Section 69.4 of the Commission's Rules*, 11 FCC Rcd. 5610, ¶ 6 ("Since SWBT has not yet filed a tariff or cost support data for its proposed new feature, MCI's pricing arguments are premature").

[7] *See, e.g., Papago Tribal Auth.* v. *FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980) (judicial review of a tariff filing is available only after the agency has made a "final determination . . . concerning the justness and reasonableness of the rate filing"); *Northern Indiana Public Serv. Comm'n* v. *FERC*, 954 F.2d 736, 738 (D.C. Cir. 1992) (issue of lawfulness of tariff is unripe where the agency order "approve[s] merely the concept" of a tariff filing but does not give "final authorization" to implement the tariff).

[8] *See* News Release, "FCC Approves Merger of AT&T Inc. and BellSouth Corporation," December 29, 2006, at 2 (AT&T's commitments "are voluntary enforceable commitments by AT&T but are not general statements of Commission policy and do not alter Commission precedent or bind future Commission policy or rules"); Separate Statement of Chairman Martin & Commissioner Tate at 3 ("even when AT&T attempts to fulfill its merger commitment by filing its tariffs, the Commission is not bound to approve these tariffs"). *See also Office of Communication of the United Church of Christ* v. *FCC*, 826 F.2d 101, 105-06 (D.C. Cir. 1987) (claim not ripe where "Commission has clearly indicated that it does not intend the Policy Statement to bind the Commission to do anything in any particular proceeding").

immediate action to squelch the notion that AT&T/BellSouth can lawfully file a tariff that discriminates against Qwest and other ILECs."[9]

But even if § 202(a) claims could be considered in the abstract, established law forecloses the Verizon/Qwest position that any rate differences that might exist if they choose not to meet the eligibility requirements of AT&T's revised tariff are "legally problematic" on their face.[10] A § 202(a) claim triggers three inquiries: "(1) whether the services are 'like'; (2) if they are 'like,' whether there is a price difference; and (3) if there is a difference, whether it is reasonable."[11] It would be Verizon's and Qwest's burdens to establish the first two prongs, and they have not even attempted to demonstrate that they could do so with respect to AT&T's future tariff filings. Verizon and Qwest have negotiated their own individualized contract tariffs with AT&T that provide both steep discounts and other accommodations tailored to their specialized needs, and they have made no attempt to show that they would actually pay higher rates than other customers if they decline to meet the eligibility conditions of the tariffs that AT&T will revise. *See, e.g.*, *MCI*, 917 F.2d at 41 ("the FCC must compare the charges actually assessed under the two pricing schemes and the terms of each arrangement"). Nor have they attempted to establish that the complex arrangements and integrated service packages that they have negotiated with AT&T that reflect various compromises and compensating benefits are "like" the services that other customers purchase through other arrangements. *See, e.g.*, *CompTel* v. *FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993) ("By its nature, § 202(a) is not concerned with the price differentials between qualitatively different services or service packages . . . an apple does not have to be priced the same as an orange"). These are, of course, inherently fact-intensive showings that cannot be resolved in the abstract before AT&T has even filed tariff revisions.

Nor does the case law support Verizon's and Qwest's extreme claims that *any* price differentials for like services that could be established would, regardless of the justifications offered, necessarily be unreasonable. Verizon cites but a single case, *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990), and it does not even address § 202(a).[12] In *Maislin*, the Supreme Court reversed Interstate Commerce Commission ("ICC") rulings that had permitted railroads to negotiate secret side-deals that were not filed as tariffs. *Maislin* has no conceivable relevance here, since all of AT&T's rates are and will remain tariffed.

Qwest urges the Commission to take note of a pair of century old railroad cases, *Wight* v. *United States*, 167 U.S. 512 (1897), and *ICC* v. *Delaware, Lackawanna & Western Railroad Co.*, 220 U.S. 235 (1911), but neither case remotely stands for the categorical rate uniformity proposition Qwest ascribes to them.[13] *Wight* upheld a ruling that the Interstate Commerce Act barred off-tariff rebates, and *Delaware* simply held that it was unreasonable for a railroad to charge resellers ("freight forwarders") more than freight owners merely because the latter held formal legal title to the freight and the former did not. The other two court decisions Qwest cites cut clearly against its position here. In *Barringer* v. *United States*, 319 U.S. 1, 9 (1943), the

[9] Qwest 1/4/07 Ex Parte at 4.

[10] Verizon 12/29/07 Ex Parte at 1.

[11] *MCI Telecomms. Corp.* v. *FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) ("*MCI I*").

[12] *See* Verizon 12/29/06 Ex Parte at 1.

[13] *See* Qwest 1/4/07 Ex Parte at 3 & n.4 (citing cases).

Supreme Court, distinguishing *Wight* and *Delaware*, upheld an ICC determination that rate differences that reflected "relevant differences in the circumstances and conditions" were not unreasonably discriminatory. *See Competition in the Interstate, Interexchange Marketplace*, 6 FCC Rcd. 5880, ¶ 132 n.216 (1991) (citing *Barringer* for the proposition that "[c]ourts have found that such factors as cost differences or differences in competitive circumstances or conditions may justify discrimination"). And in *American Trucking Ass'ns, Inc.* v. *FCC*, 377 F.2d 121 (D.C. Cir. 1966), the D.C. Circuit upheld a Commission determination that it was unreasonable to offer customers in "like circumstances" different rates, but expressly recognized that where relevant circumstances differ rates may differ. *Id.* at 131; *see also Associated Press* v. *FCC*, 452 F.2d 1290, 1301 n.86 (D.C. Cir. 1971) (in *American Trucking* "we addressed carrier discrimination within a single class, and did not consider the problem posed here of differing rates between customers in different classes").[14]

Notably absent from Verizon's and Qwest's *ex parte* submissions is any discussion of recent decisions addressing the application of § 202(a) in the modern context of more competitive markets. As the D.C. Circuit has explained, "conceptions of discrimination have changed considerably since . . . 1908," and "discrimination has never been a static concept, but instead has steadily evolved over the past century to reflect not only refinements in ratemaking methodology, but changes in the national economy as well." *Sea-Land Service Inc.* v. *U.S.*, 738 F.2d 1311, 1319 (D.C. Cir. 1984). As telecommunications markets have become increasingly competitive, the Commission and the courts have properly recognized that marketplace considerations must play a much more prominent role in assessing claims of unreasonable discrimination, because price differences generally benefit customers in competitive markets and competitive market providers generally lack any incentive (or ability) to engage in unreasonable (*i.e.*, anticompetitive) discrimination. *See, e.g.*, *Orloff* v. *FCC*, 332 F.3d 415 (D.C. Cir. 2003) (Commission did not err in "valu[ing] the free market" in rejecting § 202(a) claim against Verizon "even though there is no discernible difference between the two groups" of customers).[15] Indeed, in its *Pricing Flexibility Order*, the Commission expressly distinguished one of the § 202(a) cases on which Qwest relies as patently inapposite in the competitive environment of Phase II pricing flexibility markets.[16] Qwest itself concedes that "competitive

---

[14] The Commission orders Qwest cites are equally inapposite. *See, e.g., NECA Tariff No. 1*, 3 FCC Rcd. 694 (1988) (ruling that tariff that billed resellers and non-resellers on different usage assumptions was *not* discriminatory under § 202(a)); *In the Matter of Ameritech's Plan to Provide Comparably Efficient Interconnection to Providers of Pay Telephone Services*, 12 FCC Rcd. 4238 (1997) (*approving* Ameritech's plan to provide comparably efficient interconnection to providers of pay telephone services); *Interconnection Facilities Provided to the International Record Carriers*, 63 F.C.C.2d 761, ¶ 14 (1977) (abrogating off-tariff contracts that provided service to certain customer at rates lower than filed tariff rates); *Telpak Tariff Sharing Provisions*, 23 F.C.C.2d 606 (1970) (finding, after hearing and consideration of economic evidence, that prerequisites of competitive necessity justification for limitations on traffic aggregation by multiple customer to satisfy volume discounts were not established).

[15] The recent case law confirms that rate differences can be justified by an array of other factors as well. *See*, *e.g.*, *NARUC* v. *FCC*, 737 F.2d at 113 (rate differences reasonable when supported by "neutral, rational" justifications); *Connecticut Office of Consumer Council v. FCC, 915* F.2d 75 (2d Cir. 1990) (upholding classification that eliminated incentives artificially to raise rates).

[16] *Pricing Flexibility Order* ¶ 133 (rejecting § 202(a) challenges to contract tariffing authority in Phase I and II areas, and distinguishing *Southwestern Bell Tel. Co.*, 12 FCC Rcd. 19311 (1997), on the ground

conditions may warrant some discrimination,"[17] and both Verizon and Qwest have elsewhere conceded that competition in Phase II areas fully protects special access customers' interests.[18] In short, Verizon's and Qwest's radical position here – *i.e.*, that the tariff revisions that AT&T will file to effectuate its merger commitment could never be justified under § 202(a) under any set of facts or any record developed in a future tariff proceeding – is groundless.

Finally, Verizon's claim that AT&T's merger commitment to revise its tariffs can somehow be challenged as a "backdoor" attempt by the Commission "to impose requirements on a non-party to the merger" in violation of the notice and comment requirements of the Administrative Procedure Act is frivolous.[19] The Commission is not requiring Verizon to do anything. AT&T has made a commitment to file tariff revisions, and if Verizon chooses to reduce its own rates, that will be a purely voluntary act in response to AT&T's tariff offer. Verizon thus has no independent claim that the Commission has circumvented the APA's rulemaking requirements.[20]

Sincerely,
/s/ Gary L. Phillips

---

that in the earlier case there was no showing of sunk investment in competitive facilities); *cf.* Qwest 1/4/07 Ex Parte at 4 n.6.

[17] Qwest 1/4/07 Ex Parte at 4 & n.6.

[18] *See, e.g.*, Comments of Verizon, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 4 (filed June 13, 2005) (explaining that "customers of special access services are highly sophisticated entities that are capable of using every available leverage point to obtain the lowest practical rates," and that "when Verizon itself purchases special access services to serve customers out-of-region, it seeks to obtain the best possible price by negotiating hard and by using competitive alternatives where they are cost-effective, and it will continue to do so"); *AT&T Corp. Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, RM No. 10593, Opposition of Qwest Communications International Inc. (filed Dec. 2, 2002) (the "assertion that [competitors] lack[] competitive alternatives to the incumbents' special access services is also completely without merit. In those areas where Qwest has received pricing flexibility, [a competitor] generally has numerous competitive alternatives to Qwest's special access services." Further, there is "irreversible competitive entry" by special access competitors).

[19] *See* Verizon 12/29/06 *Ex Parte* at 1-2.

[20] Verizon's reliance on *ASCENT* v. *FCC*, 235 F.3d 662, 666 (D.C. Cir. 2001) is misplaced. *See* Verizon 12/29/06 *Ex Parte* at 2. There, the FCC imposed a condition on the SBC-Ameritech merger that facially violated the explicit requirements of § 251(c) of the Act, and the Commission had not forborne from applying these requirements pursuant to § 10 of the Act. By contrast, the merger condition at issue here does not facially violate § 202(a), but can plainly be justified in future tariff filings. *ASCENT* provides no support for Verizon's additional contention that the Commission is circumventing the APA's rulemaking procedures, for neither the AT&T commitment at issue here nor the merger order will require Verizon to reduce its rates.