

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

PETITION TO DENY

The Center for Digital Democracy (“CDD”),¹ by its counsel Media Access Project, respectfully submits this petition to deny the proposed transfer of control from BellSouth to AT&T Inc. of various licenses and authorizations. CDD opposes grant of these applications because the anti-competitive merger of these two of the four remaining “Baby Bell” companies would be contrary to the public interest. If the Commission is nonetheless disposed to allow this transaction to take place, it should at the very least, impose significant protective conditions on any grant of the applications.

CDD endorses the arguments and requests for relief contained in the *Petition to Deny* filed by Consumer Federation of America and other public interest groups (“CFA, *et al.*”). To avoid duplication, and to emphasize the importance of the future of the Internet, CDD limits its presentation here to an explanation of how permitting this merger threatens Internet freedom. In the event that the Commission chooses to grant the applications, CDD specifically stresses the importance of requiring the divestiture of Cingular, as well as all licenses that AT&T and BellSouth hold in the

¹CDD is an organization committed to preserving the openness and diversity of the Internet in the broadband era, and to realizing the full potential of digital communications, *inter alia*, through promoting the development of a new online "commons," a consolidated and more visible space in which the public will have access to a variety of noncommercial sources of information and service. This petition is supported by the declaration of CDD’s Executive Director, Jeffrey Chester, Attachment A hereto.

2.3 Ghz and 2.5 GHz bands.

NET NEUTRALITY

The history of the Internet is rooted in openness. Implemented according to the principles of the Commission's *Computer II Inquiry*, the Internet has linked networks based on the so-called end-to-end principle, in which intelligence is maintained at the edge of those networks and data is transported neutrally and without content-based discrimination, interconnection is assured and users are free to employ any hardware. Based on this premise of Network Neutrality, the Internet has evolved into a vast universally accessible engine for economic growth, scientific innovation and democratic discourse.

On October 31, 2005, the Commission gave some recognition to the importance of Net Neutrality and an open Internet by conditioning its grant of the merger of AT&T Corp. and SBC Communications, Inc. into what is now AT&T Inc. upon strict compliance, albeit for only two years, with the Commission's *Policy Statement* issued on September 23, 2005. *SBC Communications, Inc.*, 20 FCCRcd 18290, 18414 (2005).² The Commission's *Policy Statement* falls far short of true Net Neutrality principles. However, the imposition of these conditions establishes the importance of an open Internet and the Commission's commitment to protect it.

Whatever confidence the Commission majority may have had in the assurances that the newly created AT&T Inc. would respect the openness of the Internet as of October 31, 2005, the current applications for acquisition of BellSouth come before the Commission under very different -

²The Commission also imposed conditions assuring that AT&T would not reduce its Internet backbone peering operations for three years, and requiring transparency as to peering policies for two years. *Id.*, 20 FCCRcd at 18413.

and much more threatening - conditions. That is because on November 7, 2005, just days after the Commission voted to approve the AT&T/SBC merger, AT&T's new CEO announced his unequivocal intent to base the new company's long term business plan on the wholesale abandonment of Net Neutrality as soon as practicable. In one of the most widely quoted - and repeatedly reinforced - statements in recent telecommunications history, Edward Whitacre told Business Week magazine of his intent to employ its market power to prioritize AT&T's Internet offerings in stark defiance of Net Neutrality principles. Among other things, he said

Now what [Google, MSN, Vonage and others] would like to do is use my pipes for free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using.

Online Extra: At SBC, It's all About "Scale and Scope," http://www.businessweek.com/@n34h*IUQu7KtOwgA/magazine/content/05_45/b3958092.htm

BellSouth has been notably silent with respect to Net Neutrality, and up to the moment that the proposed merger was announced, had not manifested any intention of following the same course as AT&T.

Predictably, AT&T argues, at pages 109-110 of its "Public Interest Showing" that "There is no legal or policy justification for imposing a new 'net neutrality' condition on the merger." Against all evidence, AT&T insists that "the merger will not create or enhance market power in either the Internet backbone or Internet access markets...."

As between Mr. Whitacre's repeated promises to use AT&T's market power to extract

revenue from Internet users,³ and the bland self-serving assertions to the contrary buried in the parties' "Public Interest Showing," the Commission should take Mr. Whitacre's own words at face value in this respect. The fact is that the scale of the merged enterprise, controlling the preponderance of landlines in 22 states, affords massive market power to a company with powerful motives and an expressed desire to leverage that power against Internet content providers, VOIP competitors and others.

In light of these circumstances, the Commission should deny the applications for transfer. Failing that, it should, at the least, require that, for no less than five years, AT&T comply with the principles in the FCC's September 23, 2005 *Policy Statement*, as well as an interconnection mandate, and that AT&T be required to acknowledge explicitly the Commission's authority to enforce those policies. The Commission should also extend the peering conditions imposed on AT&T in the SBC/AT&T merger for an additional five years.

WIRELESS COMPETITION AND NET NEUTRALITY

The proposed merger would also undermine the prospect of intermodal competition in the provision of broadband services by combining fiber-based services with Cingular's 3G (and ultimately 4G) services and with other wireless broadband options in a single firm.

Currently, there is genuine wireline/wireless competition between Cingular and each of its two owners. As a separate entity, Cingular markets its current and forthcoming broadband services as alternatives to DSL. Since AT&T and BellSouth receive only part (60% and 40% respectively)

³Indeed, when Mr. Whitacre recently made remarks to Wall Street analysts that were construed as backing down from promises to employ tiering and other prioritizing techniques, AT&T went out of its way to "clarify" that his remarks were not so intended. *Whitacre's Internet Comments Misconstrued*, http://telephonyonline.com/broadband/regulatory/whitacre_net_neutrality_060106/

of the revenue generated by Cingular, they each have a strong incentive to provide wireline broadband service, for which they receive 100% of the revenue. Post merger, AT&T will have no incentive to promote wireline/wireless competition, as it will receive 100% of the revenue derived from either wireline or wireless service. This has numerous anti-competitive implications which are addressed by CFA, *et al.* However, CDD wishes to emphasize how the full integration of Cingular into AT&T will have adverse implications for the future of the Internet.

For one thing, there will be no prospect that an independent Cingular will see the wisdom of Net Neutrality as a competitive differentiation from AT&T. Nor would it be possible that AT&T would decide to follow a more open approach as a competitive response to Cingular's discriminatory behavior.

Moreover, the merger will allow AT&T to operate as the dominant wireline carrier in 22 states. Currently, Cingular is poised to compete in all areas of the country. Once it absorbs Cingular, AT&T will have an overwhelming advantage in its service area over its only current wireline broadband competitor, Verizon. Since Verizon has a similar advantage in its dominant service areas, the two companies have every reason to concentrate on their own regions and not to compete out of region, especially by following different models with respect to Net Neutrality.

It is especially important from the standpoint of preserving a free and open Internet that integration of Cingular means that customers using DSL provided by AT&T or BellSouth (or Verizon) will no longer be able to cross-check with a Cingular service and hence will be unable to determine if the wireline provider is providing full and unimpeded Internet access, *or vice versa*. They will be unable to test, for example, to see if particular content is subject to blockage, degrading or otherwise being prioritized in a manner inconsistent with appropriate network management.

A different but related problem in wireless markets involves the loss of competitive - and potentially competitively neutral - fixed wireless broadband offerings in the 2.3Ghz and 2.5 Ghz bands. Surprisingly, this technologically important new entrant is not even mentioned in the applicants' 133 page "Public Interest Showing" or the description of the companies in Attachment A to that document.

Both AT&T and BellSouth have held (or more accurately, warehoused) spectrum in the 2.3 Ghz band. Much more significantly, it is CDD's understanding that BellSouth is the second largest licensee in the 2.5 Ghz BRS band, and that it holds 2.5 Ghz authorizations in almost all of the top 50 markets.⁴ These vast swathes of spectrum are especially well suited for broadband delivery *via* WiMax or other similar newly evolving technologies.⁵ Allowing the AT&T/BellSouth combination will withhold this potentially competitive wireless option from the market. Once they merge, a fiber-based AT&T would have no incentive to deploy, much less innovate in, wireless broadband services. There is no dearth of deep-pocketed purchasers who would be prepared to purchase either or both Cingular and the broadband-capable spectrum that AT&T and BellSouth currently control. The Commission should facilitate this competition, and promote Network Neutrality, by making this happen. Thus, if it does not deny the applications for transfer entirely, the Commission should, at the least, impose requirements for divestiture of Cingular and all 2.3 Ghz and 2.5 Ghz spectrum licenses held by AT&T and BellSouth.

⁴Del Bianco, *Bumps in the road for AT&T-BellSouth merger?*, http://news.com.com/Bumps+in+the+road+for+AT38T-BellSouth+merger/2010-1037_3-6057214.html

⁵*See, e.g., Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, 21 FCCRcd 4473 (2006).

CONCLUSION

Wherefore, CDD respectfully asks that the Commission deny the applications for transfer of control. In the event that the Commission determines that even partial grant of the applications is in the public interest, it should impose conditions on any such action as set forth above, and grant all such other relief as may be just and proper.

Respectfully submitted,

/s/

Andrew Jay Schwartzman

/s/

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June 5, 2006

ATTACHMENT A
DECLARATION OF JEFFREY CHESTER

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I declare upon personal knowledge that the Center for Digital Democracy is interested in this proceeding as a representative of citizens who are consumers of telecommunications services and who are users interested in a free and open Internet. I further declare upon personal knowledge that the factual assertions in the foregoing *Petition to Deny* are true.

I declare under penalty of perjury
that the foregoing is true and correct.
Executed on June 5, 2006.


Jeffrey Chester

Certificate of Service

I, Benjamin Lennett, hereby certify that on this 5th day of June 2006, a copy of the foregoing Petition to Deny was served via e-mail to those upon the following:

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