

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

June 5, 2006h

Comments on	)	
	)	WCB Docket No. 06-74
Application for Consent to Transfer of Control	)	DA 06-904
Filed by AT&T Inc. and BellSouth Corporation	)	
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**Comments of the American Civil Liberties Union on the Application for  
Consent to Transfer of Control**

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June 5, 2006

The American Civil Liberties Union files these comments with regard to the proposed merger and transfer of assets between AT&T and Bell South and to reemphasize the Commission's statutory duty to investigate whether the applicants have violated federal laws regarding the privacy of their customers' communications. We believe that in order to fulfill its statutory obligation, the Commission cannot approve the merger until it fully adjudicates those complaints.

The ACLU previously wrote to the Commission asking that you reconsider Chairman Kevin Martin's decision not to investigate whether AT&T and/or Bell South has violated telecommunications law by providing the National Security Agency (NSA) with a large volume of customer records without a court order, both in the past and on an ongoing basis. *ACLU Letter to Martin*, March 24, 2006. If these published accounts are accurate these actions would be a violation of 47 U.S.C. § 222 and the Commission's implementing rules, and we therefore believe the FCC cannot approve the merger of AT&T and BellSouth until it adjudicates the merits of those allegations.

As you know, a May 11<sup>th</sup> article in *USA Today* alleged that at least three telecommunications companies, AT&T, BellSouth and Verizon, cooperated with the NSA in an effort to collect calling information and call patterns on every American. These actions seem to be in direct violation of statutory guarantees on the privacy of telephone calling information, specifically 47 U.S.C. § 222. On May 15<sup>th</sup>, Commissioner Michael Copps called for an investigation of these reports and on that same day they were formally brought to your attention in a letter from Congressman Edward J. Markey. *Copps Statement*, March 15, 2006; *Markey Letter to the FCC*, March 15, 2006. After the FCC refused to conduct such an investigation, citing its inability to undertake any inquiry that involved classified information, the ACLU urged the Commission to reconsider that decision in a letter dated May 25<sup>th</sup>. *ACLU Letter to Martin*.

We now reaffirm that call for an investigation. Further we believe that the FCC has a statutory duty as part of its review of the AT&T, BellSouth merger application to perform a full investigation of the claims reported in *USA Today*. The Communications Act provides that transfer applications, such as those filed by BellSouth and AT&T, must be treated by the FCC as though the transferee applied under Section 308 of the Act. 47 U.S.C. § 310(d). Section 308 provides that before granting an application, the Commission must make an affirmative determination that the applicant possesses the requisite character qualifications to be a Commission licensee. 47 U.S.C. § 308 (b). As the Commission has held, the central focus of its "review of an applicant's character qualifications is conduct that bears on the proclivity of an applicant ... to comply with our rules and orders." *Cingular/AT&T Order* at ¶47. All violations of the Act, the Commission's rules and/or policies "have a bearing on an applicant's character qualifications." *Id.*

In this proceeding, AT&T and BellSouth bear the burden of proving, by a preponderance of the evidence, that the proposed transaction "will not violate or interfere with the objectives of the Act or the Commission's rules,"

and that “the predominant effect of the transfer will be to advance the public interest.” *SBC/Ameritech Merger Order* at ¶ 48. In reviewing the merger application, the Commission must “weigh the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that the Applicants have shown that, on balance, the merger serves the public interest, convenience and necessity.” *Id.* As part of its merger analysis, the Commission must therefore consider whether AT&T and BellSouth are in compliance with the Communications Act and the FCC’s implementing rules, and whether this merger will result in any additional harm to consumer privacy.

In fact, BellSouth has publicly and emphatically denied participation in the NSA program while AT&T has refused to confirm or deny its participation. If we take BellSouth’s insistence at face value, then the public interest is served by ensuring that BellSouth’s customers continue to have their privacy protected, unlike AT&T customers, whose privacy appears to have been violated. It would be a cruel irony if BellSouth had not participated in the program but as a result of this merger, BellSouth customers became unwilling surveillance targets.

The Commission also has the power to remedy any faults in AT&T or BellSouth’s conduct. In approving a transaction between carriers, the Act permits the Commission to impose any condition that “the public convenience and necessity may require.” *SBC/Ameritech Merger Order* at ¶ 52. Such a condition could include, for example, requiring that the combined entity comply with its statutory duty to only disclose CPNI in response to a written order from a court of competent jurisdiction.

The FCC has received formal complaints regarding the conduct of both applicants. One of the applicants, BellSouth, has publicly denied the conduct that lies at the heart of the complaint, but its denial has never been evaluated by any relevant public body. AT&T, which is the dominant partner in the proposed transaction and will effectively assume control of the assets of both companies and decide on its future conduct if the merger is approved, has neither confirmed nor denied the allegations. Therefore we believe that by refusing to investigate these allegations, the Commission has failed in its obligations under Sections 310 and 308 of the Act. In order to fulfill its statutory obligation, the Commission cannot approve the merger until it fully adjudicates those complaints.

Respectfully submitted,

American Civil Liberties Union

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